

ALSTON + BIRD LLP

Securities Law Advisory

Special Alert

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SEC Expands Eligibility Criteria for Use of Forms S-3 and F-3

On December 11, 2007, the Securities and Exchange Commission adopted amendments to the rules governing issuers' eligibility to register primary offerings under the Securities Act using a short-form registration statement on Form S-3 or Form F-3. The new rules are intended to facilitate capital raising by smaller public companies by making Forms S-3 and F-3 available to listed issuers having a public float of less than \$75 million.

The amendments will become effective 60 days after publication in the *Federal Register*. The text of the adopted rules and interpretive guidance are not yet available. Accordingly, the descriptions provided in this special alert are based upon the proposing release and statements made by the commissioners and SEC staff at the open meeting.

Amendments to Forms S-3 and F-3

Until the new rules become effective, the registration of primary offerings¹ on Form S-3 or Form F-3² remains limited to companies having a public float (i.e., market capitalization of shares held by non-affiliates) greater than \$75 million. As a consequence, smaller public companies are not able to take advantage of the benefits associated with offerings conducted on these shorter forms, including:

- incorporation of Exchange Act filings into a registration statement by reference, including automatic updating of the registration statement by subsequent Exchange Act filings; and
- the ability to conduct continuous primary offerings "off the shelf."

The additional cost and delay resulting from the requirement to include more comprehensive Form S-1 level disclosure in a registration statement and file post-effective amendments to update a registration statement, and the inability to file shelf registrations, place a significant restriction on the ability of smaller public companies to raise capital.

¹ A primary offering is an offering by or on behalf of an issuer.

² Unless stated otherwise, references herein to Form S-3 also apply to Form F-3.

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The new rules will permit companies having a public float of less than \$75 million to register primary offerings on Form S-3 subject to the following conditions:

- each of the other eligibility requirements of Form S-3 must be satisfied (including the requirement that the issuer has been a reporting company under the Exchange Act for 12 months and has timely filed all Exchange Act reports for 12 months);
- the issuer may not be a shell company and may not have been a shell company for the 12-month period preceding the filing;
- the issuer may not sell more than the equivalent of one-third of its public float under a registration statement on Form S-3 in any 12-month period; and
- the issuer must have at least one class of common equity securities listed on a national securities exchange.

Meeting the Public Float Requirement

The new rules require issuers to determine the amount of securities that may be sold subject to the public float limitation by reference to a price at which the issuer's common stock was traded on a date within 60 days prior to the date of sale. Because the public float is measured as of the date of the intended sale, the amount of securities permitted to be sold may change over time. If the public float increases, additional securities will be available for sale. Conversely, if the public float contracts, the number of securities available for sale will decrease. If at any time the one-third threshold is less than the aggregate value of securities already sold under Form S-3 in the previous 12-month period, then no additional securities may be issued, but the validity of the use of Form S-3 for prior sales of securities will not be at risk. The one-third limitation will be lifted if the public float increases above \$75 million and will remain suspended unless and until the issuer files an annual report on Form 10-K (or otherwise amends the registration statement) to reflect a new public float that is less than \$75 million.

In calculating the amount of securities sold in any 12-month period, the issuer should include the value of any equity securities, debt securities and convertible securities. With respect to convertible securities, value should be determined by reference to the aggregate market value of the underlying equity securities (again using the same per share price used to determine the issuer's public float), not the market value of the convertible securities themselves. The market value of the underlying equity is based on the maximum number of shares into which such convertible securities may be converted as of a date that is within 60 days prior to the date of sale.

Conclusion

The amendments to Forms S-3 and F-3 were adopted as part of the SEC's continuing efforts to streamline the capital formation process, especially for smaller companies. Form S-3 eligibility affords companies more flexible and efficient means of registering primary offerings and greater control over the timing of such offerings. In particular, John White, the director of the Division of Corporation Finance, and several commissioners noted that the ability to conduct offerings "off the shelf" provides a meaningful alternative to PIPE transactions, which have been the subject of recent SEC scrutiny and often require companies to sell securities at a discount to compensate purchasers for their investment in relatively illiquid securities. The commissioners further noted that any impact on investor protection caused by greater access to the public markets by smaller public companies is mitigated by the widespread availability of comprehensive Exchange Act reports on the Internet, the requirement that companies must meet the listing standards of a national exchange to become S-3 eligible, and the public float limitation.

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