
SECURITIES LAW UPDATE December 11, 2007

SEC EXPANDS FORM S-3 ELIGIBILITY, AMENDS FORM D

In a continuation of some of the most dramatic and potentially far-reaching reforms in recent years, primarily affecting smaller public companies, the Securities and Exchange Commission (the “SEC”) today adopted rules greatly expanding the number of companies eligible to use a short-form Form S-3 registration statement for primary offerings of their securities. Combined with recent changes to Rule 144 and increasing the number of companies eligible for “scaled” or reduced disclosure in their registration statements and SEC reports, the effect of these reform initiatives will be to promote capital formation at lower cost and reduce certain reporting obligations, which will be of particular benefit to smaller public companies and companies going public.

S-3 Reform. The SEC has amended the eligibility requirements of Form S-3 to allow companies with less than \$75 million in public float to register primary offerings if they:

- otherwise meet the general requirements for use of an S-3 registration statement;
- are not shell companies at the time of filing the registration statement and have not been shell companies for at least 12 months before filing the registration statement;
- have a class of common equity listed or registered on a national securities exchange; and
- do not sell more than one-third of their public float in any 12 calendar months.

In adopting these new rules, the SEC both gave and took away from their original proposal. The good news is that the SEC had proposed a cap of 20% of public float as the maximum amount that could be registered for sale in a 12-month period. In the final rules that has been increased to one-third.

On the other hand, whereas the SEC had proposed allowing over-the-counter companies to use S-3, the final rule significantly restrict eligibility by limiting it to companies that are listed and registered on a national securities exchange. Therefore, reporting pink sheet and Bulletin Board companies will not

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be able to use S-3. This is a disappointing development given that the intent of the reform was to make capital formation easier and less costly for smaller public companies. The SEC estimates that approximately 1,400 public companies will meet the new rules as adopted, but this is down from an estimated 5,000 public companies that were thought to be on the verge of having access to Form S-3.

Even with a significant reduction in the universe of additional companies who can use S-3, we expect to see a wave of shelf registration statements being filed by smaller public companies who do meet the new eligibility requirements. S-3 registration statements are significantly shorter than full registration statements, because they rely on incorporation by reference of a large part of their disclosure. Accordingly, they are faster and much less expensive to prepare. Additionally, by having an effective registration statement “on the shelf” a company can move very quickly to use its registered securities as currency in a transaction, such as a financing or an acquisition, when the need arises.

The new rules become effective 30 days after they are published in the Federal Register.

Form D. Separately, the SEC will require electronic filing of Form D in private offerings, voluntarily starting on September 15, 2008 and mandatorily beginning on March 16, 2009.

The SEC is also revising and updating certain information to included in a Form D, including among other things:

- replacing the requirement to provide a business description of the issuer with streamlined industry group information from a pre-established list;
- requiring revenue range information (subject to an option to decline to disclose);
- reporting the first date of sale under the offering;
- specifying that material mistakes or errors in a previously filed Form D, as well as passage of time requirements, require an amendment to be filed;
- requiring current information in amendments; and
- replacing use-of-proceeds and expenses disclosures with those for sale commissions and finder’s fees only.

The changes to Form D become effective on September 15, 2008.

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