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SEC Approves Amendments Simplifying Disclosure Obligations for a Larger Number of Smaller Public Companies

On January 4, 2008, the Securities and Exchange Commission (the "Commission") formally adopted amendments to its disclosure and reporting requirements that are designed to extend the benefits of the simplified and less rigorous disclosure and reporting requirements currently in place for "small business issuers" to a larger number of smaller public companies. The final rules went into effect on February 4, 2008 (the "Effective Date"). In particular, these new rules and regulations:

- Combine the existing "small business issuer" and "non-accelerated filer" (companies with a public float of less than \$75 million) categories into a new category of "smaller reporting companies;"
- Simplify disclosure requirements by moving scaled disclosure requirements for smaller companies from Regulation S-B into Regulation S-K and Regulation S-X;
- Add a new "smaller reporting company" checkbox to the cover page of registration statements and periodic reports that smaller reporting companies must check to indicate such status;
- Eliminate current "SB" forms for small business issuers (and eliminate all references to "small business issuers" in Commission rules, regulations and forms); and
- Allow smaller reporting companies to elect to comply with scaled financial and non-financial disclosure on an item-by-item or "a la carte" basis.

New Category: "Smaller Reporting Companies"

- **Eligibility for Smaller Reporting Company Status.** The new rules establish a category of "smaller reporting companies" eligible to avail themselves of the scaled disclosure requirements. The new rules define "smaller reporting company" as a company that has less than \$75 million in public common equity float. For those companies unable to calculate a public common equity float, eligibility is based on whether the company had annual revenues of less than \$50 million in its last fiscal year.
- **Determination of Smaller Reporting Company Status.** The smaller reporting company determination dates are based on three categories of companies: (i) reporting companies with a public float; (ii) non-reporting companies with a public float filing an initial registration statement; and (iii) reporting or non-reporting companies without a public float.
 - **Reporting Companies with a Public Float.** The public float of a reporting company will be calculated on the last business day of the company's second fiscal quarter by using a price at which the shares of its common equity were last sold or the average of the bid and asked prices of such shares in the principal market for the shares as of the last business day of the company's second fiscal quarter, multiplied by the number of outstanding shares held by non-affiliates of the company on such date.

- **Non-reporting Companies with a Public Float Filing an Initial Registration Statement.** A non-reporting company filing an initial registration statement under the Securities Act of 1933 (the “Securities Act”) will calculate its public float as of a date within 30 days of the filing of its registration statement (instead of a date within 60 days under the Regulation S-B determination dates). Such a company will calculate its public float based on three components: (i) the estimated public offering price per share at the time of the initial filing of the registration statement multiplied by (ii) (A) the number of shares of common equity held by non-affiliates before the offering plus (B) the number of shares of common equity to be sold pursuant to the registration statement. A company making its initial filing on a Securities Exchange Act of 1934 (the “Exchange Act”) registration statement will calculate its public float based on the number of shares of common equity held by non-affiliates multiplied by the estimated public offering price of the shares, if available, on a date within a 30 day window of the registration statement being filed.
- **Alternative Revenue Test for Reporting and Non-reporting Companies Unable to Calculate a Public Float.** In order for companies unable to calculate a public float to qualify as smaller reporting companies, they must have annual revenues of less than \$50 million during the last fiscal year. A reporting or non-reporting company unable to calculate a public float will calculate its annual revenues during the most recent completed fiscal year for which audited financial statements are available. A reporting company will make this determination on an annual basis, while a non-reporting company will make this determination as of a date within 30 days of the date of the filing of a registration statement under either the Securities Act or the Exchange Act.
- **Entering and Exiting Smaller Reporting Company Status.** A smaller reporting company will transition out of smaller reporting company status for the first quarter in the fiscal year after the fiscal year in which its public float rises above \$75 million. Such a company would not again qualify for smaller reporting company status until its public float falls below \$50 million on the relevant determination date. Where an issuer cannot calculate a public float, the Commission will allow the issuer to use the scaled disclosure item requirements until it exceeds \$50 million in revenue. Once an issuer fails to qualify for smaller reporting status under this revenue test, it will continue to remain disqualified until its annual revenues fall below \$40 million.

Integration of Regulation S-B into Regulation S-K and Regulation S-X

- **Elimination of Regulation S-B.** The Commission eliminated Regulation S-B and, instead, integrated twelve non-financial item requirements from Regulation S-B into new paragraphs of Regulation S-K. These new paragraphs of Regulation S-K contain scaled disclosure requirements for smaller reporting companies and, in some instances, include a statement that smaller reporting companies are not required to comply with a particular item.
- **Minor Modifications of Substantive Disclosure Requirements.** The substantive disclosure requirements applicable to smaller reporting companies will differ, as a result of the amendments, from those currently applicable to small business issuers, in only three ways:
 - The scaled disclosure requirements with respect to related person transactions require disclosure if the amount involved exceeds the lesser of (i) \$120,000; or (ii) 1% of the average of the smaller reporting company’s assets at the year-end over the last two years. This standard differs from Regulation S-B because Regulation S-B uses the average assets over the past three years for this determination threshold;

- The scaled disclosure requirements of Item 404 of Regulation S-K will require an additional year of disclosure; and
- Smaller reporting companies will be required to provide a slightly more extensive disclosure of bankruptcy or insolvency actions than were required under Regulation S-B.
- **New Article 8 of Regulation S-X.** The Commission moved the financial reporting rules currently applicable to small business issuers from Regulation S-B to new Article 8 of Regulation S-X. These financial statement requirements can be used by smaller reporting companies in lieu of the more rigorous requirements of Regulation S-X. The new rules require smaller reporting companies to provide two years of comparative audited balance sheet data in annual financial statements, rather than the one year that was previously required under Regulation S-B.
- **“A La Carte” Disclosure.** The amendments allow a smaller reporting company to choose, on an item-by-item basis or “a la carte” basis, to comply with either the simplified non-financial and financial requirements made available in Regulation S-K and Article 8 of Regulation S-X for smaller reporting companies or the requirements of other companies in Regulation S-K and Article 3 of Regulation S-X. Further, the relevant Regulation S-K items make clear that where the reporting requirement applicable to smaller reporting companies is more rigorous than that required of larger companies, smaller reporting companies will not have the option to comply with the requirements applicable to larger companies and must comply instead with the scaled disclosure requirements. Currently, the only item of Regulation S-K disclosure that is more rigorous for smaller reporting companies is Item 404 with respect to related person transactions.

Effective Date and Transition Provisions

- **Transition Period: Companies Currently Qualifying as “Small Business Issuers.”** Companies currently qualified as small business issuers under Regulation S-B will have two options with respect to their first annual report that is filed following the Effective Date of the rule changes: (i) file on a Form 10-KSB using the Regulation S-B item requirements; or (ii) file on a Form 10-K using the new scaled disclosure requirements of Regulation S-K (or, if they so choose, the larger company Regulation S-K requirements). Furthermore, small business issuers may continue to file their periodic reports using the Regulation S-B and the “SB” Forms until their next annual report is filed. Thereafter, subsequent periodic reports must be filed on a form that does not have the “SB” designation.
- **Companies Newly Qualifying for “Smaller Reporting Company” Status.** Companies newly qualifying as “smaller reporting companies” will have the option to use the new simplified Regulation S-K requirements when filing their next periodic report due after the Effective Date of the amendments. These companies, however, must check the “smaller reporting company” box on the cover page of the registration statement or periodic report filed, whether or not they so choose to rely on the scaled disclosure standards of the amended Regulation S-K.
- **Registration Statement “SB” Forms.** The “SB” Securities Act and Exchange Act registration forms, SB-1, SB-2, and 10-SB, were eliminated on the Effective Date. Companies filing a registration statement after the Effective Date will be required to file on the appropriate form without an “SB” designation. If a registration statement was filed on an “SB” form before the Effective Date, and the company seeks to amend it after the aforementioned date, the company must file the amendment on a correct form without an “SB” designation, but may continue to use the disclosure format and content based on the “SB” form until six months after the Effective Date.

If you should have any questions regarding these rules, please contact any of the following members of the Public Companies Practice Group.

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