

January 8, 2008

SEC Adopts Amendments to Form S-3 and Form F-3

The SEC has adopted amendments to the eligibility requirements for registration statements on Form S-3 and Form F-3. These amendments are intended to allow smaller companies (companies with less than \$75 million in public float) to benefit from the more flexible and efficient access to the public securities markets afforded by Form S-3 and Form F-3 without compromising investor protection. Under the revised forms, a registrant with listed securities will be able to conduct primary securities offerings on Form S-3 or Form F-3 (as applicable) without regard to the size of its public float or debt ratings, as long as it does not sell securities (debt and equity) with a value of more than the equivalent of one-third of its public float in primary offerings during any rolling period of 12 calendar months and meets the other form requirements. The amendments will become effective on January 28, 2008.

There are two major differences between the final rule and the proposed rule. First, the final rule increased the limitation on the amount of securities that may be offered by a smaller company during any rolling period of 12 calendar months from 20% of its public float to one-third of its public float. Second, while the proposed rule contemplated permitting all reporting companies with a public trading market to use the amended Form S-3 or Form F-3 as proposed, the final rule limits the extended eligibility for smaller companies to those companies with at least one class of common equity securities that are listed and registered on a national securities exchange in the United States.

The ability to conduct primary offerings on Form S-3 and Form F-3 confers significant advantages on eligible registrants. These Forms permit the incorporation of required information by reference to a company's disclosure in its Exchange Act filings, including Exchange Act reports that were previously filed as well as those that will be filed in the future, which allows for automatic updating of the registration statement. Form S-3 and Form F-3 eligibility for primary offerings also enables companies to conduct primary offerings "off the shelf" under Rule 415 of the Securities Act, which provides considerable flexibility in accessing the public securities markets from time to time in response to changes in the market and other factors.

Revisions to Form S-3

To use Form S-3, a registrant must meet the Form's eligibility requirements relating to Exchange Act registration, public filings and timeliness of filings, as well as at least one of the Form's transaction requirements. The amendments add a new category of eligible transactions,

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which are set forth in General Instruction I.B.6. to Form S-3 (the “New Instruction”), that allows a registrant with less than \$75 million in public float to register a primary offering of its securities on Form S-3, provided that the following conditions are met:

- the registrant has a class of common equity securities that is listed and registered on a national securities exchange;
- the registrant does not sell more than the equivalent of one-third of its public float in primary offerings under the New Instruction during a rolling period of 12 calendar months preceding the sale; and
- the registrant is not a “shell company” and has not been a “shell company” for at least 12 calendar months immediately preceding the filing of the registration statement on Form S-3.

Class of Common Equity Securities Listed and Registered on a National Securities Exchange

The registrant’s eligibility under the New Instruction is conditioned on having a class of common equity securities listed and registered on a “national securities exchange”. A “national securities exchange” is defined as a securities exchange that has registered with the SEC under Section 6(a) of the Exchange Act and includes the NYSE, the American Stock Exchange, NASDAQ and several other securities exchanges in the United States. In the proposing release, the SEC had asked for comment with respect to whether such a requirement should be included in the rules to be adopted. This condition was added to the final rule to address concerns raised in the comment process about potential abuse of the expanded eligibility requirements. The SEC cited the exchanges’ listing rules and procedures and other requirements, as providing an additional measure of protection for investors. Furthermore, the SEC noted that the additional condition was consistent with its historical treatment of secondary offering eligibility on Form S-3.

One-Third of Public Float Limitation on Primary Offerings in Prior 12 Calendar Month Period

To rely on the New Instruction, the registrant must not sell securities in primary offerings with a value of more than one-third of its public float over the prior period of 12 calendar months (including the intended sale).¹ (The New Instruction, however, does not limit the amount of securities that may otherwise be registered and offered pursuant to other registration statements or offered in private placements.) In response to concerns raised in the comment process that the proposed 20% of public float limitation in the proposing release would be of limited utility to small businesses with capital needs that would, in many cases, greatly exceed the amount of securities that could be sold under the proposed rule, the SEC increased the limitation to one-third of a company’s public float. Under the final amendments, offerings above the one-third limitation

¹ The meaning of the phrase “period of 12 calendar months” is intended to be consistent with the way in which the phrase “12 calendar months” is used for purposes of the registrant eligibility requirements of Form S-3. A “calendar month” is a month beginning on the first day of the month and ending on the last day of that month.

will violate the requirements as to proper form for the registration statement under Rule 401 even though the registration statement previously had been declared effective.

The amendments contemplate a two-step process for the calculation of the one-third limitation.

Step One: Determination of Public Float Immediately Prior to the Contemplated Sale. “Public float,” as set forth in Instruction I.B.1. of Form S-3, means the aggregate market value of the voting and non-voting common equity held by nonaffiliates of a registrant. The registrant must determine its public float immediately prior to the intended sale, computed by reference to the price at which its common equity was last sold, or the average of the bid and asked prices of its common equity, in the principal market for the common equity as of a date within 60 days prior to the date of sale. If the relevant sale of securities, together with all securities sold in primary offerings in the preceding period of 12 calendar months, does not exceed one-third of the registrant’s public float calculated as described above, then the offering would comply with the New Instruction.

Because the restriction on the amount of securities that can be sold over a period of 12 calendar months is calculated by reference to a registrant’s public float immediately prior to a contemplated sale, as opposed to the time of the initial filing of the registration statement, the amount of securities that a registrant is permitted to sell can continue to grow over time if the registrant’s public float increases. A registrant may therefore benefit from increases in the size of its public float during the time the registration statement is effective. Conversely, the amount of securities that a registrant is permitted to sell at any given time may also decrease if the registrant’s public float contracts. Nevertheless, a contraction in a registrant’s public float would not cause a violation of the one-third limitation with respect to offerings previously completed, because the relevant point in time for determining whether a registrant has exceeded the threshold would be the time of sale.

Step Two: Aggregation of Primary Offering Sales over Prior 12 Calendar Months. A registrant wishing to rely on the New Instruction must aggregate the gross sale prices for all primary offerings of its debt and equity securities under the New Instruction in the prior 12 calendar month period, including the intended sale. Registrants who meet the requirements of the New Instruction would be eligible to offer non-investment grade debt securities on Form S-3 in addition to the non-convertible investment grade debt securities allowed under the current instructions for Form S-3.

Securities that are convertible into or exchangeable for equity securities (such as convertible debt or warrants) issued in the preceding 12 calendar months pursuant to the New Instruction also count towards the one-third limitation. The relevant calculations are based on the aggregate market value of the equity securities underlying the derivative securities instead of the market value of the derivative securities, and the calculation will differ based on whether the derivative security has been exercised or converted at the time the calculation is made. If already exercised or converted, the aggregate market value of the underlying equity securities is equal to (x) the number of underlying equity securities issued upon conversion or exercise times (y) the market price of such underlying equity securities on the date of conversion or exercise. If not yet exercised or converted, the aggregate market value of the underlying equity securities is equal to

(x) the maximum number of equity securities into which the derivative security was convertible as of a date within 60 days prior to the date of sale (which must be the same as the date chosen for the calculation of the registrant's public float in Step One described above) times (y) the same per share market price of the registrant's equity securities used for purposes of calculating its public float pursuant to Step One described above.

The SEC has stated that the method of calculation of the one-third limitation based on the market value of the securities underlying any derivative securities is intended to reduce the risk that convertible securities would be structured and offered in a manner designed to avoid the effectiveness of the one-third limitation. The one-third limitation on sales will not impact a holder's ability to convert or exercise derivative securities; it only limits the ability of the registrant to offer additional securities under the New Instruction.

Effect of Fluctuations in Public Float

A Form S-3 registrant that meets the \$75 million public float threshold of General Instruction I.B.1. at the time its registration statement is filed is not subject to restrictions on the amount of securities it may sell under the registration statement even if its public float falls below \$75 million subsequent to the effective date of the Form S-3 but prior to the update required under Section 10(a)(3) of the Securities Act. The SEC has stated that it is appropriate to provide a registrant registering on Form S-3 pursuant to the New Instruction the same flexibility if its public float increases so it equals or exceeds \$75 million subsequent to the effective date of its Form S-3, without the additional burden of filing a new Form S-3 registration statement. Once a registrant has had a Form S-3 declared effective, the New Instruction lifts the one-third limitation on sales made subsequent to the time that the registrant's public float increases to \$75 million or more.

As is currently the case pursuant to Rule 401, a registrant would also be required to recompute its public float each time an amendment to the Form S-3 is filed for the purpose of updating the registration statement in accordance with Section 10(a)(3) of the Securities Act, which typically occurs when an annual report on Form 10-K is filed. In the event that the registrant's public float as of the date of the filing of the Form 10-K is less than \$75 million, the one-third limitation would be reimposed for all subsequent sales made pursuant to the New Instruction and would remain in place until the registrant's public float again equals or exceeds \$75 million.

Prohibition of Reliance on the New Instruction by Shell Companies

To rely on the New Instruction, a registrant must not be a "shell company" and must not have been a "shell company" for at least 12 calendar months immediately preceding the filing of the registration statement on Form S-3. The term "shell company" is defined in Section 405 of the Securities Act as a registrant, other than an asset-backed issuer, that has (a) no or nominal operations and (b) either (1) no or nominal assets, (2) assets consisting solely or cash and cash equivalents, or (3) assets consisting of any amount of cash and cash equivalents and nominal other assets.

While the SEC recognizes the use of “shell companies” for many legitimate business purposes, it is wary that these entities may give rise to disclosure abuses. Therefore, a “shell company” would continue to be prohibited from registering securities in primary offerings on Form S-3 unless it meets the \$75 million float threshold of General Instruction I.B.1. of Form S-3. Under the amendments, a former “shell company” that cannot meet the \$75 million public float threshold but otherwise satisfies the registrant eligibility requirements of Form S-3 would become eligible under the New Instruction to use Form S-3 to register primary offerings of its securities once the following conditions are met:

- the registrant has not been a “shell company” for at least 12 calendar months;
- the registrant must have filed information that would be required in a registration statement on Form 10, Form 10-SB, or Form 20-F, as applicable, to register a class of securities under Section 12 of the Exchange Act (such information is collectively described as “Form 10 information” and is typically required to be included in a Form 8-K when a company ceases to be a “shell company”); and
- the registrant must have been timely in its Exchange Act reporting for 12 calendar months.

The final rule does not affect existing limitations on the eligibility of a “shell company” in using automatic shelf registration statements on Form S-3 or registration statements on Form S-8.

Revisions to Form F-3

Form F-3 is available to foreign private issuers that satisfy (a) the form’s eligibility requirements, which are similar to those contained in Form S-3 and generally relate to a registrant’s reporting history under the Exchange Act, and (b) at least one of the form’s transaction requirements. Prior to the amendments, Form F-3 limited the ability of a registrant to conduct primary offerings on the form unless its worldwide public float equals or exceeds \$75 million.

In order to maintain the rough equivalency between Form S-3 and Form F-3, the amendments to Form F-3 are comparable to the changes to Form S-3. Specifically, the new category of eligible transactions, which is set forth in General Instruction I.B.5. to Form F-3, would allow a foreign private issuer with less than \$75 million in worldwide public float to register primary offerings of its securities on Form F-3, provided that the following conditions are met:

- the registrant has a class of common equity securities that is listed and registered in the United States on a national securities exchange;
- the registrant does not sell more than the equivalent of one-third of its public float in primary offerings under General Instruction I.B.5. of Form F-3 over the rolling period of 12 calendar months preceding the sale; and

- the registrant is not a “shell company” and has not been a “shell company” for at least 12 calendar months immediately preceding the filing of the registration statement on Form F-3.

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This memorandum is not intended to provide legal advice with respect to any particular situation, and no legal or business decision should be based solely on its content. Questions concerning issues addressed in this memorandum should be directed to any member of the Paul Weiss Securities Group, including:

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