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Management Alert

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

On December 11, 2007, the Securities and Exchange Commission (SEC) adopted amendments to Forms S-3 and F-3, the short-forms used by eligible domestic and foreign companies, respectively, to register securities offerings under the Securities Act of 1933. Although the final amendments significantly retreat from the expansions contained in the proposed amendments, the SEC hopes these amendments will allow a greater number of public companies to benefit from the flexibility and efficiency in accessing the public securities markets afforded by Forms S-3 and F-3.

Background of Forms S-3 and F-3

Form S-3 is the short-form available for domestic companies to register securities offerings under the Securities Act. Use of Form S-3 is restricted to companies that meet the form's registrant requirements—generally relating to the company's reporting history under the Securities Exchange Act of 1934—and at least one of the transaction requirements. Prior to the amendments, companies had been permitted to register offerings by or on behalf of the company for its own account (*i.e.,* "primary offerings") on Form S-3 only if their non-affiliate equity market capitalization (*i.e.,* "public float") was at least $75 million. Form S-3 is commonly used in conjunction with Rule 415 under the Securities Act, which allows securities to be registered for sale on a continuous basis or from time-to-time in the future. These "shelf offerings" give companies a great deal of flexibility in accessing the public market for securities by allowing them to avoid additional delays when they decide to conduct an offering. This flexibility and greater control over the timing of their offerings allows companies to take advantage of propitious market conditions to raise capital on more favorable terms.

Form F-3 was designed to parallel Form S-3, and is the equivalent short-form registration form available for foreign private issuers to register securities offerings under the Securities Act. Like Form S-3, Form F-3 is available to foreign private issuers that satisfy the form's registrant requirements, which are similar to the registrant requirements of Form S-3, and at least one of the form's transaction requirements. In addition, like Form S-3, prior to the amendments, Form F-3 limited the ability of foreign private issuers to conduct primary offerings on the form unless their public float equaled or exceeded $75 million.

Summary of the Amendments

The amendments create a new category of transaction to allow companies with less than $75 million in public float to register primary offerings on Form S-3 or F-3, as applicable, provided they meet the other existing registrant requirements and meet the following additional requirements described below.

1. Company has a class of common equity securities listed and registered on a national securities exchange

As proposed, the amendments would have made Forms S-3 and F-3 available for primary offerings even if the company was not listed on a national securities exchange. However, in crafting the final amendments, the SEC determined that the exchanges' listing rules and procedures, as well as other requirements, would provide a measure of protection for investors against potential abuses that may arise from expanded use of shelf registration. As a result, to register a primary offering on Form S-3 or F-3 under the new provisions, a company must have at least one class of common equity securities registered on a national securities exchange. "Bulletin board" and "pink sheet" companies cannot take advantage of these new liberalizing provisions and remain ineligible to use Form S-3 or F-3.

2. Company has not sold more than one-third of its public float under the new provisions over the previous 12 calendar months

Under the proposed amendments, companies taking advantage of the new provisions would have been limited to selling no more than the equivalent of 20% of their public float during any 12 calendar month period. In response to public comment, the SEC increased this limit in the final amendments to one-third of a company's public float. Primary offerings on Form S-3 or F-3 under the new provisions above this one-third cap would violate the form requirements, and Rule 401 under the Securities Act was amended to provide that such violations would violate the requirements as to proper form under that rule even though the registration statement previously had been declared effective.

The one-third cap applies only to offerings under the new provisions. Accordingly, neither secondary offerings nor primary offerings registered on another form would count toward or be subject to the one-third cap, and companies with at least $75 million in public float would not be affected by the one-third cap.

To determine the amount of securities that may be sold pursuant to Form S-3 or F-3, a company must engage in a two-step analysis:

- First, determine its public float immediately prior to the intended sale.
- Second, aggregate all sales of its securities under the new provisions in the previous 12-month period—*including the intended sale*—to determine whether the one-third cap would be exceeded.

Because the one-third cap is calculated by reference to a company's public float immediately prior to a proposed sale, the amount of securities that a company is permitted to sell can grow over time as its public float increases. In addition, the one-third cap will be lifted if a company's public float increases to $75 million or more subsequent to the effective date of the company's Form S-3 or F-3 without the need to file a new Form S-3 or F-3 registration statement.

Conversely, the amount of securities that a company may sell can decrease over time if its public float shrinks. Similarly, if a company meets the $75 million public float threshold when its Form S-3 or F-3 is declared effective but its public float falls below the $75 million threshold when its next annual report on Form 10-K is filed, the one-third cap would be imposed for all subsequent sales made pursuant to the new provisions and remain in place until the company's public float increases to $75 million or more.

3. Company is not a shell company and has not been a shell company for at least 12 calendar months

Shell companies are specifically excluded from registering primary offerings on Form S-3 or F-3 under the new provisions. A company with less than $75 million in public float that is, or was, a shell company would not be able to register a primary offering on Form S-3 or F-3 until:

- It has ceased to be a shell company for at least 12 calendar months.
- It has filed current "Form 10 information" with the SEC reflecting its status as an entity that is not a shell company.
- And it has been timely reporting for 12 calendar months.

Form 10 information is ordinarily filed on Form 8-K and is equivalent to information that a company would be required to file if it were registering a class of securities on Form 10 or Form 20-F under the Exchange Act.

Conclusion

Although far fewer companies will benefit from the amendments to Forms S-3 and F-3 than would have under the proposed amendments, those smaller public companies that are covered by the new provisions should have more flexibility and experience greater efficiency in accessing the public securities markets. These benefits should give these smaller companies faster and easier access to capital when they need it or when market conditions are favorable.

These amendments became effective January 28, 2008.

If you have any questions regarding this Management Alert, please contact the Seyfarth Shaw attorney with whom you work, or any Corporate attorney on our website, www.seyfarth.com.

ATLANTA
One Peachtree Pointe
1545 Peachtree Street, N.E.
Suite 700
Atlanta, GA 30309-2401
404-885-1500
404-892-7056 fax

BOSTON
World Trade Center East
Two Seaport Lane
Suite 300
Boston, MA 02210-2028
617-946-4800
617-946-4801 fax

CHICAGO
131 South Dearborn Street
Suite 2400
Chicago, IL 60603-5577
312-460-5000
312-460-7000 fax

HOUSTON
700 Louisiana Street
Suite 3700
Houston, TX 77002-2797
713-225-2300
713-225-2340 fax

LOS ANGELES
One Century Plaza, Suite 3300
2029 Century Park East
Los Angeles, CA 90067-3063
310-277-7200
310-201-5219 fax

NEW YORK
620 8th Avenue
32nd Floor
New York, NY 10018
212-218-5500
212-218-5526 fax

SACRAMENTO
400 Capitol Mall
Suite 2350
Sacramento, CA 95814-4428
916-448-0159
916-558-4839 fax

SAN FRANCISCO
560 Mission Street
Suite 3100
San Francisco, CA 94105-2930
415-397-2823
415-397-8549 fax

WASHINGTON, D.C.
815 Connecticut Avenue, N.W.
Suite 500
Washington, D.C. 20006-4004
202-463-2400
202-828-5393 fax

BRUSSELS
Boulevard du Souverain 280
1160 Brussels, Belgium
(32) (2) 647 60 25
(32) (2) 640 70 71 fax

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www.seyfarth.com