

January 2008 / Special Alert

A legal update from Dechert's Corporate and Securities Group

SEC Adopts Amendments to Form S-3 and Form F-3 to Expand Eligibility to Smaller Companies

Overview

Smaller companies will soon be allowed to benefit from the greater flexibility and efficiency in accessing the U.S. public securities markets afforded by Form S-3 and Form F-3 under the Securities Act of 1933. On December 19, 2007, the SEC adopted amendments to the eligibility requirements to use these forms for primary offerings that will take effect on January 28, 2008.

Benefits of Form S-3 and Form F-3

Form S-3 and Form F-3 are "short form" registration statements. The public float requirement, which was fixed at \$75 million, precluded many companies with a small float from using Form S-3 and Form F-3 to register primary offerings and taking advantage of the efficiencies afforded by use of these forms. These efficiencies include:

- incorporation by reference of previously and subsequently used reports filed under the Securities Exchange Act of 1934 in order to satisfy the forms' disclosure requirements, thereby allowing for automatic updating of the registration statement; and
- use of shelf registrations under Rule 415 of the Securities Act of 1933.

Form S-3 and Form F-3 allow issuers to avoid the delays and costs associated with preparing and filing post-effective amendments to "long-form" registration statements. Shelf registration provides issuers with more control over the tim-

ing of their offerings. This flexibility permits issuers to access the capital markets more quickly and to raise capital on more favorable terms, such as pricing or interest rate.

Conditions for Eligibility

The amendments adopted by the SEC permit domestic and foreign private issuers (other than shell companies) to conduct primary offerings on these forms without regard to the size of the public float, provided that an issuer:

- satisfies the other eligibility conditions for using the applicable form;
- has a class of common equity securities listed and registered on a national securities exchange; and
- does not sell more than the equivalent of one-third of its public float in primary offerings over any period of 12 calendar months.

Calculation of Public Float

Under the amendments, offerings above the one-third cap would violate the form requirements of Form S-3 and Form F-3. Under new Rule 401(g)(3) promulgated under the Securities Act of 1933, violations of the form requirements may be assessed against registration statements that previously had been declared effective. Therefore, issuers will want to take extra care to ensure that they are calculating the cap correctly.

There is a two-step process for calculating the amount of securities that may be sold:

- determination of the issuer's public float immediately prior to the intended sale; and
- aggregation of all sales of securities (both equity and debt) by the issuer pursuant to primary offerings under General Instruction I.B.6. of Form S-3 or General Instruction I.B.5. of Form F-3 during the previous 12 month period (including the intended sale).

Public float is computed by reference to the price at which an issuer's common equity was last sold or the average of the bid and asked prices of their common equity, as of a date within 60 days prior to the date of sale. For sales of derivative securities, the cap must be calculated based on the market value of the underlying securities.

One important note is that sales of securities by the issuer pursuant to primary offerings during any period when the issuer's public float equals or exceeds \$75 million will not count against the cap. If the issuer's float falls below \$75 million, the cap will be imposed for all subsequent sales until the issuer's float equals or exceeds \$75 million.

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For companies with public float of less than \$75 million or companies whose public float is at risk of falling below \$75 million, these amendments create new opportunities for smaller companies to facilitate capital formation and may serve as a viable alternative to other available capital-raising methods such as private placements.

Practice group contacts

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