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SEC Makes Securities Registration Easier for Smaller Listed Companies

Smaller U.S. public companies will soon have available to them a more efficient way to raise money in the public markets. Beginning January 28, 2008, such companies will be able to use a "short-form" registration statement on Form S-3 (or Form F-3 for foreign private issuers) for primary offerings of up to one-third of the value of their publicly held securities. Previously, Form S-3 was only available to companies that had at least a \$75 million "public float" (essentially the market value of the company's securities held by non-insiders).

Being able to use Form S-3 has significant advantages. First, the disclosure requirements are much simpler. Rather than directly including large volumes of disclosure, the company can rely on both previously-filed and future-filed SEC reports to fulfill disclosure requirements via automatic incorporation of those documents by reference. Other registration forms do not allow future incorporation by reference, thus requiring separate supplements or amendments when future developments occur. Second, once a Form S-3 is declared effective by the SEC, companies are able to offer securities "off the shelf" under Rule 415 of the Securities Act. A "shelf" registration allows companies to register in advance a maximum number or amount of securities to be offered and sold from time to time in the future rather than immediately upon effectiveness of the registration statement. Once the Form S-3 "shelf" is effective, offerings of securities that were included in the registration statement can be conducted very quickly when an issuer so desires based on market or other factors. For each offering, a supplement will be filed to describe the terms, but, because the registration statement is already effective, no further SEC review will occur that could potentially delay the offering.

Under the amendments, companies other than shell companies can conduct primary offerings on Form S-3 without regard to the size of their public float so long as:

- the other Form requirements (discussed below) are satisfied,
- they have a class of common equity securities listed and

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registered on a national securities exchange (such as NYSE, AMEX or Nasdaq; the Form is still not available to companies with securities traded over the OTC Bulletin Board or pink sheets), and

- they do not sell more than the equivalent of one-third of their public float in primary offerings over any period of 12 calendar months.

The other Form requirements for Form S-3 that continue to apply to any company, large or small, utilizing the Form, are that (1) the company has a class of securities registered under the Securities Exchange Act of 1934, (2) the company has been public at least a year, and (3) the company has filed all of its SEC periodic reports (10-Ks, 10-Qs and certain 8-Ks) on time for the 12 months prior to the filing of the Form. Issuers may also not have certain debt defaults, and primary offerings may only be made for cash (for example, Form S-3 is not available to register securities used as consideration for an acquisition).

The one-third requirement is intended to offer issuers flexibility in the size of their offerings. It is calculated as of any date within 60 days before an offering (contrasted with a measurement date as of the filing of the Form S-3 or any amendment for issuers with public floats greater than \$75 million). Therefore, companies might benefit from an increase in public float after filing a registration statement. A decrease in public float, however, would also affect the one-third requirement. The test applies to both debt and equity securities, with convertible debt securities being valued based on the underlying equity shares into which the debt is convertible. A company that reaches a public float level of \$75 million after filing a Form S-3 will have the one-third restriction lifted for so long as it meets the \$75 million threshold.

The summary above is intended to describe the major changes impacting smaller public companies as a result of the SEC's expansion of the availability of Form S-3 for primary securities offerings. For a more comprehensive analysis of these changes, or

for further information about the impact of these and other recent SEC changes designed to make capital raising more efficient for public companies in the U.S., please contact the lawyer at Sullivan & Worcester LLP with whom you regularly consult, or the lawyers listed above.