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SEC Eases Disclosure Burden for Smaller Companies

Scaled Disclosure More Widely Available, but Small Forms are Eliminated

The SEC has adopted amendments to its reporting regulations that will increase the number of smaller public companies eligible to utilize less burdensome disclosure requirements and streamline those disclosure requirements by combining smaller and larger company disclosure requirements into a single set of forms and regulations.

Expanded availability of scaled disclosure. Existing SEC rules allow “small business issuers” to file registration statements and periodic reports using a set of forms and disclosure regulations that are somewhat less burdensome than those applicable to larger companies. For example, these forms and regulations require fewer years of audited financial statements, less executive compensation analysis and fewer tables and less detail or coverage on business descriptions, management’s discussion and analysis and other historical data. Small business issuers are companies with both a public float (the market value of securities held by non-insiders) and revenues under \$25 million. The amendments create a new category of issuer that is eligible to use the scaled disclosure requirements called “smaller reporting companies.”

Under the new amendments, the new “smaller reporting company” category eliminates the revenue test for most companies and is comprised of companies with a public float less than \$75 million, as calculated on the last business day of a company’s most recent second fiscal quarter. If public float is not calculable, companies with annual revenues less than \$50 million will qualify as smaller reporting companies. Under the new definition, the SEC estimates that 1,500 additional companies would be eligible for the scaled disclosure and reporting requirements. Furthermore, the new term does not exclude foreign private issuers that otherwise meet the qualifications. These foreign issuers can choose to use the domestic forms and make disclosures under the smaller reporting company standards, or to use the “F” forms currently available to them.

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Technical changes to eliminate small business forms and regulation.

Additionally, under the amendments, the SEC will combine the scaled disclosure forms (so-called SB forms) and regulations (Regulation S-B) into the forms and regulations applicable to larger companies. The substantive requirements generally will not change – rather, these amendments will combine all public companies’ disclosure requirements into a single system, with each form and regulation pointing out within it which parts apply to smaller reporting companies. One notable exception is a new requirement for smaller reporting companies to provide two years of comparative audited balance sheet data where only one year had been required under Regulation S-B.

Twelve items from Regulation S-B that are specific to smaller companies will be moved to Regulation S-K, and the financial statement requirements from Regulation S-B will be moved into Regulation S-X. The current SB forms will be eliminated with a phase-out period during which time companies will be able make the transition to the standard forms applicable to larger companies. Following the transition, companies that formerly used small business forms such as registration statements on Form SB-2 or periodic reports on Forms 10-KSB or 10-QSB will use forms such as Form S-1 and Forms 10-K and 10-Q.

Companies that qualify as smaller reporting companies under the new amendments can choose item-by-item on the applicable report whether to comply with the standard disclosure requirements or the scaled disclosure requirements, so long as investors can make meaningful comparisons from period to period. Smaller reporting companies will, however, be required to comply with those smaller reporting company standards that are more rigorous than the larger company requirements under Regulation S-K, though this is rarely the case. Currently, the only more rigorous example relates to slightly more onerous reporting requirements for small business issuers about their related

person transactions. The SEC expects that its staff will review filings by smaller reporting companies for compliance only with scaled disclosure requirements, whether or not the company chooses to use those or larger company requirements.

One benefit for smaller reporting companies transitioning to the standard forms is that most smaller reporting companies will now use Form S-1 to offer securities to the public, thereby allowing the companies to incorporate by reference prior filings under the Exchange Act. Incorporation by reference was not permitted under SB forms.

Transition. The amendments will take effect on February 4, 2008. Any company that qualifies as a smaller reporting company after the effective date of the amendments will have the option to use the scaled disclosure requirements for registration statements and reports filed after the effective date. Current small business issuers with a fiscal year ending on or after December 15, 2007 can choose whether to file an annual report on Form 10-KSB or a standard Form 10-K. After filing their next annual report, however, these companies must file on non-SB forms. Registration forms SB-1, SB-2, and 10-SB will be rescinded on the effective date of the amendments. After the effective date, companies that amend registration statements or reports originally filed on SB forms must use standard forms but will be permitted to follow the disclosure format and content based on the SB form for six months following the effective date.

The summary above is intended to describe the major changes impacting smaller public companies as a result of the SEC’s new “smaller reporting company” definition and the consolidation of small business forms and regulations. 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.

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