



SEC ADOPTS REGULATORY RELIEF FOR SMALLER REPORTING COMPANIES

January 8, 2008

The SEC recently adopted a series of amendments intended to provide regulatory relief for smaller reporting companies under the Securities Act of 1933 and the Securities Exchange Act of 1934.¹ These amendments, which become effective on February 4, 2008, allow smaller reporting companies with less than \$75 million in public float to benefit from scaled-down disclosure and reporting requirements that were previously available to only small business issuers with less than \$25 million in public float and revenues. The SEC estimates that nearly 1,600 additional companies will be eligible to use the SEC's scaled disclosure requirements as a result of the amendments.

Background

The SEC's previous registration and reporting system for small business issuers, the centerpiece of which was Regulation S-B, has been criticized for its complexity and underutilization. Critics of the system complained that too few small companies have been eligible to benefit from Regulation S-B's scaled reporting standards and that many small companies have feared a stigma or lack of market acceptance associated with Regulation S-B reporting. The SEC amendments described in this client alert attempt to remedy these deficiencies and protect smaller companies and their investors from unduly burdensome federal securities regulation.

Expanding Eligibility for Smaller Reporting Company Scaled Regulation

As adopted, the amendments extend existing scaled disclosure and reporting benefits to a new category of "smaller reporting companies" that generally includes any company with less than \$75 million in public float² as of the last business day of the company's most recently concluded second fiscal quarter.³ Companies that do not have a public float or are unable to calculate it are eligible for scaled treatment if their revenues are less than \$50 million annually. The \$75 million and \$50 million thresholds will be automatically adjusted for inflation every five years.

¹ See Smaller Reporting Company Regulatory Relief and Simplification, Securities Act Release No. 33-8876, Exchange Act Release No. 34-56994 (December 19, 2007), available at <http://www.sec.gov/rules/final/2007/33-8876.pdf>. These amendments were originally proposed on July 5, 2007. See Smaller Reporting Company Regulatory Relief and Simplification, Securities Act Release No. 33-8819, Exchange Act Release No. 34-56013 (July 5, 2007), available at <http://www.sec.gov/rules/proposed/2007/33-8819.pdf>. See also our July 23, 2007 client alert discussing the proposing release, available at <http://www.wcsr.com/default.asp?id=680&objId=53>.

² Public float will be calculated in the same manner as is currently used to determine accelerated filer status: the price at which the shares of the company's common equity were last sold (or the average of the bid and asked prices of such shares) in the principal market for the shares as of the last business day of the company's most recently concluded second fiscal quarter, multiplied by the number of outstanding shares held by non-affiliates.

³ Non-reporting companies filing an initial registration statement will determine their eligibility for "smaller reporting company" status by making a public float estimate during a 30-day window before the filing based on the estimated offering price per share, the number of shares of common stock held by non-affiliates before the offering, and the number of shares of common stock to be sold at the estimated offering price.

Smaller reporting companies will now have all of the reduced disclosure and reporting benefits previously made available to small business issuers and non-accelerated filers. These benefits include: (1) eligibility to use reduced disclosure and reporting standards previously provided to small business issuers under Regulation S-B, including, among other things, less detailed financial statements and simplified disclosure requirements regarding executive compensation, corporate governance, and management's discussion and analysis; and (2) additional time for filing annual and quarterly reports.⁴

Integrating Regulation S-B into Regulation S-K and Regulation S-X

Regulation S-B previously contained 13 items that provided scaled disclosure for smaller companies, 12 of which pertained to non-financial disclosures and one of which pertained to financial statements.⁵ As adopted, the SEC's amendments are intended to simplify and improve the disclosure and reporting rules for smaller reporting companies by moving these scaled disclosure provisions from Regulation S-B into Regulation S-K and Regulation S-X. Specifically, the 12 non-financial scaled disclosure item requirements have been moved, without material modification, from Regulation S-B into new "smaller reporting company" subsections of their Regulation S-K counterparts. Additionally, the scaled financial statement requirements in Item 310 of Regulation S-B have been moved into a new Article 8 of Regulation S-X, with only one material modification to require two years of balance sheet data instead of one year. Please refer to the attached table for an item-by-item summary of the scaled disclosure alternatives available to smaller reporting companies.

The result of this integration is an expanded Regulation S-K that allows smaller reporting companies to adopt an "a la carte" approach and choose, on an item-by-item and form-by-form (i.e., quarterly) basis, whether to comply with the scaled disclosure requirements formerly contained in Regulation S-B or the requirements applicable to larger companies. In any one filing, a smaller reporting company has the option, at its election, to use the scaled financial and non-financial disclosure requirements for one, some, all, or none of the items. The only exception to this approach is that smaller reporting companies must comply with the smaller reporting company item requirements to the extent that they are more rigorous than the larger company requirements, as is currently the case in only Item 404, which requires additional disclosures for related person transactions, underwriting discounts and commissions and corporate parents. The SEC staff will evaluate item-by-item compliance with the requirements that apply to only smaller reporting companies.

Regulation S-B, the "small business issuer" designation, and all related "SB" forms have been eliminated, except that, for transition purposes, Forms 10-QSB and 10-KSB (and the related provisions of Regulation S-B) will continue to be available until October 31, 2008, and March 15, 2009, respectively.

Transitioning to and from Smaller Reporting Company Status

The amendments also simplify the rules governing transitions to and from smaller reporting company status using the transition model currently followed with respect to accelerated filer status. A smaller reporting company loses eligibility to claim smaller reporting company status in the first fiscal year following a fiscal year in which the company's public float rises above \$75 million as of the last business day of the company's second fiscal quarter. For a company not claiming smaller reporting company status, if its public float falls

⁴ Just like non-accelerated filers, smaller reporting companies have 90 days to file their annual reports on Form 10-K (compared to 60 and 75 days for large accelerated filers and accelerated filers, respectively) and 45 days to file their quarterly reports on Form 10-Q (compared to 40 days for all other filers).

⁵ The remainder of the items in Regulation S-B were substantially similar to their Regulation S-K counterparts for larger companies.

below \$50 million as of the last day of the company's second fiscal quarter, the company may transition to smaller reporting company status in the Form 10-Q quarterly report corresponding to such second quarter.⁶

Compliance Dates

Any company qualifying as a "smaller reporting company" as of the last business day of its most recent second fiscal quarter has the option to file its next annual report for a fiscal year ending on or after December 15, 2007, on either Form 10-KSB (using the old Regulation S-B disclosure requirements) or Form 10-K (using the scaled disclosure rules in amended Regulation S-K). After filing its next annual report (whether on Form 10-KSB or Form 10-K), a smaller reporting company must use Form 10-K and Form 10-Q for all subsequent annual and quarterly reports and may elect to use the scaled disclosure rules in amended Regulation S-K in such reports.

Conclusion; Additional Information

As adopted, the amendments should lessen the regulatory burden faced by many smaller public companies that have a small public float but have been unable or unwilling to be deemed a small business issuer. The integration of Regulation S-B into Regulation S-K and Regulation S-X and the elimination of the SB forms should allow these smaller companies to benefit from scaled regulation – and accompanying reductions in legal and accounting costs – without subjecting themselves to the taint sometimes associated with SB filers.

If you have any questions regarding these amendments, please contact [Ryan B. Opel](#), the principal author of this client alert. Alternatively, please feel free to contact the Womble Carlyle attorney with whom you usually work or any of our Corporate and Securities attorneys at the following link: <http://www.wcsr.com/default.asp?id=1099&objId=10>.

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⁶ With respect to issuers that do not have or cannot calculate a public float, issuers with less than \$50 million in annual revenues may use the scaled disclosure requirements until annual revenues exceed \$50 million. Issuers with revenues in excess of \$50 million are not eligible for smaller reporting company status unless annual revenues fall below \$40 million during the previous fiscal year.

SUMMARY OF SCALED DISCLOSURE ALTERNATIVES
FOR SMALLER REPORTING COMPANIES

ITEM	SCALED DISCLOSURE ALTERNATIVES
Financial Statements (Article 8 of Regulation S-X)	<ul style="list-style-type: none"> • Only 2 years of financial statements instead of 3
Item 101 – Description of Business	<ul style="list-style-type: none"> • Less detailed description the company’s business • Only 3 years of business development activity information instead of 5
Item 201 – Market Price of Dividends on Registrant’s Common Equity and Related Disclosure Matters	<ul style="list-style-type: none"> • No performance graphs required for percentage change in cumulative shareholder return
Item 301 – Selected Financial Data	<ul style="list-style-type: none"> • No disclosure required
Item 302 – Supplementary Financial Information	<ul style="list-style-type: none"> • No disclosure required
Item 303 – Management’s Discussion and Analysis of Financial Condition and Results of Operations	<ul style="list-style-type: none"> • Only 2 years of analysis instead of 3 • No tabular disclosure of contracts required
Item 305 – Quantitative and Qualitative Disclosures About Market Risk	<ul style="list-style-type: none"> • No disclosure required
Item 402 – Executive Compensation	<ul style="list-style-type: none"> • Provide executive compensation disclosure for only 3 named executives instead of 5 • Provide the Summary Compensation Table for only 2 years instead of 3 • No Compensation Disclosure and Analysis required • Provide only 3 summary tables instead of 7 • Provide alternative narrative disclosures • No footnote disclosure required for grant date fair value of equity awards
Item 404 – Transactions with Related Persons, Promoters and Certain Control Persons	<ul style="list-style-type: none"> • Calculations for related person transactions based on the last 2 fiscal years instead of the last 3 • No disclosure required for policies and procedures for reviewing related persons transactions
Item 407 – Corporate Governance	<ul style="list-style-type: none"> • No disclosures required for Compensation Committee Interlock and Insider Participation • No Compensation Committee Report required • No Audit Committee Report required until first annual report after filing and effectiveness of initial registration statement
Item 503 – Prospectus Summary, Risk Factors, and Ratio of Earnings to Fixed Charges	<ul style="list-style-type: none"> • No disclosure of ratio of earnings to fixed charges when issuing debt • No disclosure of ratio of combined fixed charges and preference dividends to earnings when issuing preferred equity • No disclosure of risk factors in certain forms
Item 504 – Use of Proceeds (referencing Article 8 of Regulation S-X)	<ul style="list-style-type: none"> • Only 2 years of financial statements required instead of 3 for acquired businesses with less than \$50 million in revenues
Item 601 – Exhibits	<ul style="list-style-type: none"> • No requirement to provide Exhibit 12 (Statements re Computation of Ratios)