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*Client Alert*

**Corporate & Securities**
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## SEC GRANTS SMALLER ISSUERS GREATER POTENTIAL ACCESS TO "SHORT FORM" PRIMARY SHELF REGISTRATIONS

The Securities and Exchange Commission ("**SEC**") has recently broadened the eligibility requirements for "short form" registration of public offerings on Form S-3 (and Form F-3 for foreign issuers) so that companies with a public float[1] below $75 million can have easier access to the public securities markets.[2] This rule change should provide our smaller issuer clients (and the investment banks that cater to them) greater access to the capital markets. This Client Alert is intended to offer a brief overview of the new rules. The new rules become effective January 28, 2008.

*Background*

Citing the great advances in electronic dissemination of information, including the public's enhanced ability to access companies' disclosures over the Internet, the SEC has significantly expanded the use of Form S-3 for specified public offerings by companies that do not meet the previous common equity public float requirement of $75 million. These so-called "short form" registration statements allow for the significant simplification of offering documents as compared to the documents required when using a Form S-1 or SB-2. Under the amended eligibility requirements, smaller public companies will be in a better position to take advantage of market windows by having registered securities available on a "shelf" registration statement.

*Eligibility*

Under the amended eligibility requirements, a company with a public float of less than $75 million could register a primary offering using a Registration Statement on Form S-3 (including a "shelf" registration), provided that the company:

- does not sell more than one-third (33.33%) of its public float in primary offerings on those forms in any one-year period;
- has timely filed all required SEC reports for the 12-months prior to filing the Form S-3;
- has a class of common equity securities listed and registered on a national exchange (OTCBB and Pink Sheets issuers are not eligible); and
- is not at the time of filing, and has not been at any time in the last year prior to filing, a "shell company" (as defined under Rule 405 of the Securities Act).

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1 "Public float" means the product of: (i) a company's outstanding common stock, less shares held by officers, directors and 5% shareholders multiplied by (ii) the public share price.

2 See SEC Release 33-8878.

In order to determine the amount of securities it could sell pursuant to Form S-3 at one time, a company would:

- determine its public float as of a date within sixty (60) days prior to the intended sale; and
- compare that number to the aggregate amount of all sales of the company's securities (both debt and equity) in primary offerings under Form S-3 over the previous 12-month period, including the intended offering.

In the case of convertible securities, the SEC has provided that the aggregate market value of the maximum number of shares into which the securities sold in the prior twelve month period are convertible be used in the calculation. If that resulting number did not already exceed the one-third public float cap, the company would be permitted to sell securities until aggregate sales reach the one-third cap. Since the company's public float limitation would be calculated immediately prior to the contemplated sale (as opposed to at the time of the initial filing of the registration statement), the amount of securities that a company would be permitted to sell could grow or decrease over time as the company's public float increases or decreases.

Furthermore, the one-third public float limitation on sales would be lifted if a company crossed the $75 million public float threshold. However, at the time of sale the public float decreased below $75 million, the limitation would be re-imposed. Explaining the adoption of the amended Forms S-3 and F-3, the SEC said that it intended for the one-third limitation to be large enough to enable issuers to meet their financial needs when marketing opportunities arise but small enough to take into account the effect such issuances could have on the market for thinly traded securities.

*Example*

Assume on January 1, 2008, XYZ Corp. (the "**Company**") has a public float of 11 million shares held by non-affiliates and that the Company's stock is trading at $4.00 per share. The Company's public float would have an aggregate market value of $44 million. The Company trades on AMEX, has not been a shell company within the previous twelve months, and has timely filed all 1934 Act periodic reports.

On January 1, 2008, the Company files a shelf registration statement on Form S-3 for up to $35 million[3] of debt and equity securities over the next three years from time to time as market opportunities arise.

In March 2008, the Company decides to sell common stock off the registration statement. To determine the amount of securities that it may sell in connection with the intended takedown, the Company calculates its public float as of a date within 60 days prior to the anticipated date of sale. Assuming that its public float is now $45 million, it calculates that the total market value of all sales effected pursuant to the amended form described above over the past year, including the intended sale, may not exceed $15 million, or one-third of the Company's float. Since the Company has not made any prior sales off the subject Form S-3, it is able to sell the entire $15 million.

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[3] Pursuant to the amended Form S-3, there is no cap on the amount an issuer can register on Form S-3, only a limit on the amount that can be sold in any twelve month period. While there is no legal cap on the amount which may be registered, one must consider the potential overhang effects the amount may have on the price of a company's securities, as well as other financial factors, when determining the amount the amount to be registered.

Assuming it sold the entire $15 million in March 2008, the Company in September 2008 again contemplates a takedown from the shelf. It determines, on September 1, 2008, that its public float had increased to $50 million. As one-third of $50 million is $16,666,666, million, the Company is now able to sell additional securities from the subject Form S-3. However, as the Company had sold $15 million of securities from the subject Form S-3 in the previous twelve months, it is now only able to sell $1,666,666 million worth of additional securities.

In January 2009, assume the Company's public float has risen to $60 million. To this point, the Company has only sold $16,666,666 million worth of securities from the Form S-3. It has, in the aggregate, $18,333,334 million remaining on the shelf registration. As one-third of $60 million is $20 million, the Company is now able to sell additional $3,333,334 million worth of securities from the subject Form S-3, for an aggregate total of $20 million.

Finally, in April 2009, assume the Company's public float had decreased to $50 million. One-third of this amount is $16,666,666 million. The Company has already sold a total of $20 million worth of securities from the subject Form S-3. However, in the previous twelve months, the Company has only sold $5 million worth of securities from the subject Form S-3. Accordingly, the Company may sell an additional $11,666,666 million of securities, for a grand total of $31,666,666 million of securities in a 13-month period.

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If you have questions or would like additional information on the material covered in this Client Alert, please contact one of our senior corporate and securities attorneys listed below or the EG&S attorney with whom you regularly work.


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