

SEC Form S-3 Amendment Effective January 28, 2008

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In December 2007, the Securities and Exchange Commission adopted an amendment to the eligibility requirements for use of a registration statement on Form S-3 relating to primary offerings¹, which went into effect on January 28, 2008. Form S-3 is a convenient alternative for registering securities than the more onerous registration statements on Forms S-1 and SB-2. However, only issuers that meet one of the eligibility requirements of Form S-3 may use that form. The amendment makes Form S-3 more widely available to issuers conducting certain limited primary securities offerings.

Prior to the amendment, an issuer was required to have a public float² of at least \$75 million to be eligible to use Form S-3 to register a primary offering of securities. Consequently, Form S-3 was not previously available for registration of primary offerings by smaller business issuers whose public floats were less than \$75 million.

Unlike the pre-existing eligibility requirement for primary offerings that included the public float limitation, the amendment only applies to securities to be offered for cash by or on behalf of the issuer, and does not apply to an issuer's registration of outstanding securities for the benefit of a different party. The amendment allows an issuer to register these limited primary offerings on Form S-3, regardless of the size of the issuer's public float, if the following three requirements are met: (1) the aggregate market value of the securities sold in the twelve (12) calendar months preceding the sale is not more than one-third (1/3) of the aggregate market value of the issuer's public float; (2) the issuer is not a shell company, and has not been a shell company for the preceding twelve (12) calendar months; and (3) the issuer has at least one class of common equity securities listed and registered on a "national securities exchange."³ The amendment therefore makes Form S-3 available to smaller issuers, as long as the securities to be offered are offered for cash by or on behalf of the issuer and the issuer otherwise meets the above listed requirements.

In light of this amendment, it is possible for a newly-eligible issuer to convert a prior registration on Form S-1 or SB-2 to Form S-3. Such a conversion to Form S-3 can be advantageous to an issuer because the burden of maintaining an effective registration with the Securities and Exchange Commission on Form S-3 is significantly less than the burden of maintaining a registration on Form S-1 or SB-2. However, not all registrations will be eligible for conversion to Form S-3 pursuant to the amendment. An issuer will only be able to rely on the amendment to convert from Form S-1 or SB-2 to Form S-3 if the prior registration was in connection with a offering of securities for cash by or on behalf of the issuer.

If you have any questions or would like additional information regarding Form S-3 or regarding any other securities issue, please contact Giordano Halleran & Ciesla's Securities Practice Group at 732-741-3900.

¹ General Instruction I.B.1. of Form S-3 defines a "primary offering" as an offering of securities for cash by or on behalf of the issuer, or the offering of outstanding securities for cash for any person other than the issuer.

² "Public float" means the aggregate market value of the issuer's common stock held by parties that are not affiliated with the issuer.

³ The SEC does not regard the Over-the-Counter Bulletin Board to be a "national securities exchange" within the meaning of the Form S-3 eligibility requirements. Consequently, issuers whose securities are listed on the Over-the-Counter Bulletin Board will not be eligible to register securities on Form S-3 under the amendment.