

CLIENT ADVISORY

SEC Streamlines Disclosure and Reporting Requirements for Small Public Companies and Expands Number of Small Public Companies Eligible for Scaled Disclosure

On November 15, 2007, the SEC adopted significant rule amendments that streamline the disclosure and reporting requirements for small public companies and expand the universe of small business companies that are eligible for scaled disclosure.

The amendments replace the current “small business issuer” category with a new expanded category of “smaller reporting companies” that will include companies with a public equity float of less than \$75 million (as opposed to the current threshold of \$25 million that applies to small business issuers eligible to file on the current “S-B” forms) or, if a company does not have a calculable public equity float, having revenues of less than \$50 million in the last fiscal year. The disclosure requirements applicable to small business issuers under Regulation S-B are being folded into Regulation S-K and the current “S-B” forms are being eliminated.

The new rules:

- Expand eligibility for scaled disclosure and reporting requirements to an estimated additional 1,500 companies;
- Integrate disclosure requirements for small companies in Regulation S-B into Regulation S-K, where they will be available to smaller reporting companies;
- Eliminate the current “S-B” forms; and
- Offer eligible companies the ability to comply with either the standard disclosure requirements or the scaled disclosure requirements on an *a la carte* basis.

The final rules are described in more detail below.

BACKGROUND ON SMALLER REPORTING COMPANY REGULATORY RELIEF AND SIMPLIFICATION

As SEC Chairman Cox has noted, small public companies make vital contributions to our economy but bear disproportionately high costs of being public. The need to lessen their regulatory burden was the focus of several recommendations by the Advisory Committee on Smaller Public Companies. The amendments that the SEC adopted on November 15 respond to several recommendations made by the Advisory Committee in its final report.¹

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¹ See [Final Report of the Advisory Committee on Smaller Public Companies](#) (Apr. 23, 2006).

Since 1992, the SEC has maintained separate disclosure and reporting requirements for small business issuers. Currently, “small business issuers,” companies with both public float and revenues less than \$25 million, are eligible to use the scaled disclosure and reporting requirements found in Regulation S-B. The scaled requirements have less rigorous requirements for financial reporting, executive compensation disclosure and analysis, market risk disclosures, and corporate governance disclosures, among other benefits. In addition, “non-accelerated filers,” generally companies with a public float of less than \$75 million that do not qualify as either “large accelerated filers” or “accelerated filers,” are eligible for longer deadlines for filing their annual and quarterly reports than “large accelerated filers” and “accelerated filers.”

EXPANSION OF ELIGIBILITY FOR SCALED DISCLOSURE

The amendments expand eligibility for scaled disclosure and reporting to all “smaller reporting companies,” a new category that replaces the “small business issuer” category and is largely coextensive with the “non-accelerated filer” category. A “smaller reporting company” will include any company, including a foreign company, with a total public float of less than \$75 million as of the last business day of the company’s most recently completed second fiscal quarter. For companies that do not have a calculable public float, the ceiling for eligibility is annual revenue of less than \$50 million. Investment companies and asset-backed issuers, however, are excluded from the definition, as they currently are excluded from the small business issuer category. The SEC staff estimates that this expanded category will encompass more than 1,500 additional companies, or nearly 5,000 companies in total.

INTEGRATION OF REGULATION S-B INTO REGULATION S-K

While the amendments leave the substance of the disclosure and reporting requirements for small business largely unchanged, the relevant provisions will be moved from

Regulation S-B and integrated into Regulations S-K and S-X, where they will be available to smaller reporting companies. Specifically, each individual disclosure item in Regulation S-B, except Item 310 covering financial statements, will be moved and added under a new subheading to the corresponding item in Regulation S-K. Where the disclosure standards are substantially similar for smaller reporting companies and larger companies, the language in the Regulation S-K items will remain unchanged.

Item 310 in Regulation S-B, governing the financial statements of smaller companies, will be moved to a new Article 8 of Regulation S-X. In addition, the amendments effect a substantive change: Article 8 will require two years of audited income statements and two years of audited balance sheets (rather than audited income statements for two years and an audited balance sheet for one year currently required under Regulation S-B). In addition, the new rules will permit all foreign companies to qualify as “smaller reporting companies” if they choose to file on domestic company forms and present their financial statements pursuant to US Generally Accepted Accounting Principles.

The SEC staff believes that the integration of the small business reporting standards into Regulations S-K and S-X will reduce the costs of regulatory compliance for smaller reporting companies and mitigate the perceived stigma of reporting as a small business issuer.

“A LA CARTE” COMPLIANCE

In addition to streamlining and integrating the disclosure and reporting requirements, the amendments allow smaller reporting companies to pick and choose for each disclosure item in any given filing whether to comply with the smaller reporting company standard or the larger company standard, where the larger company standard is more rigorous. The principal exception to this *a la carte* approach is that companies must elect to report financial statements on the basis of either the smaller reporting company standard or the larger company standard in Regulation S-X for an entire fiscal year, and cannot switch within a single fiscal year.

The SEC staff believes that an *a la carte* approach will give companies more flexibility to provide meaningful and relevant disclosure to investors. The approach is intended to allow smaller reporting companies to determine for themselves the proper balance and mix of disclosure, given compliance costs and market demand for information.

EFFECTIVE DATE; TRANSITION PERIOD FOR CURRENT REGULATION S-B FILERS

The new rules will become effective 30 days after publication in the Federal Register. Once effective, current Regulation S-B filers may elect to take advantage of them immediately or to continue reporting under the current rules for periodic reports until they file their next annual report.

CONCLUSION

The new rules are expected to allow an additional 1,500 small public companies to take advantage of scaled disclosure and reporting requirements, while eliminating the perceived stigma of reporting as a “small business issuer” on special “S-B” forms. The current \$25 million public float and revenue test was set in 1992 and has never been adjusted. Raising the eligibility threshold for smaller company status to \$75 million in public float is long overdue.

The SEC adopted the amendments affecting small business disclosure substantially as proposed, but did not adopt the proposal to automatically adjust the \$75 million public float and \$50 million revenue eligibility ceilings for inflation. The SEC was concerned that an indexing provision would lead to inconsistent ceilings for smaller reporting companies and non-accelerated filers and introduce unneeded complexity into the rules. However, the staff intends to revisit these thresholds and reconsider the issue of indexing on a broader scale in the near future.

We hope you found this information useful. If you would like more information, please contact your Arnold & Porter attorney or:

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