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## SEC Approves Amendments Simplifying Disclosure Obligations for a Larger Number of Smaller Public Companies

In December 2007, the SEC adopted amendments to its disclosure and reporting requirements to extend the benefits of the simplified and less rigorous disclosure and reporting requirements currently in place for “small business issuers” to a larger number of smaller public companies. The amendments establish a category of “smaller reporting companies,” generally any company with less than \$75 million in public float, eligible to use the SEC’s simplified disclosure and reporting requirements. In addition, the amendments integrate the disclosure requirements currently contained in Regulation S-B into Regulation S-K and eliminate the “SB” forms, including Forms 10-KSB, 10-QSB, SB-1 and SB-2.

### Background

Over the years, the SEC has made a concerted effort to ensure that its rules and regulations do not unduly burden smaller public companies. In this regard, in 1992, the SEC adopted an integrated simplified disclosure system for small public companies known as Regulation S-B. The SEC adopted Regulation S-B and its associated “SB” forms to reduce compliance costs and improve the ability of start-ups and other small businesses to obtain financing through the public capital markets. Regulation S-B contains a number of disclosure requirements that are scaled to the characteristics of smaller companies (i.e., it requires less extensive disclosure than that required for larger companies). These scaled or simplified disclosure requirements include: two years versus three years of audited statements of income and cash flows; an audited balance sheet only as of the end of the most recent fiscal year, reduced executive compensation disclosure (including no CD&A); simplified MD&A; and no requirement for selected financial data, quantitative and qualitative disclosures about market risks or compensation committee interlock and insider participation. Regulation S-B is only available to “small business issuers,” which are companies with annual revenues of less than \$25 million and a public float of \$25 million or less.

In March 2005, the SEC established the Advisory Committee on Smaller Public Companies to assess the current regulatory system for smaller public companies under the securities laws, including the impact of the Sarbanes-Oxley Act of 2002. In April 2006, the Advisory Committee on Smaller Public Companies issued a final report containing a list of recommended changes to the SEC’s rules and regulations. Among other things, the Advisory Committee on Smaller Public Companies made several recommendations relating to simplifying disclosure and reporting requirements for smaller public companies and labeled them as priority items. These amendments are in response to recommendations made by the Advisory Committee on Smaller Public Companies.

### Eligibility Requirements

The amendments provide the benefits of the simplified disclosure and reporting requirements currently in place for “small business issuers” to a significantly larger number of companies by creating a new category of eligible issuers, “smaller reporting companies.” In general, a smaller reporting company is a company that (i) has a public float of less than \$75 million or, in the case of a company that has no public float, (ii) has annual revenues of less than \$50 million.

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A company will determine its eligibility for smaller reporting company status based on whether the company is: (i) a reporting company already filing periodic reports; (ii) a non-reporting company filing a registration statement under either the Securities Act of 1933 (i.e., on a Form S-1) or the Securities Exchange Act of 1934 (i.e., on a Form 10); or (iii) a reporting or non-reporting company that has no public float.

- **Reporting Companies with a Public Float.** A reporting company with a public float determining its eligibility as a smaller reporting company will calculate its public float *as of the last business day of its most recently completed second fiscal quarter*, computed by multiplying the aggregate worldwide number of shares of its common equity held by non-affiliates by the price at which the common equity was last sold, or the average of the bid and asked prices of common equity, in the principal market for the common equity. This determination will be made on an annual basis.
- **Non-Reporting Companies.** A non-reporting company determining its eligibility as a smaller reporting company will calculate its public float *as of a date within 30 days of the date of the filing of a registration statement under either the Securities Act or the Exchange Act*, computed by multiplying the aggregate worldwide number of shares of its common equity held by non-affiliates before the registration, plus, in the case of a Securities Act registration, the number of such shares included in the registration statement by the estimated public offering price of the shares.
- **Reporting and Non-Reporting Companies without a Public Float.** A reporting or non-reporting company with no public float determining its eligibility as a smaller reporting company will calculate its annual revenues *during the most recent completed fiscal year for which audited financial statements are available*. A reporting company will make this determination on an annual basis, while a non-reporting company will make this determination as of a date within 30 days of the date of the filing of a registration statement under either the Securities Act or the Exchange Act.

Importantly, the amendments expand eligibility for smaller reporting company status to non-U.S. companies if they (i) fall within the definition of a smaller reporting company, (ii) choose to file on domestic company forms (i.e., Forms 10-K, 10-Q and S-1 as opposed to Forms 20-F, 6-K and F-1) and (iii) provide financial statements prepared in accordance with U.S. generally accepted accounting principles. Prior to these amendments, the SEC's simplified disclosure and reporting requirements under Regulation S-B were only available to U.S. and Canadian companies.

Finally, the amendments exclude investment companies, including business development companies, and asset-backed issuers from smaller reporting company status. The exclusion of such entities from "smaller reporting company" status is consistent with their treatment under Regulation S-B, which also excluded such entities from "small business issuer" status.

## Integrating Regulation S-B into Regulation S-K

The amendments simplify and improve the disclosure and reporting rules for smaller reporting companies by integrating the provisions of Regulation S-B into Regulation S-K. The SEC believes that the consolidation of the Regulation S-K and S-B disclosure requirements will provide a more unified set of rules that will be easier to use. The SEC did not substantively change the non-financial provisions of Regulation S-B when they were moved into Regulation S-K. The SEC accomplished this integration by the addition of a new paragraph entitled "Smaller Reporting Companies" to each item of Regulation S-K that contains separate disclosure standards for smaller reporting companies.

In addition, the SEC moved the simplified financial statement requirements previously contained in Item 310 of Regulation S-B into new Article 8 of Regulation S-X, and amended these requirements to provide a simplified disclosure option for smaller reporting companies requiring two years of audited balance sheets instead of one year.

Importantly, the amendments allow a smaller reporting company to choose, on an item-by-item basis or “a la carte” basis, to comply with either the simplified non-financial and financial requirements made available in Regulation S-K and Article 8 of Regulation S-X for smaller reporting companies or the requirements of other companies in Regulation S-K and Article 3 of Regulation S-X, when the requirements for other companies are more rigorous.

### Elimination of “SB” Forms

The amendments eliminate the SEC’s current “SB” forms, including Forms 10-KSB, 10-QSB, SB-1 and SB-2. As a result, subsequent to February 4, 2008 (the effective date of the amendments) and, in the case of Forms 10-KSB and 10-QSB, the transition period described below, smaller reporting companies will be required to use the forms used by other companies, such as Forms 10-K, 10-Q, S-1 and S-3.

### Effective Date and Transition Provisions

The effective date of the amendments is February 4, 2008. After the effective date, companies qualifying as “small business issuers” under Regulation S-B will have the option to file their next annual report for a fiscal year ending on or after December 15, 2007 on either Form 10-KSB, using the simplified disclosure requirements in Regulation S-B, or Form 10-K, using the new simplified disclosure requirements in Regulation S-K. After a “small business issuer” files that next annual report, it will be required to file quarterly reports on Form 10-Q and annual reports on Form 10-K, and may elect to comply with the new simplified disclosure requirements for smaller reporting companies in Regulation S-K.

Companies newly qualifying as “smaller reporting companies” will have the option to use the new simplified Regulation S-K requirements when filing their next periodic report due after the effective date of the amendments. These companies will determine eligibility for smaller reporting company status based on whether they had a public float of less than \$75 million as of the last business day of their most recently completed second fiscal quarter or, in the case of companies that have no public float, had annual revenues of less than \$50 million during the most recent completed fiscal year for which audited financial statements are available.

If a registration statement was filed on an “SB” form before the effective date of the amendments, the company must file the amendment to such registration statement on the appropriate form available to the company without an “SB” designation, but may continue to use the disclosure format and content on the “SB” form until six months after the effective date. For example, a company that filed on Form SB-2 before the effective date will be required to file a pre- or post-effective amendment on Form S-1, but will be able to maintain the item requirement format of its Form SB-2 for up to six months after the effective date.

### Entering and Exiting Smaller Reporting Company Status

Subsequent to the initial “smaller reporting company” status determinations described in the immediately preceding paragraph, a larger reporting company that has (i) less than \$50 million in public float as of the last business day of its second fiscal quarter or, in the case of a company that has no public float, (ii)

annual revenues of less than \$40 million during its previous fiscal year may transition to the simplified disclosure and reporting requirements in the Form 10-Q covering the second fiscal quarter corresponding to the measurement date establishing eligibility as a smaller reporting company.

Moreover, if a smaller reporting company fails to meet the definition of a smaller reporting company (either because it has a public float of more than \$75 million as of the last business day of its second fiscal quarter or, in the case of a company that has no public float, (ii) has annual revenues of more than \$50 million during its previous fiscal year), then the smaller reporting company will have to transition to larger company reporting beginning with its first fiscal quarter of the next fiscal year.

## Conclusion

The amendments will allow a larger number of smaller public companies to take advantage of the simplified and less rigorous disclosure and reporting requirements now available under Regulation S-B. As a result, the amendments further the SEC's goal of ensuring that its rules and regulations do not unduly burden smaller public companies.



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