Securities Briefing Vol. 6, No. 2

August 1, 2007

TOPICS IN THIS SECURITIES BRIEFING:

This Securities Briefing provides an overview of the SEC's proposed rules to:

- Allow smaller companies to use the registration statement on Form S-3 for primary securities offerings regardless of public float;
- Require the electronic filing of Form D; and
- Reduce the one-year holding period of Rules 144 and 145 for "restricted securities" issued by reporting companies.

This Securities Briefing is intended only as a summary of the SEC's proposed rules discussed and you are encouraged to review the full text of the proposed rules.

PROPOSAL TO REVISE FORM S-3 ELIGIBILITY REQUIREMENTS FOR SMALLER COMPANIES

OVERVIEW

The SEC has proposed expanding the eligibility of primary offerings registered on the Form S-3 to smaller companies to enhance their ability to access the public securities markets. The Form S-3 is a short form registration statement that allows companies to incorporate much of the required information from their existing SEC filings. Currently, Form S-3 is available only to those companies that have complied with reporting requirements on a timely basis for at least one year and in order to register a primary offering of securities, the company must have a minimum public float of at least $75 million.

In the proposing release, the SEC noted the following factors, among others, as motivation for the proposed rule:

- In April 2006, the SEC's Advisory Committee on Smaller Public Companies recommended that all reporting companies listed on a national securities exchange, NASDAQ or trading on the Over-the-Counter Bulletin Board electronic quotation service be eligible to use Form S-3 if they have been filing reports under the Securities Exchange Act of 1934 ("Exchange Act") for at least one year. The Advisory Committee noted that the inability of smaller companies to register primary offerings on Form S-3 limits their ability to raise capital.
- The ability to conduct primary offerings on Form S-3 "confers significant advantages to eligible companies" due to the ability to forward incorporate SEC filings made after the Form S-3's effective

date. This eliminates the need for post-effective amendments to the registration statement and creates the ability to conduct primary offerings "off the shelf."

- Primary "shelf" offerings permit a company to register securities offerings prior to planning any specific offering, and once the registration statement is effective, offer securities in one or more tranches without additional SEC action.
- Having more control over the timing of offerings by eliminating the need for post-effective amendments to registration statements and creating shelf eligibility for primary offerings will allow more companies to take advantage of favorable market conditions to raise capital on more favorable terms.

Given these and other factors, the SEC has proposed to amend the Form S-3 eligibility requirements to permit certain smaller companies to use Form S-3 for primary offerings of their securities, whether or not they satisfy the minimum $75 million public float requirement, if they satisfy the other requirements of Form S-3.

PROPOSED REVISIONS TO FORM S-3 ELIGIBILITY FOR PRIMARY OFFERINGS

Under the SEC's proposed General Instruction I.B.6 to Form S-3, companies with less than $75 million in public float could register primary offerings of their securities on Form S-3 if they satisfy the following conditions:

- All other eligibility conditions of Instruction I.A to Form S-3 are satisfied (see "Other eligibility requirements" below).
- They are not shell companies and have not been shell companies for at least the 12 calendar months immediately preceding the filing of Form S-3.
- They do not sell more than 20% of the aggregate market value of the voting and non-voting common equity held by their non-affiliates over any period of 12 calendar months.

The proposed new eligibility conditions would permit companies quoted on the Over-the-Counter Bulletin Board and Pinks Sheets to use Form S-3 if they can satisfy all other eligibility requirements of the Form S-3.

Other eligibility requirements. The other eligibility conditions listed under Instruction I.A of Form S-3 include, among others, the following:

- Registrant must have a class of securities registered under Sections 12(b) or 12(g) of the Exchange Act or is required to file reports under Section 15(d) of the Securities Exchange Act; and
- Registrants must have timely filed all materials with the SEC required by Sections 13, 14 or 15(d) of the Exchange Act for at least the 12 calendar months immediately preceding the filing of the Form S-3.

Calculation of 20% limitation on amount of securities that may be sold. According to the SEC's release, the calculation of the 20% limitation on the amount of securities that can be sold under Form S-3 is a two-step process. First, determine the registrant's public float immediately prior to the intended sale. A

registrant's public float is computed using the price at which its common equity was last sold, or the average of the bid and asked prices of its common equity, in the principal market for the common equity as of a date within 60 days prior to the date of sale. Second, compare the public float number to the aggregate amount (gross proceeds) of all sales of securities in a primary offering registered under Form S-3 in the previous 12-month period, including the amount of the intended sale, to determine if the 20% limitation would be exceeded.

The SEC indicated that it selected a 20% cap in order to balance the needs of a company to raise capital through primary offerings and the impact of such offerings in markets that are thinly traded. The SEC also emphasized that the 20% cap is a flexible limitation because it is calculated based on the public float immediately prior to the contemplated sale as opposed to being fixed at the time the Form S-3 is filed. As a result, the amount of securities a company may sell under Form S-3 increases as its public float increases, but that amount would also decrease if the company's public float decreases. The release includes a number of examples to illustrate the operation of the 20% cap imposed by proposed Instruction I.B.6.

Elimination of 20% limitation on amount of securities that may be sold. Proposed Instruction I.B.6 removes the 20% limitation on the number of securities that may be sold under Form S-3 if the registrant's public float increases to $75 million or more after the Form S-3's effective date. The SEC structured proposed Instruction I.B.6 in this manner to reflect the current operation of Instruction I.B.1 (i.e., Form S-3 registrants that satisfy the $75 million public float threshold at the time the Form S-3 is filed are not subject to restrictions on the amount of securities that may be sold under the Form S-3 even if their public float falls below $75 million after the Form S-3's effective date).

COMMENTS ON, AND COPY OF, PROPOSED SEC RULES REGARDING FORM S-3 ELIGIBILITY FOR SMALLER COMPANIES

The SEC's release proposing the changes to Form S-3 eligibility requirements for smaller companies contains a number of questions that interested parties may consider in their comment letters. Comments on the proposed rules are due on or before August 27, 2007. A copy of the proposed SEC rules to revise Form S-3 eligibility for smaller companies is available on the SEC's website at www.sec.gov by selecting Proposed Rule: Revisions to the Eligibility Requirements for Primary Securities Offerings on Forms S-3 and F-3 or by going to http://www.sec.gov/rules/proposed/2007/33-8812.pdf

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PROPOSAL TO MANDATE ELECTRONIC FILING OF FORM D

OVERVIEW

The SEC has proposed amendments to Form D, Regulation D and Regulation S-T to impose a mandatory requirement to electronically file the Form D. A Form D filing is required by any company making a private

offering in reliance on the exemptions available under Regulation D or Section 4(6) of the Securities Act of 1933 ("Securities Act"). The proposal also includes a number of changes to the Form D to simplify, update and revise its content. The revised Form D would be filed with the SEC on a new online system that would be accessible from any computer with Internet access. The Form D information would be available on the SEC's web site in an "interactive and easily searchable" format for use or review by regulators and any one else that wishes to access the data.

In the proposing release, the SEC indicated that mandating electronic filing of Form D could "promote uniformity between federal and state securities regulation" of private offerings and assist the regulators with better monitoring of those offerings. In particular, the SEC "hopes" that state securities regulators will accept "one-stop" filing of the Form D with the SEC as being sufficient for state law purposes. The SEC also believes that converting to an electronic filing of Form D would create a useful database that would assist the SEC in its enforcement efforts, and its evaluation of the effectiveness of exemptions under the Securities Act "in order to facilitate capital formation in a manner consistent with investor protection."

PROPOSED ELECTRONIC FILING PROCEDURE

The new online filing system for Form D would be accessible from any computer with Internet access. Both the initial filing of the Form D and any required amendments to it will be made through the new system. The new Form D would permit the designation of the states to which the Form D should be directed. The SEC expects that the Form D will have drop-down menus and other guidance functions to assist with the completion of the Form D.

The Form D will continue to be due within 15 days of the first sale of the issuer's securities in reliance on one or more of the exemptions available under Regulation D or Section 4(6) of the Securities Act. The proposed changes also clarify when an amendment to Form D must be filed (discussed below in "Proposed Changes to Form D Content - Identification of claimed exemptions or exclusions and type of filing").

A company required to file a Form D will need the same codes as are required to file on the SEC's EDGAR system. If a company does not have these EDGAR access codes, it must obtain EDGAR access codes by filing electronically a Form ID at http://www.sec.gov/edgar.shtml and filing, in paper by fax within two business days before or after filing of the Form ID, a notarized authenticating document. The EDGAR access codes include the following:

- Central Index Key (CIK) Code which is the company's identification number;
- CIK Confirmation Code (CCC) which is the company's confirming code for validation purposes;
- Password; and
- Password Modification Authorization Code (PMAC).

The online filing system will not have a way to save an incomplete Form D online from session to session. Data entry will also need to occur at a pace that will prevent a time-out from occurring during the session. The SEC currently expects that time-outs will occur one hour following a user's last activity on the system. Due to these filing system characteristics, all information needed to complete the Form D should be assembled before going online to file it. A company will be able to download and print the Form D before and after it is filed. Once the filing is made, the system would indicate receipt of the filing and provide an "accession number" (or unique number assigned to the filing) in an email notification to the filer. A company will be able to view its Form D on the SEC's web site shortly after it is filed with the SEC.

PROPOSED CHANGES TO FORM D CONTENT

The SEC has proposed reorganizing and simplifying the Form D into 14 numbered items. There will be instructions at the end of the Form D to explain the requirements for each item. The proposed revised Form D does not require information on the use of proceeds and expenses of the offering because this information is not needed to evaluate whether the claimed exemption is available to the issuer.

Basic identifying and contact information. Items 1-3 of the proposed Form D essentially reflects the information required by the current Form D:

- Item 1 lists the issuer's current and previous names, jurisdiction of incorporation or organization, entity type, year of incorporation or organization and SEC filing number, if any.
- Item 2 lists the company's address and telephone number of its principal place of business. Post office boxes and "care of" addresses will not be permitted.
- Item 3 lists name, relationship to company and address of the company's executive officers, directors and promoters. Note that the SEC proposes eliminating the current requirement to identify owners of 10% or more of a class of the company's securities.

The proposed Form D also eliminates the requirement to provide a name of the offering because the current requirement is unclear and is outdated.

Information about the issuer. Items 4 and 5 of the proposed Form D cover information about the issuer:

- Item 4 identifies the industry group of the issuer which is selected from a dropdown menu. This item replaces the current requirement to provide a brief description of the issuer's business. The SEC believes that industry group classification will be less burdensome and provide more useful information for regulatory purposes.
- Item 5 identifies the revenue range of the issuer to help the SEC determine the size and types of issuers that rely on the Regulation D and Section 4(6) exemptions. A "decline to disclose" option will be available if a private company considers its revenue range confidential information.

Identification of claimed exemptions or exclusions and type of filing. Items 6 and 7 cover information required by the current form with some changes:

- Item 6 identifies the exemption(s) or exclusions that the issuer is relying upon for the offering using a check-the-box format. Changes from the current Form D include specifying the paragraph or subparagraph of Rule 504 that is being claimed by the issuer for any Rule 504 exemption, and eliminating a check box to claim the Uniform Limited Offering Exemption ("ULOE").
  - The SEC wants this more detailed information on Rule 504 offerings to support its "policymaking and rulemaking efforts in various areas."
  - The SEC proposes eliminating all references to ULOE in the revised Form D because it believes the ULOE box in the current Form D is confusing and does not result in a significant amount of useful information.
- Item 7 identifies whether the filing is a new one or an amendment to a previously filed Form D. This Item also discloses whether the Form D is directed just to the SEC or to the SEC and the states selected by the issuer. Item 7 includes a new requirement to indicate either the date of first sale or that a first sale has not yet occurred.
- The SEC has proposed changes to Rule 503 to clarify the circumstances under which an amendment to Form D is required. An amendment to Form D will be required in the following three cases:
  - To correct a mistake of fact in the previously filed Form D;
  - To reflect a change in the information provided in a previously filed Form D. No amendment is required to disclose changes that occur after the offering terminated or a change that involves any of the following:
  - an issuer's revenues;
  - the amount of securities sold in the offering;
  - the total offering amount if the change, together with all other changes in that amount since the previously filed notice, does not result in an increase of more than 10%;
  - the number of accredited investors investing in the securities;
  - the number of non-accredited investors investing in the offering so long as such number is not more than 35; or
  - in an offering that is longer than one year, information on related persons, if the change was due solely to filling a vacancy due to death or a departure in the ordinary course of business.
- To update annually, between January 1 and February 14, information about the offering if the offering lasts more than one year.

Under proposed revised Rule 503, any amended Form D must provide current information for each item of the amended Form D regardless of why the amendment was filed.

Information about offering. In general, Items 8-14 expand on the information currently required about the offering:

- Item 8 identifies whether the offering is intended to last more than one year. This item has been included to assist regulators with compliance issues.
- Item 9 identifies the type of securities offered. The proposed revised Form D includes additional categories such as "option, warrant or other right to acquire another security" and "security to be acquired upon exercise of option, warrant or other right to acquire security."
- Item 10 identifies whether the offering is being made in connection with a business combination transaction. This is another item included to assist regulators with compliance issues.
- Item 11 identifies whether there is a minimum investment amount.
- Item 12 identifies each individual that has been or will be paid any commission or other compensation with respect to the offering, and the states that individual has or intends to solicit sales. If there are more than five individuals that are associated persons of the same broker or dealer, only the broker or dealer need be listed. Proposed item 12 also requires disclosure of the CRD number for each individual or broker-dealer listed to facilitate checking the brokers or broker-dealers' records.
- Item 13 identifies the total offering amount and the amount of sales as of the date of filing the Form D.
- Item 14 identifies whether or not the offering will be made to non-accredited investors and if so, the number of non-accredited investors who have invested in the securities as of the filing date, and the number of accredited investors who have invested in the offering as of the filing date.

Signature and submission of Form D. The revised Form D combines the federal and state signature sections into one signature block that also incorporates the consent to service of process provisions included in the current Form U-2. The proposed combined signature block also includes an undertaking to furnish to the SEC and/or each state in which the notice is filed, upon written request, with copies of offering materials.

COMMENTS ON, AND COPY OF, PROPOSED SEC RULE ON ELECTRONIC FILING OF FORM D

The SEC release proposing the electronic filing of Form D contains a number of questions that interested parties may consider in their comment letters. Comments on the proposed Form D rules are due on or before September 7, 2007. A copy of the proposed SEC rules to require electronic filing of Form D is available on the SEC's website at www.sec.gov by selecting Proposed Rule: Electronic Filing and Simplification of Form D or by going to http://www.sec.gov/rules/proposed/2007/33-8814.pdf

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PROPOSAL TO SHORTEN RULES 144 AND 145 HOLDING PERIODS

OVERVIEW

The SEC has proposed reducing the holding period under Rules 144 and 145 to six months for "restricted securities" of reporting companies if the holder has not engaged in hedging transactions. In general, "restricted securities" are securities acquired from the issuer in a transaction not involving a public offering. The reduced six-month holding period is not proposed to be extended to restricted securities of non-

reporting companies. The SEC's proposal also, among other things, reduces the resale restrictions for restricted securities held by non-affiliates, eliminates the manner of sale restrictions for debt securities, increases the Form 144 filing thresholds, codifies several SEC staff interpretative positions on Rule 144 issues and modifies certain provisions of Rule 145.

The SEC believes that shortening the holding period will increase the liquidity of privately sold securities and decrease the cost of capital for reporting companies without harming investor protection. Based on the SEC's observation of market reaction to the 1997 reduction of the Rule 144 holding periods, the SEC is now comfortable that a six-month holding period is a reasonable indication that an investor has assumed the economic risk of investment in the securities of reporting companies which is one of the underlying principals of Rule 144. The SEC does not believe that the markets of non-reporting companies have sufficient information or safeguards to justify reducing the holding period for securities of non-reporting companies.

PROPOSED SIX-MONTH HOLDING PERIOD

The SEC has proposed reducing the holding period under Rule 144(d) to six months for restricted securities of reporting companies held by affiliates and non-affiliates. Affiliates and non-affiliates could resell restricted securities of reporting companies after holding them for six months, subject to the other applicable conditions of Rule 144. The proposed rules do not change the one-year holding period for restricted securities of non-reporting companies.

Tolling provision. The SEC is proposing a tolling provision to address hedging transactions because they shift the economic risk of investment away from the holder of the securities which is contrary to Rule 144's underlying principals. The SEC proposes tolling the holding period during any period the holder or previous owner of the securities had a short position or entered into a "put equivalent position" (as defined in Exchange Act Rule 16a-1(h)). There would be no tolling of the holding period if the security holder "reasonably believes" that no short position or put equivalent position was held by the previous owner. There is a one-year cap on the proposed tolling provision so that regardless of the duration of the hedging transactions, the holding period will not be more than one year. Because restricted securities of non-reporting companies must still be held for one year, they will not be subject to the tolling provision.

Related changes. The SEC also proposes to make corresponding changes to:

- Form 144 to elicit information on hedging transactions engaged in prior to the proposed resale, and
- The notes to Rule 144 to make clear that brokers will also have to inquire about hedging transactions for securities held less than one year as part of the manner of sale requirements.

PROPOSED REDUCTION IN RESALE RESTRICTIONS FOR NON-AFFILIATES

The SEC has decided that the economic risk of investment in restricted securities held by non-affiliates is sufficiently demonstrated once the applicable holding period has been satisfied. This being the case, the SEC believes it is appropriate to "reduce the complexity of resale restrictions that may inhibit sales by, and impose costs, on non-affiliates." To implement these objectives, the SEC has proposed to permit non-affiliates to resell:

- Reporting company restricted securities under Rule 144 after expiration of the six-month holding period, subject only to the requirement of Rule 144(c) for current public information regarding the issuer, and
- Non-reporting company restricted securities under Rule 144 after expiration of the one-year holding period without the need to comply with any of the other conditions of Rule 144.

In both cases, the holder of the restricted securities must not have been an affiliate of the issuer of the securities during the three months prior to the resale under Rule 144. The SEC's proposing release contains the following helpful table that summarizes the proposed revised resale restrictions under Rule 144:

CHART

Affiliate or person selling on behalf of an affiliate Non-affiliate (and has not been an affiliate during the prior three month period)
Reporting Company Restricted Securities
During six-month holding period*
- no resales under Rule 144 permitted.

After six-month holding period*
- may resell in accordance with all Rule 144 requirements including:
• current public information;
• volume limitations;
• manner of sale for equity securities; and
• filing of Form 144.

During six-month holding period*
- no resales under Rule 144 permitted.

After six-month holding period* but before one year - may resell in accordance with the current public information requirement.

After one year - unlimited public resale under Rule 144; need not comply with other Rule 144 requirements.

Non-Reporting Company Restricted Securities
During one-year holding period -
no resales under Rule 144 permitted. Tolling provision does not apply.

After one-year holding period -
may resell in accordance with all Rule 144 requirements except holding period, including:
• current public information;
• volume limitations,
• manner of sale for equity securities, and
• filing of Form 144.

During one-year holding period -
no resales under Rule 144 permitted. Tolling provision does not apply.

After one-year holding period -
unlimited public resale under Rule 144; need not comply with other Rule 144 requirements.

** Such holding period may be longer than six months (but not longer than one year), depending on hedging activities.*

PROPOSED ELIMINATION OF MANNER OF SALE RESTRICTIONS FOR DEBT SECURITIES

The SEC has proposed eliminating the manner of sale limitations imposed by Rule 144(f) for resales of debt securities. The SEC also proposes that the term debt securities include non-participatory preferred stock and asset-backed securities. The SEC proposes to define non-participating preferred stock as non-convertible capital stock entitled to a preference on payment of dividends and in distribution of assets on liquidation, dissolution, or winding up of the issuer, but not entitled to participate in the issuer's residual earnings or assets. The SEC's rationale for this proposal is based on its conclusion (after studying the issue since 1997) that the risk of abusive selling efforts and compensation is much lower in the fixed income securities market than in the equity securities market. As a result, the SEC believes that the manner of sale limitations of Rule 144 "may place an unnecessary burden" on the resale of fixed income securities.

PROPOSED INCREASE IN THE FORM 144 FILING THRESHOLDS

The existing Form 144 filing thresholds have been in place since 1972 and require a Form 144 to be filed for sale transactions involving more than 500 shares or $10,000 within a three-month period. The SEC proposes increasing these thresholds to transactions involving 1,000 shares or $50,000. The proposed increased dollar threshold takes into account inflation and the SEC intends the 1,000 share threshold to "capture trades which merit notice" even though the dollar amount involved is not significant. Because under the SEC's proposals non-affiliates will no longer be required to file a Form 144, the SEC is soliciting

comment on how to coordinate the filing deadlines for Forms 144 and 4, and to permit affiliates, at their option, to satisfy their Form 144 filing obligation by timely filing a Form 4.

PROPOSED CODIFICATION OF SEC STAFF POSITIONS RELATING TO FORM 144

The SEC proposes to codify several Staff positions issued by the Division of Corporate Finance relating to Form 144 in an effort to make them "more transparent and readily available to the public." The Staff positions proposed to be codified include, among others, the following interpretations:

- That securities acquired from an issuer in a transaction exempt under Section 4(6) of the Securities Act are considered "restricted securities" under Rule 144(a)(3).
- That the tacking of the Rule 144(d) holding periods is permitted, subject to certain terms and conditions of proposed notes to Rule 144(d), when:
  - a company reorganizes into a holding company structure;
  - the securities sold were acquired from the issuer due to an exchange or conversion of other securities of the same issuer; or
  - the securities sold were acquired upon a cashless exercise of options or warrants.
- That a pledgee of securities may sell the pledged securities without having to aggregate the sale with sales by other pledgees of the same securities from the same pledgor if there is no concerted action by those pledgees.
- That Rule 144 is not available for resales of securities issued by a reporting or non-reporting shell company, other than a business combination related shell company.
- That Rule 144 is available for resales of securities issued by a company that has ceased to be a reporting or non-reporting shell company if at least 90 days has elapsed from the time the company made the SEC filing to demonstrate that it is no longer a shell company.

PROPOSED AMENDMENTS TO RULE 145

The SEC has proposed the following changes to Rule 145:

- Eliminate the presumed underwriter status provision in Rule 145(c) except for transactions covered by Rule 145(a) that involve a shell company, other than a business combination related shell company.
- Align Rule 145(d) resell restrictions with the proposed provisions to the resale restrictions of Rule 144 relating to shell companies.

COMMENTS ON, AND COPY OF, PROPOSED SEC RULES TO SHORTEN RULES 144 AND 145 HOLDING PERIODS

The SEC release proposing the shortening of Rules 144 and 145 holding periods contains a number of questions that interested parties may consider in their comment letters. Comments on the proposed rules are due on or before September 4, 2007. A copy of the proposed SEC rules to shorten the Rules 144 and 145 holding periods is available on the SEC's website at www.sec.gov by selecting Proposed Rule:

Revisions to Rule 144 and Rule 145 To Shorten Holding Period For Affiliates and Non-Affiliates or by going to http://www.sec.gov/rules/proposed/2007/33-8813.pdf

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