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TOPICS IN THIS SECURITIES BRIEFING:

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

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

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

REVISION OF RULES 144 AND 145 (HOLDING PERIODS AND OTHER CHANGES)

OVERVIEW

The SEC has adopted rules reducing the holding period under Rules 144 and 145 to six months for "restricted securities" of reporting companies substantially in the form proposed. 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 extended to restricted securities of non-reporting companies. The SEC's final rules also, among other things, reduce the resale restrictions for restricted securities held by non-affiliates, change the manner of sale restrictions for resales of equity securities by affiliates, eliminate the manner of sale restrictions and increase the volume limitations for debt securities held by affiliates, increase the Form 144 filing thresholds, codify several SEC staff interpretative positions on Rule 144 issues and modify 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.

EFFECTIVE DATE

The revisions to Rules 144 and 145 are effective February 15, 2008 but are applicable to securities acquired before or after the effective date.

SIX-MONTH HOLDING PERIOD

The final rules reduce 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 may resell restricted securities of reporting companies after holding them for six months, subject to the other applicable conditions of Rule 144. The final rules do not change the existing one-year holding period for restricted securities of non-reporting companies.

Reporting companies eligible for reduced six-month holding period. The reduced six-month holding period is available to only those reporting companies that have been subject to the reporting requirements of the Securities Exchange Act of 1934, as amended (the "Exchange Act") for at least 90 days before the proposed Rule 144 sale and which have filed all the reports required by the Exchange Act (other than Form 8-K reports) during the preceding 12 months (or for such shorter period that the reporting company has been required to file such reports).

Proposed tolling provision was not adopted. The SEC had proposed adopting 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 was persuaded by the comment letters that adding a tolling provision would "unduly complicate Rule 144" and cause shareholder or brokers to "incur significant costs to monitor hedging positions." These results would be contrary to the underlying purposes of the revisions to streamline Rule 144 and reduce the costs of raising capital. The SEC stated in the adopting release that it will reconsider the tolling provision issue if it observes "abuse relating to the hedging activities of holders of restricted securities."

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's final rules permit non-affiliates to:

- make unlimited public resales of 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;

- make unlimited public resales of 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; and
- make unlimited public resales of 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 all 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 final release contains the following helpful table that summarizes the revisions to the resale restrictions under Rule 144:

CHART

CHANGES TO MANNER OF SALE RESTRICTIONS FOR RESALES OF EQUITY SECURITIES BY AFFILIATES

As discussed elsewhere in this Securities Briefing, the final rules no longer impose manner of sale restrictions on resales of restricted securities by non-affiliates or the resale of debt securities by affiliates. Manner of sale restrictions continue to apply to resales of equity securities by affiliates under the final rules, but with the following changes:

- the resale of restricted securities through "riskless principal transactions" is permitted by revised Rule 144(f). A riskless principal transaction is defined in a new note to Rule 144(f) as "a principal transaction where, after having received from a customer an order to buy, a broker or dealer purchases the security as principal in the market to satisfy the order to buy or, after having received from a customer an order to sell, sells the security as principal in the market to satisfy the order to sell."
- the definition of broker transactions in revised Rule 144(g) is expanded to include publishing bid and ask prices for a security in an alternative trading system if the broker has published such prices in the alternative trading system on each of the last 12 trading days.

ELIMINATION OF MANNER OF SALE RESTRICTIONS AND INCREASING VOLUME LIMITATIONS FOR DEBT SECURITIES HELD BY AFFILIATES

The SEC's final rules adopted the proposed amendments to Rule 144 to eliminate the manner of sale limitations imposed by Rule 144(f) for resales of debt securities held by affiliates in the form proposed. Also as proposed, the SEC's final rules define the term debt securities to include non-participatory preferred stock and asset-backed securities. Amended Rule 144 (a) defines 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 adopting these changes 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.

In response to comments, the SEC's final rules increase the Rule 144(e) volume limitations for debt securities. As amended, Rule 144(e)(2) permits the resale of debt securities by affiliates in an amount not to exceed 10 percent of the principal amount of the tranche (or class if the securities involved are non-participating preferred stock or asset-backed securities) when taken together with all sales of such securities by the affiliate during the preceding three months.

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. In the 2007 proposing release, the SEC proposed increasing these thresholds to transactions involving 1,000 shares or $50,000. In response to comments, the SEC's final rules increase the Form 144 filing thresholds to 5,000 shares or $50,000. While the SEC solicited comment on how to coordinate the filing deadlines for Forms 144 and 4 in the proposing release, the SEC has decided to defer taking any action on this subject in the final rules. However, the SEC indicated that it intends to issue a separate release in the future that will provide "greater flexibility" to affiliates for satisfying the Form 4 and Form 144 filing requirements.

CODIFICATION OF SEC STAFF POSITIONS RELATING TO FORM 144

As proposed, the SEC's final rules amending Rule 144 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 now 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 new Rule 144(d) and related notes, 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 restricted and unrestricted securities issued by a company that has ceased to be a shell company if at least one year has elapsed from the time the company made the SEC filing to demonstrate that it is no longer a shell company, and it has filed all required Exchange Act reports and materials (other than Form 8-Ks) during the preceding 12 months. The one year waiting period is longer than the 90-day period originally proposed. The SEC opted for a longer time period to protect investors from "the abuse and micro-cap fraud occurring" with securities of shell companies.

AMENDMENTS TO RULE 145

The SEC has adopted amendments to Rule 145 in the form proposed as follows:

- Eliminating 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.
- Aligning the Rule 145(d) resell restrictions with the final amendments to the resale restrictions of Rule 144 relating to shell companies.

COPY OF FINAL SEC RULES REVISING RULES 144 AND 145

A copy of the final SEC rules revising Rules 144 and 145 is available on the SEC's website at www.sec.gov by selecting Final Rule: Revisions to Rules 144 and Rule 145 or by going to http://www.sec.gov/rules/final/2007/33-8869.pdf

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REVISIONS TO FORM S-3 ELIGIBILITY REQUIREMENTS FOR SMALLER COMPANIES

OVERVIEW

The SEC has amended Form S-3 to expand the eligibility of primary offerings for 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. Prior to the amendments, Form S-3 was available only to those companies that complied with reporting requirements on a timely basis for at least one year and had a minimum public float of at least $75 million. The amendments to Form S-3 remove the $75 million public float requirement, provided that the registrant meets the other requirements of Form S-3.

In the final release, the SEC noted the following factors, among others, as motivation for the amendments:

- 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 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 amended 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.

EFFECTIVE DATE

The amendments to the eligibility requirements of Form S-3 are effective January 28, 2008.

REVISIONS TO FORM S-3 ELIGIBILITY FOR PRIMARY OFFERINGS

Under the new General Instruction I.B.6 to Form S-3, companies with less than $75 million in public float can 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 have a class of common equity securities listed and registered on a national securities exchange.
- They do not sell more than one-third of their public float in primary offerings over any period of 12 calendar months.
- 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.

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 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 Form S-3.

Listed Securities Only and One-Third Cap. In the proposing release, the amendments to Form S-3 would have been available to all companies with securities trading in a public market, including those quoted on the Over-the-Counter Bulletin Board and Pink Sheets. The final amendment limited the Form S-3 eligibility to only those companies registered on a national securities exchange. The SEC noted that the

exchange registration requirement was included to provide an additional level of protection to investors. Exchanges have listing rules and procedures, such as minimum public float, minimum number of public shareholders, shareholder approval of specified matters, the independence of boards and committees, and strong corporate governance standards, which should mitigate the effects of expanding the number of companies that are eligible to use the Form S-3.

The proposing release would have also limited the amount of securities that could be offered in a twelve-month period under Form S-3 to 20% of the company's public float. The final amendment increased that cap to one-third of a company's public float. The SEC raised the cap in response to comments that suggested the 20% cap would limit the usefulness of the rule. To ensure that the one-third cap is respected, the SEC adopted a corresponding amendment to Rule 401(g) of the Securities Act of 1933, to provide that "violations of the one-third cap would also violate the requirements as to proper form under Rule 401 even though the registration statement previously had been declared effective."

Calculation of one-third limitation on amount of securities that may be sold. According to the SEC's final release, the calculation of the one-third 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 one-third limitation would be exceeded.

The SEC indicated that it selected a one-third 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 one-third 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 final release includes a number of examples to illustrate the operation of the one-third cap imposed by new General Instruction I.B.6.

Elimination of one-third limitation on amount of securities that may be sold. New General Instruction I.B.6 removes the one-third cap 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 new General Instruction I.B.6 in this manner to reflect the current operation of General 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).

COPY OF FINAL SEC RULES REGARDING FORM S-3 ELIGIBILITY FOR SMALLER COMPANIES

A copy of the final SEC rules revising Form S-3 eligibility for smaller companies is available on the SEC's website at www.sec.gov by selecting Final 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/final/2007/33-8878.pdf

MEMBERS OF GRAY PLANT MOOTY SECURITIES PRACTICE TEAM

Attorneys on the Securities Team include:

J.C. Anderson (612) 632-3002

Lindley S. Branson (612) 632-3024

Maxwell J. Bremer (612) 632-3056

Christopher A. Carlisle (612) 632-3033

Barry F. Clegg (612) 632-3220

Gene H. Hennig (612) 632-3202

Alyssa J. Hirschfeld (612) 632-3316

Inchan Hwang (612) 632-3310

Julia S. Offenhauser (612) 632-3067

Douglas M. Ramler (612) 632-3324

Michael P. Sullivan, Jr. (612) 632-3350

Daniel R. Tenenbaum (612) 632-3050

Mark D. Williamson (612) 632-3379

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