

[Home](#) | [Print](#)**02/01/08*****Revisions to Registration Statements on Forms S-3 and F-3 to Allow Their Use by Companies with Less than \$75 Million Public Float***

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Last month the U.S. Securities and Exchange Commission adopted amendments to its Forms S-3 and F-3 Registration Statements under the Securities Act of 1933 ("Securities Act") to allow their use by certain companies with less than a \$75 million public float for primary offerings (that is, offerings by or on behalf of the company) of their securities. Form S-3 and Form F-3 are the "short-form" registration statements used by eligible SEC-reporting domestic companies and foreign private issuers, respectively, to register securities offerings under the Securities Act. Currently, companies with a public float of less than \$75 million cannot use these forms to conduct primary offerings of their securities. Under the amendments, SEC reporting companies with a public float of less than \$75 million that otherwise meet the requirements to file on Form S-3 or Form F-3 will be able to use these forms to register primary offerings of securities if they (1) have a class of common equity securities listed and registered on a national securities exchange, and (2) do not sell (using the new provisions of the Form) more than the equivalent of one-third of their public float in primary offerings in any 12-month period.

Shell companies will not be eligible to use Forms S-3 and F-3 in this manner until 12 months after they cease being a shell company and have filed the information that would be required in a registration statement under Form 10 or Form 20-F, as applicable, to register a class of securities under the Securities Exchange Act of 1934 ("Exchange Act").<sup>1</sup>

The amendments, which are discussed in detail below, will be effective January 28, 2008. The balance of this memorandum focuses on Form S-3, but corresponding revisions have also been made to Form F-3.

**I. BACKGROUND**

Currently, in order to be eligible to use Form S-3 for primary offerings of securities, domestic companies must (i) have a class of securities registered under Section 12 of the Exchange Act or be subject to the Exchange Act's periodic reporting requirements pursuant to Section 15(d)<sup>2</sup> thereof, (ii) have been subject to the periodic reporting requirements of the Exchange Act and filed all such required reports for at least 12 months, and (iii) have timely filed all such required reports in the 12 months and any portion of a month prior to filing the registration statement, with the exception of certain Current Reports on Form 8-K.<sup>3</sup> These "registrant requirements" for use of Form S-3 remain in place under the amendments. Prior to the effective date of the amendments, in order to use Form S-3 to register the offer and sale of securities by or on behalf of the company, the issuing company must have a public float (that is, aggregate worldwide market value of voting and non-voting common equity held by non-affiliates) of at least \$75 million.<sup>4</sup>

There are two primary advantages of being able to use Form S-3 to register the sale of securities. First, the form allows incorporation of required disclosure by reference to a company's disclosure in its Exchange Act reports, including, unlike Registration Statement on Form S-1, reports that will be filed in the future. Such "forward incorporation" allows the prospectus filed as part of a Form S-3 registration statement to remain current for an extended period of time and avoids the time, delay and expense of having to file a post-effective amendment to keep the current. Second, Form S-3 allows companies to conduct primary "off the shelf" offerings pursuant to Rule 415 under the Securities Act. This means a company can register for sale any amount of any type of securities on Form S-3 and, for three years after effectiveness, sell the securities "off the shelf" by filing a prospectus supplement in connection with, but not prior to, the sale. This allows a company to take advantage of market conditions by being able to immediately issue securities in sales that are registered under the Securities Act without having to delay such issuance by going through the SEC's registration and review process prior to being able to effect the sale of its securities. In other words, once the shelf registration statement is on file and effective, the company can immediately sell its securities to an interested investor in sales registered under the Securities Act, which, assuming the investor is not an affiliate of the company, will allow the investor to receive securities that are not "restricted securities," as

defined in Rule 144 under the Securities Act, for purposes of resale.

## II. EXPANSION OF FORM ELIGIBILITY

### A. One-Third Cap and Listed Securities Requirement

As indicated above, pursuant to new General Instruction I.B.6 of Form S-3 reporting companies that satisfy the registrant requirements of Form S-3 but have a public float below \$75 million (at the time of filing and the proposed sale) will be able to use Form S-3 to conduct primary offerings of securities provided that they:

- Have a class of common equity securities that is listed and registered (i.e. "listed") on a national securities exchange<sup>5</sup> (though not necessarily the same class as that being registered for sale);
- Do not sell more than the equivalent of one-third of their public float in primary offerings under Instruction I.B.6 of Form S-3 in any 12-month period; and
- Are not a shell company, and have not been a shell company for at least 12 months prior to filing the registration statement.

The primary differences between the amendments as adopted and as proposed, as discussed in our May 31, 2007 Client Alert, are the inclusion of the national securities exchange listing requirement and the increase in the amount of securities that may be sold from 20% of the company's public float to one-third.

Offerings that exceed the one-third cap would violate the form requirements of Form S-3 under the amendments. The amendments amend Rule 401(g) under the Securities Act to provide that violation of the cap would violate the requirements as to proper form under Rule 401 even if the SEC has previously declared the registration statement effective. A company with a public float below \$75 million that would exceed the one-third cap if it utilized Form S-3 would, however, of course

be free to use Form S-1 to register additional primary offerings under the Securities Act.

## **B. Calculation of Public Float and the Amount of Securities That May Be Sold**

Currently, pursuant to General Instruction I.B.I thereto a company filing a registration statement on Form S-3 determines its public float as of a date within 60 days of filing of the registration statement. If its public float as so calculated is \$75 million or more, the company is eligible to use Form S-3 to register for sale by or on its behalf an unlimited amount of securities, and the registration statement will be effective for up to three years from the date it is declared effective. Such company need not recalculate its public float to determine its eligibility to use the form until the Form S-3 is updated for purposes of Section 10(A)(3) of the Securities Act, typically when its next annual report on Form 10-K is filed. General Instruction I.B.1 is not being amended, and therefore this method of registering an unlimited amount of securities in primary offerings will remain available after the effective date of the amendments for companies with a public float of at least \$75 million.

In order to calculate the amount of securities that may be sold by a company with a public float below \$75 million pursuant to new General Instruction I.B.6 to Form S-3, a company utilizing that instruction will need to calculate immediately prior to the proposed sale both (i) its public float and (ii) the aggregate of all sales of securities it has sold pursuant to General Instruction I.B.6 in the previous 12 months, to ensure that the one-third cap is not exceeded. These amounts will be based on the price at which the company's common equity was last sold, or the average bid and asked prices for the common equity, in the common equity's principal market (the "market price") on a date within 60 days prior to the date of sale. This is similar to the current practice under General Instruction I.B.1 to Form S-3 except that the relevant market price date for purposes of the new instruction is the time of sale as opposed to the time of filing, and the public float is determined based on the number of shares outstanding immediately prior to the sale instead of on the date the market price is

determined. Assuming that the company's public float at the calculation date is below \$75 million, it may not sell more than one-third of its public float, minus aggregate sales pursuant to General Instruction I.B.6 in the previous 12 months, pursuant to the Form S-3.

### **1. Calculation of Public Float**

As indicated above, assuming the relevant Form S-3 registration statement is effective, a company would calculate the maximum amount of securities it can sell pursuant to General Instruction I.B.6 by first calculating its public float immediately prior to the proposed sale. To do this, the company would multiply the aggregate number of shares of voting and non-voting common equity held by its non-affiliates worldwide immediately prior to the proposed sale by the market price of the common equity as of a date within 60 days of the date of sale.

Pursuant to a new instruction 3 to General Instruction I.B.6 to Form S-3, if at any time after filing the registration statement the filing company's public float increases to \$75 million or more, the one-third cap is lifted and the Form S-3 is considered to be filed pursuant to General Instruction I.B.1. Therefore, such a company may sell securities pursuant to the Form S-3 registration statement without regard to the one-third cap and without the need to recalculate its public float until, as discussed above, an updating amendment is filed to the Form S-3 (i.e. at the time of filing of the next annual report on Form 10-K). If the company's public float at that time falls to below \$75 million, the one-third cap will be reimposed until such time as the company's public float again reaches \$75 million or more.

Therefore, if the company's public float equals or exceeds \$75 million when it calculates its public float immediately prior to the time of sale, the company may sell securities pursuant to the Form S-3 without regard to the one-third cap.

If its public float is below \$75 million, then as discussed below the company must then calculate the aggregate sales of its securities pursuant to primary offerings under General Instruction I.B.6 of Form S-3 in the previous 12-month period, including the intended sale, in order to determine the maximum amount of securities that may be sold at that time pursuant to the Form S-3.

## **2. Calculation of Sales in the Previous 12-Month Period**

In order to calculate the aggregate market value of all securities sold in the past 12 months pursuant to General Instruction I.B.6 to Form S-3, a company would add together the gross sales price for all primary offerings pursuant to the instruction during the preceding 12-month period. It may then sell pursuant to the Form S-3 securities with a value up to the difference between its public float at the time of sale and such amount of securities previously sold.

For example, a company with a public float below \$75 million files a shelf registration statement on Form S-3 registering \$50 million of debt and equity securities that it intends to sell over the next three years. After the registration statement is declared effective, the company decides to do a primary offering of equity securities pursuant to the registration statement and calculates its public float to be \$30 million. Assuming the company has sold no securities pursuant to General Instruction I.B.6 to Form S-3 in the past 12 months, it may sell up to \$10 million (1/3 of \$30 million) worth of securities pursuant to the Form S-3 at this time.

Assume next that the company in our example sells \$5 million worth of common stock. Six months later it decides to conduct another primary offering of securities pursuant to the Form S-3 and calculates that its public float has risen to \$39 million. The company can then sell up to \$8 million

worth of securities pursuant to the Form S-3: \$13 million allowed under the one-third cap (1/3 of \$39 million) minus the \$5 million worth of securities it has sold in the past 12 months.

Under the amendments, the aggregate gross sales price includes sales of debt as well as equity securities. As a result, eligible companies will now be able to offer and sell non-investment grade debt on Form S-3.<sup>6</sup> If such debt securities are convertible into or exercisable for shares of equity securities, however, the aggregate sales price for purposes of calculating the one-third cap is the market value of the underlying securities and not the price at which the convertible securities were actually sold. The market value of the underlying equity securities will be based (i) on the maximum number of shares into which such convertible securities sold in the previous 12 months are convertible into as of a date within 60 days prior to the anticipated date of sale, multiplied by (ii) the market price of the common equity on the same date used for purposes of calculating the public float (i.e. the date of sale). If any such convertible securities have been sold and converted in the past 12 months, however, the aggregate sales price for the underlying equity securities is calculated by multiplying the number of shares into which the convertible securities were actually converted by the market price on the date of conversion. This applies to the calculation of both the amount of securities previously sold and any amounts intended to be sold for which the company is making this calculation. In either case, the market value of the underlying security may exceed the actual sales price of the debt securities, which will lower the actual amount of securities that can be sold pursuant to the Form S-3.

Taking the example above, assume that the market price of the company's common equity on the day it calculated its \$30 million public float was \$5.00 and that, instead of common stock, the

company initially proposes to issue \$5 million of convertible debt securities that are convertible into common stock at a 10% discount to the market price of the common stock on the date of sale. At the 10% discount, the conversion price is \$4.50 and, therefore, 1,111,111 shares of common stock ( $\$5,000,000$  divided by  $\$4.50$ ) underlie the \$5 million of convertible debt. Because the market price of those shares is \$5, the value of the equity securities underlying the convertible debt is  $\$5,555,555$  ( $1,111,111 \times \$5$ ), which is less than the \$10 million one-third cap as calculated above and thus, the company could sell the debt securities as proposed.

Assume again that the company decides to do another primary offering of securities six months later, at which time its public float has again risen to \$39 million, but that the convertible debt securities described in the prior paragraph have been converted and that the market price of the common stock was \$6.00 on the date of conversion. In this case, the company may still issue up to \$13 million of securities minus any securities sold in the past 12 months, but the amount of securities sold in the past 12 months as calculated pursuant to the amendments is  $\$6,666,666$  (the \$5 million amount of the debt securities divided by the \$4.50 conversion price (1,111,111), multiplied by the \$6.00 market price on the date of conversion). Therefore, at this point the company could issue up to  $\$6,333,334$  worth ( $\$13,000,000 - \$6,666,666$ ) of additional securities pursuant to the Form S-3.

These calculations will be made prior to each sale of securities off the Form S-3. Therefore, companies will benefit from any increase in their public float as the amount of securities they can sell will increase (and vice-versa). A decrease in public float, however, will not invalidate previous sales if they satisfied the one-third cap as calculated at the time of sale.



### 3. Additional Information

In addition, revised instructions to Form S-3 require companies to disclose in each prospectus filed with the SEC pursuant to such form an updated calculation of their public float and the amount of securities offered pursuant to new General Instruction I.B.6 during the previous 12 months (up to and including the date of the prospectus).

#### C. Summary

Therefore, after the effective date of the amendments an eligible SEC-reporting company registering primary offerings of securities on Form S-3 will continue to calculate its public float as of a date within 60 days of filing to determine whether it qualifies to sell its securities pursuant to existing General Instruction I.B.1 to the Form. If the company's public float is below \$75 million, then it may still file the Form S-3 to register primary offerings of securities as long as it has a class of common equity listed on a national securities exchange. After effectiveness of the Form S-3, such company would calculate its public float immediately prior to any proposed sale of securities off the Form S-3 by reference to the market price of the stock within 60 days of the proposed sale. If this amount is \$75 million or more, the Form S-3 is considered filed under General Instruction I.B.1 and the company may sell an unlimited amount of securities (up to the amount registered) pursuant to the Form S-3. If the public float at the time of the proposed sale is less than \$75 million, then the company may sell up to one-third of its public float in primary offerings off the Form S-3 pursuant to General Instruction I.B.6 thereto, minus the aggregate amount of any such sales during the previous 12 months, as calculated in accordance to the discussion in Section II.B.2 above.

This memorandum contains only a general summary of the amendments discussed herein and should not be construed as providing legal advice. The adopting release with respect to the amendments, including the text of the amendments, is available at <http://www.sec.gov/rules/final/2007/33-8878fr.pdf>. If you have any questions about the information in this

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## NOTES

<sup>1</sup> Pursuant to current General Instruction I.B.1 to Forms S-3 and F-3, shell companies that meet the registrant requirements and \$75 million public float requirement can already utilize these forms to register primary offerings of securities.

<sup>2</sup>The obligation to file periodic reports arises pursuant to Section 15(d) of the Exchange Act pursuant to the filing and subsequent declaration of effectiveness of a registration statement under the Securities Act.

<sup>3</sup>These requirements do not apply to offerings of investment grade asset-backed securities on Form S-3.

<sup>4</sup> Transactions involving primary offerings of non-convertible investment grade securities, certain rights offerings, dividend reinvestment plans and conversions, and (if the class of securities being registered is listed and registered on a national securities exchange or quoted on the automated quotation system of a national securities association) resales by selling stockholders are not subject to the public float requirement.

<sup>5</sup> This includes any securities exchange registered with the SEC pursuant to Section 6(a) of the Exchange Act. This currently includes, inter alia, the New York Stock Exchange, the American Stock Exchange, and Nasdaq.

<sup>6</sup> As indicated above, Form S-3 currently allows companies to offer non-convertible investment grade debt on Form S-3 regardless of their public float.

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