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CORPORATE ADVISOR

SEC Proposes Amendments to Eligibility Requirements for Primary Securities Offerings on Forms S-3 and F-3

July 2, 2007

Summary

The SEC is proposing to revise the eligibility requirements for short form registration using Forms S-3 and F-3 to enable domestic and foreign issuers respectively to conduct primary securities offerings¹ using these forms regardless of the size of their public float or the rating of debt they are offering. The proposed rules provide that if these issuers satisfy the other eligibility requirements of Forms S-3 (domestic issuers) or F-3 (foreign issuers) and they do not sell more than 20% of their public float in primary offerings over any 12 calendar month period they will become eligible for short form registration. The proposed amendments should facilitate greater market accessibility and more efficient and cost-effective registration of primary offerings.

Forms S-3 and F-3

Forms S-3 and F-3 provide a "short form" for companies to register securities offerings under the Securities Act of 1933. Forms S-3 and F-3 permit registrants to rely on reports filed under the Securities Exchange Act of 1934 ("Securities Act") to satisfy the Forms' disclosure requirements. This includes "forward incorporation", which enables companies to incorporate subsequently filed Exchange Act reports thus facilitating the automatic update of registration statements. A registrant without the ability to forward incorporate must file a new registration statement or post-effective amendment to its registration statement whenever there is a fundamental change to the information contained therein.

Additionally, Forms S-3 and F-3 enable companies to conduct primary offerings "off the shelf" under Rule 415 of the Securities Act.² Companies eligible to register these primary shelf offerings under Rule 415 benefit from the ability to register securities prior to any planned offering, thus once the registration statement becomes effective they can offer securities in one or more tranches without awaiting further SEC approvals. Generally, post-effective amendments and new registration statements are subject to selective review by the SEC and must be declared effective before the registration statement may be used again to offer and sell securities. For companies leveraging Rule 415 and Forms S-3 or F-3, the ability to forward

¹ Securities offered by or on behalf of the registrant for its own account

² Rule 415 provides that securities may be registered for an offering to be made on a continuous or delayed basis in the future provided that the registration statement pertains only to securities registered (or qualified to be registered) on Form S-3 or Form F-3 which are to be offered and sold on an immediate, continuous or delayed basis by or on behalf of the registrant, a majority owned subsidiary of the registrant, or a person of which the registrant is a majority-owned subsidiary.

incorporate enables them to avoid the delay and costs associated with the preparation and filing of post-effective amendments and awaiting SEC review.

Under the current rules, foreign and domestic issuers may only register primary offerings on Forms S-3 and F-3 if their non-affiliate equity market capitalization is at least \$75 million³ and they have complied with the reporting requirements of the Exchange Act for at least one year.⁴ This market capitalization requirement, an investor protection mechanism, often precludes smaller issuers from eligibility for short form registration and subsequently impedes their ability to raise capital on favorable terms. The SEC has therefore proposed amendments to the eligibility requirements which will abolish this capitalization requirement provided the issuer can meet certain other parameters discussed below.

Proposed Amendments

The SEC is proposing to amend the General Instruction I.B.6. to Form S-3 and the General Instruction I.B.5. to Form F-3 to enable companies with less than \$75 million in public float to register their primary offerings on Forms S-3 or F-3 provided:

- they meet the other eligibility requirements for the use of Form S-3 or Form F-3
- they are not shell companies and have not been shell companies for at least 12 calendar months prior to the filing of the registration statement
- they do not sell more than the equivalent of 20% of their public float in primary offerings under General Instruction I.B.6. of Form S-3 or I.B.5. of F-3 over any period of 12 calendar month period
- they have timely filed Exchange Act reports for 12 calendar months and any portion of a month preceding the filing of the registration statement.

These new eligibility rules will allow companies not traded on a national securities exchange, such as those quoted on the OTC Bulletin Board and the Pink Sheets, to potentially take advantage of short form registration provided they can satisfy the registrant eligibility requirements provided in General Instruction I.A.

Determining Eligibility

For companies with a public float below \$75 million, the proposed rules contemplate a two step process to ascertain the amount of securities that may be sold using a Form S-3 or F-3. The process first requires the registrant to determine its public float immediately prior to the intended sale and then requires the registrant to calculate the aggregate market value of securities (inclusive of both equity and debt) sold pursuant to primary offerings under General Instruction I.B.6. of Form S-3 or I.B.5. to Form F-3 in the previous 12-month period (including the intended sale) to ensure the 20% limitation is not exceeded.

Calculation of the public float will be based on the price at which the registrant's 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. Calculation of the aggregate market

³ Primary offerings of non-convertible investment grade securities, certain rights offerings, dividend reinvestment plans and conversions and offerings by selling shareholders of securities registered on a national securities exchange do not require that the company maintain a minimum equity market capitalization.

⁴ Issuers of investment grade asset-backed securities do not need to have a reporting history.

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value of securities sold during the preceding 12-month period should be determined by adding together the gross sales price for all primary offerings pursuant to proposed Instruction I.B.6. of Form S-3 and I.B.5. of Form F-3 during the preceding 12 calendar month period. Based on this two step process, registrants would then be permitted to sell securities with a value up to, but not greater than, the difference between 20% of their public float and the value of securities sold in primary offerings under Form S-3 or Form F-3 in the prior 12 calendar month period.

Anticipated Benefits

The proposed amendments are designed to facilitate more efficient registration and greater market accessibility without compromising investor protection. More efficient registration will ensure companies avoid unnecessary delays in the offering process and reduce or eliminate costs associated with the preparation and filing of post-effective amendments. Currently, many smaller companies are precluded from using the Form S-3 or F-3 simply because their public float is too small. This can impede their ability to raise capital and makes the registration process more cumbersome and costly. The availability of public filings on the Internet likewise means that investors have access to the same volume of information for smaller public companies as they do for the largest filers which makes additional investor protection mechanisms such as a minimum equity market capitalization unnecessary.

Forms S-3 and F-3 also provides companies with greater control over the timing of their offerings, which enables them to take advantage of favorable market conditions to raise capital on more desirable terms. This ability to effectively take shares 'off the shelf' as required provides a viable financing alternative to other popular methods such as private placements. Wider availability of the S-3 and F-3 short form registration to issuers should facilitate greater access to public securities markets and reduce the costs and delays associated with the preparation and filing of post-effective amendments to registration statements.

The SEC is accepting comments on the proposed amendment until August 27, 2007.

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For further information about Babirak, Vangellow & Carr and its lawyers, you may visit our web site at www.bvcpc.com. If you have any question regarding any topic covered in this Corporate Advisor or regarding any corporate finance or related matter, please feel free to contact the following:

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