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SEC ADOPTS NEW RULES ON RULE 144,
FORM S-3, AND SMALLER PUBLIC
COMPANY DISCLOSURE

Effective February 15, 2008, the United States Securities and Exchange Commission (“SEC”) has adopted new rules that will significantly decrease the regulatory burden for smaller public companies. New rules will simplify compliance with SEC Rules 144 and 145, expand the availability of the Form S-3 “short-form” registration statement, and expand the availability of “small business filer” disclosure.

The most significant changes are summarized below.

Amendments to Rule 144 and Rule 145

The SEC has adopted amendments to Rule 144 that will shorten the holding period for securities of public reporting companies, simplify compliance for sales by non-affiliates, and raise the “*de minimis*” threshold for filing Form 144. The new rules also eliminate the “presumptive underwriter” doctrine of Rule 145, except for transactions involving shell companies, which will significantly simplify compliance with that Rule following business combinations. The amendments to Rule 144 and Rule 145 are effective February 15, 2008, and will apply to all resales under those Rules after that date.

Rule 144

Rule 144 under the Securities Act of 1933 applies to resales of “restricted securities” (i.e., securities acquired in a non-public transaction) and “control securities” (i.e., securities held by affiliates – officers, directors and significant stockholders) of the issuer. Under the current version of Rule 144, resales of restricted securities will not comply with the Rule unless the securities have been held for at least one year following full payment for the securities. Resales of restricted securities held more than one year and resales of control securities may be made under Rule 144, subject to the availability of current public information about the issuer, volume limitations, manner of sale restrictions, and, except for certain *de minimis* transactions, the requirement to file a Form 144 Notice of Sale. After two years, non-affiliates of the company (and former affiliates who have not been affiliates for at least 3 months prior to the time of sale)

may resell without restriction.

Under the amended version of Rule 144, restricted securities of companies that have been public companies for at least 90 days could be sold after a holding period of 6 months. For non-affiliates, resales of securities held longer than 6 months, but less than one year, will be subject only to the current public information requirement. All restrictions for non-affiliates will lapse after one year. Rule 144 will likewise be available for resales of equity securities held by affiliates after a 6-month holding period, but the current public information requirement, the volume limitations, the manner of sale requirements and the Form 144 filing requirements would continue to apply. Debt securities held by affiliates may be resold after 6 months without regard to the manner of sale requirements. The new rules also modify the “manner of sale” requirements and liberalize the volume restriction with respect to resales of debt securities. In addition, the *de minimis* threshold for filing Form 144 will be increased from sales involving either 500 shares or \$10,000 to a new threshold of 5,000 shares or \$50,000. There is no change to the current Rule 144 requirements for resales of securities of non-reporting companies. The amendments should greatly simplify compliance with the requirements of Rule 144 for securities of public reporting companies. Non-affiliates who have held securities for the minimum holding period will no longer have to comply with the volume limitations, the manner of sale requirements, or the requirement to file Form 144. Under the new rules, only affiliates will be required to file Form 144, and the increase in the *de minimis* threshold will likely lead to a significant decrease the number of Form 144 filings.

The new rules also codify certain Rule 144 interpretive positions of the Staff of the SEC Corporation Finance Department. In particular, the new rules set forth the Staff’s position that Rule 144 is not applicable to shell companies, or companies that were shell companies within the past 12 months.

Rule 145

Under the current version of Rule 145, affiliates of either party to a business combination transaction are presumed to be “underwriters.” As such, these affiliates are subject to certain post-transaction restrictions on resale of securities received in the transaction for up to two years following the transaction, even if the securities issued in the transaction were registered on Form S-4. The new rules eliminate the “presumptive underwriter” doctrine, unless one of the parties to the transaction is a shell company (other than business combination shell company). In addition, the post-transaction restricted period for securities issued in transactions subject to Rule 145 will be shortened to conform to the changes to Rule 144.

The following table summarizes the most significant changes to Rules 144 and 145:

Current Rules		Newly Approved Amendments
Resales of Restricted Securities by Non-Affiliates	Limited resales after 1 year holding period	For reporting companies, unlimited resales after 6 months, as long as seller has not been affiliate for 3 months prior to sale; subject to current public information requirement for resales after holding period of more than 6 months but less than 1 year For nonreporting companies, unlimited resales after 1 year, as long as seller has not been affiliate for 3 months prior to sale
	Unlimited resales after 2 year holding period, as long as seller has not been affiliate for 3 months prior to sale	
Resales by Affiliates	Limited resales after 1 year holding period	Limited resales after holding restricted securities of reporting companies for 6 months, or non-reporting companies for 1 year
Manner of Sale Restrictions	Apply to resale of any type of security under Rule 144	Does not apply to resales of debt securities, or to any resales by non-affiliates
Form 144	Filing threshold at 500 shares or \$10,000	With respect to affiliates, filing threshold at 5,000 shares or \$50,000
		No Form 144 requirement for non-affiliates
		Presumptive underwriter provision applies
Rule 145	Presumptive underwriter provision applies to all Rule 145(a) transactions	Only to Rule 145(a) transactions involving shell companies (other than business combination shells), with shortened holding periods under Rule 145(d)

Easing of Eligibility Requirements for Forms S-3 and F-3

The SEC has adopted rules revising the eligibility requirements for primary offerings on Form S-3. Similar changes are also being made to Form F-3, the form used by foreign private issuers. The new rules will be effective in late January or early February 2008; the exact effective date has not yet been determined. Currently, the "short-form" registration statements on Forms S-3 and F-3 may only be used for primary offerings by companies that have been public for one year, have timely filed all their Exchange Act reports for the past 12 months, and have a "public float" (market value of shares held by non-affiliates) of at least \$75 million. The new rules will allow domestic companies and foreign private issuers to conduct primary offerings on Forms S-3 or F-3 without regard to the public float requirement, as long as the company satisfies the other eligibility requirements of the form and does not sell more than 1/3 of its public float over any 12-month period. Under these new rules, smaller public companies will be able to conduct shelf offerings. Shelf offerings are not permitted on Form S-1, which is currently the only form available to smaller companies. All companies using Form S-3 for primary offerings could take advantage of the form's automatic incorporation by reference of Exchange Act filings made after the effective date; Form S-1 allows incorporation by reference only of documents filed prior to the filing of the registration statement. The limitation of 1/3 of the public float will

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be based on the number of shares outstanding at the time the registration statement is filed, and at the time of each takedown, in a shelf offering. The limit includes common stock issuable upon the exercise of warrants or other derivative securities that were part of the transaction.

The forms would not be available to shell companies until 12 months after the cessation of shell company status, unless the former shell had a public float of at least \$75 million. Disclosure Relief for Smaller Public Reporting Companies. Currently, the SEC rules define both "non-accelerated" filers (companies with a public float of less than \$75 million), and "small business" filers (companies with public floats of less than \$25 million that meet certain other requirements). Non-accelerated filers have the benefit of longer reporting deadlines for periodic reporting, but otherwise file the same reports as accelerated filers. Small business filers use Forms 10-KSB and 10-QSB which have fewer disclosure requirements. The most significant difference between "SB" filers and those using standard forms is that SB filers need only provide two years of audited financial information instead of three. SB filers also have fewer disclosure requirements in the discussion of business developments, MD&A, and executive compensation.

The new rules essentially combine non-accelerated filers with small business filers into a new category, "smaller public reporting company." This means that companies with public floats of less than \$75 million (as of the end of the company's second fiscal quarter) could use the reduced disclosure options currently available only to small business filers. Regulation S-B, which currently governs small business filings, is being eliminated, and its reduced disclosure requirements would be folded into Regulation S-K. Smaller public companies would thereafter file on standard forms (10-K, 10-Q), but could choose the reduced disclosure requirements on an "a la carte" basis.

These new rules will be effective in January 2008; the exact effective date has not yet been determined.

Contacts

If you have any questions regarding the information included in this Client Alert, please contact the **Law Office of Gregory Bartko** at their offices located in Atlanta, Georgia.