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CAPITAL GAINS

Small companies stand to gain from the newly streamlined SEC rules on public offerings

In March 2005, the U.S. Securities and Exchange Commission formed the Advisory Committee on Smaller Public Companies to assess the rules and the regulatory system for smaller public companies and recommend changes.[1] Largely in response to the Advisory Committee's recommendations, the SEC in mid 2007 undertook the most pervasive review of its small business capital formation regulations since its 1992 small business initiatives.[2] The amendments approved by the SEC, which have taken effect this year, make comprehensive changes to the reporting scheme for companies that now comprise a new category, "smaller reporting companies."[3] The new amendments also make significant changes to Rule 144, liberalize use of the Form S-3 short-form registration statement, streamline the Form D Notice, and expand the exemption from registration for stock option plans. By doing so, the amendments modernize and improve requirements for raising capital for private and public companies.[4]

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In announcing several proposed changes to small business capital-raising regulations, SEC Chairman Christopher Cox stated:

> Small businesses are a critical part of our nation's economy. Although it may seem that large companies are creating most of the new jobs and innovations, in fact, small business is leading the way in America's economy. Today's rule amendments will enable smaller companies to raise capital more effectively and ease some of the burdens of our reporting and disclosure requirements, and they will ensure that investors in these companies are paying for important investor protections and not red tape.[5]

To accomplish this purpose, the amendments will:

- Shorten the holding period for resales of restricted securities of reporting companies to six months by amending Rule 144[6] under the Securities Act of 1933. Previously, the holding period for unrestricted sales by nonaffiliates was two years.
- Allow smaller reporting companies with securities listed on a national securities exchange (such as NASDAQ and NYSE) that have been reporting for 12 months to use Form S-3 registration statements for primary offerings for cash. Form S-3 permits issuers to conduct "shelf registrations" and to satisfy substantive disclosure requirements by incorporating by reference documents previously filed, as well as subsequently filed, with the SEC. Prior to the amendments, the registration of primary offerings on Form S-3 was limited to those companies having a public float of $75 million or more or those companies registering primary offerings of nonconvertible investment grade debt or certain other transactions.
- Expand the category of companies eligible to use the SEC's relaxed or "scaled" disclosure scheme for smaller reporting companies. The SEC accomplished this by creating the new "smaller reporting companies" category, defined as companies with a public equity float of less than $75 million.[7] The new category replaces the former "small business issuer" category, which made the relaxed reporting scheme available only to those companies with a public equity float of less than $25 million and gross revenues of less than $25 million. In 2006, of the 11,898 companies that filed annual reports under the Securities Exchange Act of 1934,[8] 3,749 had a public float of less than $25 million. The new amendments will affect the 4,976 companies (42 percent of companies filing annual reports) that have a public float of less than $75 million.[9]

Finally, the amendments substantially revise Rule 503[10] and related rules governing Form D, which must be filed whenever securities are offered and sold pursuant to any of the exemptions under Regulation D (Rules 504, 505, or 506). The changes substantially revise and simplify the form and provide for Form D e-filing.

The new Form D becomes effective on September 15, 2008. During a six-month transition period concluding on March 16, 2009, issuers have the option of using the new Form D or the existing Form D, referred to as Temporary Form D, which can be filed only in paper format. The new Form D can be filed either electronically or in paper format during this transition period. After March 16, 2009, the new Form D must be used and must be filed electronically. The form will be available through the SEC's publicly accessible database. Until the states, through the North American Securities Administrators Association (NASAA), adopt uniform electronic filing rules, issuers must still file a copy of Form D in those states in which the offering is to be made, usually in paper format.

Changes in Resale Requirements under Rules 144 and 145

The changes in resale requirements under Rules 144 and 145 became effective February 15, 2008, and apply to securities acquired both before and after the effective date. Rule 144, adopted in 1972, provides a safe harbor under Section 4(1) of the Securities Act[11] for the resale of "restricted securities"—those securities acquired directly from an issuer or indirectly from an affiliate of the issuer in a private offering.[12] Prior to the new amendments, Rule 144 permitted resales after holding the securities for one year, subject to:

- Under Rule 144(c), the availability of current public information (such as information provided by issuers in their current Securities Exchange Act reports, including 10-K, 10-Qs, 8-Ks, and the like).
- Under Rule 144(e), volume limitation—every three months, the greater of 1 percent of the outstanding capital stock or the average weekly trading volume for the four calendar weeks preceding the sale.
- Under Rule 144(f) and (g), the manner of

Resale Requirements for Equity Securities under Rule 144

	Affiliate or Person Selling Equity Securities on Behalf of an Affiliate	Nonaffiliate (and has not been an Affiliate during the prior three months) Selling Equity Securities
Restricted Securities of Reporting Issuers who have been subject to Sections 13 or 15(d) of the Securities Exchange Act of 1934 for 90 days	During six-month holding period—no resales under Rule 144 permitted (Rule 144(d)(1)(i)). After six-month holding period—May resell but in accordance with all Rule 144 requirements including: current public information (Rule 144(c)(1)), volume limitations (Rule 144(e)(1)), manner of sale requirements (Rule 144(f)), and filing of Form 144 (Rule 144(h)).	During six-month holding period—no resales under Rule 144 permitted (Rule 144(d)(1)(i)). After six-month holding period but before one year—unlimited public resales under Rule 144 except that the current public information requirement still applies (Rule 144(c)(2)). After one-year holding period—unlimited public resales under Rule 144; need not comply with any other Rule 144 requirements (Rule 144(b)(1)(i)).
Restricted Securities of Nonreporting Issuers	During one-year holding period—no resales under Rule 144 permitted (Rule 144(d)(1)(ii)). After one-year holding period—may resell but in accordance with all Rule 144 requirements, including: current public information (Rule 144(c)(2)), volume limitations (Rule 144(e)(1)), manner of sale requirements for equity securities (Rule 144(f)), and filing of Form 144 (Rule 144(h)).	During one-year holding period—no resales under Rule 144 permitted (Rule 144(d)(1)(ii)). After one-year holding period—unlimited public resales under Rule 144; need not comply with any other Rule 144 requirements (Rule 144(d)(1)(ii)).

One of the primary benefits of Form S-3 is that it allows companies to conduct primary offerings "off the shelf" under Rule 415 of the Securities Act. Rule 415 enables a company to register an offering of securities on a continuous basis prior to planning any specific offering.

sale requirements (applicable to registered brokers seeking to effect the resale).

• Under Rule 144(h), filing Form 144 with the SEC.

Under former Rule 144(k), nonaffiliate persons holding restricted securities for two years and who have not been affiliates for three months prior to the sale could resell without restrictions.

The most significant change in the amended Rule 144 eliminates these listed restrictions for sales of securities of an SEC reporting company by nonaffiliates after a six-month holding period.[13] The resale requirements for equity securities may most easily be understood by placing them into two categories, reporting companies and nonreporting companies. (See the chart on page 40.)

The SEC adopted changes in Rule 144(h) requiring the filing of Form 144 (which no longer applies to nonaffiliates selling after six months). An affiliate must file a Form 144 if the intended sale exceeds either 5,000 shares or $50,000 within a three-month period. Three copies of the form must be filed with the SEC and one copy with the exchange on which the securities are listed.

In the last several years, the public equity markets have been dominated by larger public offerings of securities. Small public companies, which have had difficulty accessing capital through public offerings, have often resorted to private investments in public equities, or "PIPEs." PIPE offerings are private placements. They are usually priced at a discount to the market, often between 18 percent and 20 percent, with a covenant by the company to register immediately the resale of the securities sold in the private placement so that the investors' risk of illiquidity is mitigated. The SEC must, however, review and declare effective the registration statement before investors may resell their securities. This review may take several weeks or more. By reducing the holding period under Rule 144 for unrestricted resales by nonaffiliates from two years to six months, the amendments will likely eliminate the need to register the investors' resale. The resulting decrease in the illiquidity risk to investors associated with purchasing restricted securities should provide issuers with a corresponding reduction in the cost of issuing those securities.

Form S-3 Registered Offerings

The amendments for Form S-3 registered offerings will be effective January 28, 2009. They expand the eligibility requirements of Form S-3 to allow a domestic public company listed on a national securities exchange, such as NASDAQ and the NYSE, to conduct primary securities offerings on Form S-3 without regard to the size of its public float or the rating of the debt it is offering. A company may do so if: 1) it has been an SEC reporting company, and has reported timely for at least 12 calendar months, 2) it does not sell more than the equivalent of one-third of its public float in primary offerings over any period of 12 calendar months, and 3) it is not a shell company and has not been one for at least 12 calendar months before filing the registration statement.

Prior to the new amendments, companies were able to register primary offerings—securities offered by or on behalf of the company for its own account—on Form S-3 only if their public float—that is, nonaffiliate equity market capitalization—was $75 million or more. The expanded form eligibility does not extend to shell companies until 12 calendar months after they cease being shell companies.

Form S-3 allows eligible domestic companies to register securities offerings under the Securities Act. It permits companies to "backward incorporate" required information by reference to a company's previous disclosures in its reports filed under the act, and to "forward incorporate" disclosures that the company will file in the future. By contrast, a company without the ability to forward incorporate must file a new registration statement or post-effective amendment to its registration statement to update it for fundamental changes to the information set forth in the registration statement.[14]

One of the primary benefits of Form S-3 is that it allows companies to conduct primary offerings "off the shelf" under Rule 415[15] of the Securities Act. Rule 415 enables a company to register an offering of securities on a continuous basis prior to planning any specific offering. Under a shelf offering, the SEC staff may review, under its normal selective review process, the Form S-3 registration statement before declaring it effective—but, once effective, offers and sales in one or more tranches or takedowns (designated portions of the total shelf offering) are not conditioned on further SEC action or subject to prior selective staff review. Thus, a company could register securities on the shelf and take advantage of favorable market conditions from time to time to price its securities.

Previously, companies with public floats that are less than $75 million and were not eligible to conduct shelf offerings would commonly utilize PIPE offerings to access capital quickly. The availability of shelf offerings to smaller public companies provides a significant financing alternative to PIPEs. Moreover, enabling smaller reporting companies to register securities off the shelf and sell them when market conditions become favorable provides those companies with advantages not available with other more common methods of financing.

The amendments do not adopt the

Advisory Committee's recommendation to expand Form S-3 eligibility to companies traded on NASD's Over-the-Counter Bulletin Board (OTCBB). By limiting the expanded eligibility of Form S-3 to those companies listed on a national securities exchange, the SEC effectively incorporates the quantitative and qualitative listing standards of the exchanges, which include strong corporate governance requirements. For example, under the requirements, the issuer's board must contain a majority of independent directors, and key committees must be composed solely of independent directors.

As of May 2007, however, the cost of compliance for companies with securities listed on the NASDAQ Capital Market tier of the NASDAQ Stock Market LLC (formerly the NASDAQ SmallCap Market) was substantially reduced.[16] At that time, the SEC approved rule amendments that designated securities listed on the NASDAQ Capital Market as covered securities for purposes of Section 18 of the Securities Act. Because covered securities are exempt from state law registration requirements, compliance with state blue-sky laws for securities listed on the NASDAQ Capital Market tier is largely eliminated.

Smaller Public Companies Reporting

Under a new system of reporting for smaller reporting companies, which became effective February 4, 2008, smaller reporting companies will file their SEC reports and registration statements using the same forms as other SEC reporting companies.[17] The former Small Business forms, such as Form SB-2 and Form 10-KSB, are eliminated,[18] and the disclosure requirements formerly associated with those forms and contained in Regulation S-B will now be incorporated into Regulation S-K,[19] which is applicable to all SEC reporting companies. The SEC refers to the relaxed disclosure requirements applicable to smaller reporting companies as scaled disclosure.

The definition of "smaller reporting companies" includes: 1) those that have a common equity public float (such as aggregate market value of the voting and nonvoting common equity held by nonaffiliates) of less than $75 million, and 2) those with an annual revenue of $50 million or less and no common equity public float.[20] Public float is calculated as of the last business day of the second fiscal quarter.[21] This is the same date used to determine accelerated filer status.[22]

Foreign companies qualify as smaller reporting companies if they do not use SEC forms designated for foreign filers and if they prepare their financial statements in accordance with U.S. Generally Accepted Accounting Principles (GAAP). Previously, the only foreign companies permitted to use small business disclosure procedures were Canadian companies.

The amendments add a new Item 310 (Financial Statements of Smaller Reporting Companies) to Regulation S-K, which sets forth requirements on the form and content of financial statements for smaller reporting companies. These include requiring that financial statements be prepared solely according to GAAP. New Item 310 does not require compliance with SEC Regulation S-X, provided that the auditors comply with the Regulation S-X requirements relating to qualifications and independence of auditors. The new Item 310 calls only for two years of comparative audited balance sheets and audited statements of income, cash flows, and changes in stockholders' equity for each of the latest two fiscal years, rather than the

Proposed Changes to Regulation D Private Offerings

At one time or other, virtually all counsel to business clients are asked for advice regarding methods of financing. In equity financings—whether in a private offering of securities by a publicly traded company or in an initial issuance of equity in a newly incorporated business—the private placement rules under Regulation D of the Securities Act of 1933[1] and the provisions governing resale of restricted securities under Rule 144 of the Securities Act will apply.

Regulation D, initially adopted in 1982, was designed to facilitate capital formation while protecting investors by simplifying and clarifying the existing exemptions from registration for private offerings. In response to recommendations by the SEC's Advisory Committee on Smaller Public Companies, on August 3, 2007, the SEC proposed amendments to Regulation D that are intended to provide greater flexibility for private offerings by:

- Adding a new Rule 507,[2] which creates a new category of investor—"large accredited investor."
- Adding three new categories to the present definition of "accredited investor" in Rule 501.[3]
- Revising the Regulation D integration safe harbor in Rule 502(a).[4]
- Extending the disqualification provisions to all offerings under Regulation D.
- Restricting resale of securities under one of the exemptions under Rule 504.[5]
- Revising Form D.

Currently, with the limited exception of certain offerings not exceeding $1 million pursuant to Rule 504(b), offerings made under Regulation D may not be accompanied by any form of general solicitation or advertising. An issuer may establish the absence of general solicitation or advertising by showing a preexisting relationship between the issuer and the offeree. Although this is not the exclusive means of satisfying the Regulation D requirement, it may be difficult for an issuer to otherwise prove that an offeree—particularly one whose relationship is several times removed from the issuer and its affiliates—was not solicited through means of a general solicitation.

If a general solicitation occurs during the course of a securities offering, Regulation D would be unavailable, even if there was no general solicitation of any of the actual purchasers. The remedy for violation of Regulation D's prohibition of general solicitations is rescission liability to all of the purchasers, as the offering would not be exempt from registration.[6]

The proposed Rule 507 would permit offerings of unlimited amount to an unlimited number of "large accredited investors," defined as individuals with more than $2.5 million in investments, or annual income of $400,000 or more (or $600,000 with one's spouse) in the last two years and with an expectation to maintain the same income level in the current year. Directors and executive officers of the issuer would also be considered large accredited investors without being subject to the income, assets, or investments requirement.

Legal entities that have at least $10 million in investments also would qualify as large accredited investors. In addition, the following entities would qualify as large accredited investors even though not subject to a dollar threshold: banks, registered investment companies, private business development companies, and other regulated entities.

The new rule would permit limited advertising, in the form of a general announcement similar to that permitted in California Corporations Code Section 25102(n) and the Model Accredited Investor Exemption promulgated by the North American Securities Administrators Association. The general announcement must state that sales will be made only to large accredited investors, that no money or other consideration is being solicited, and that the securities have not been registered with or approved by the SEC. The announcement may also contain:

- The name and address of the issuer.
- A brief description of the business in 25 or fewer words.
- The name, type, number, price, and aggregate amount of securities being offered and a brief description of the securities.
- The definition of a large accredited investor.
- Any required suitability standards.
- Contact information for obtaining additional information.

The announcement can only be presented in

three years required for all other issuers.[23]

The scaled disclosure for smaller reporting companies differs from the disclosure required for all other companies in several ways:

- The discussion and analysis by management of a company's financial condition and results of operations are slightly less detailed and required for two, rather than three, years.[24]
- The disclosure of selected financial data and supplementary financial information along with quantitative and qualitative data about market risk and a performance graph comparing the yearly percentage change in cumulative shareholder return with the cumulative total return of a broad equity market index and industry index are not required.[25]
- The disclosure of executive compensation is required for only three named executive officers (specifically including the principal executive officer but not the principal financial officer), rather than the five required of larger companies. This information is required for only two years, rather than three years, and a compensation discussion and analysis is not required. Moreover, less disclosure is required regarding equity awards.[26]
- Related party disclosures for smaller reporting companies comprise the only area requiring more disclosure than what is required for other companies. Smaller reporting companies must disclose related party transactions not only exceeding $120,000 but also any related party transaction exceeding 1 percent of the total assets of a smaller reporting company, although policies and procedures for reviewing related person transactions are not required as they are for larger companies. Also, in contrast to the requirement for all other companies, smaller reporting companies must disclose in each periodic report information regarding promoters and certain control persons as well as information about underwriting discounts and commissions and corporate parents.[27]
- Disclosure regarding compensation committee interlocking relationships and the Compensation Committee Report is not required.[28]
- Risk factor disclosures in annual reports on Form 10-K and quarterly reports on Form 10-Q are not required.[29]

These newly adopted amendments should significantly facilitate, and reduce regulatory obstacles to, small business capital formation. Promoting capital formation is one of the statutory missions of the SEC. This mission has been hindered by too much regulation of small businesses, which are an important engine of the economy and on which the cost of regulation falls most heavily. Counsel advising small business issuers should be aware that the new amendments significantly simplify the rules for their clients' capital raising transactions. ■

[1] *See* SEC Advisory Committee on Smaller Public Companies, Final Report 20-21 (2006), *available at* http://www.sec.gov/info/smallbus/acspc.shtml.

[2] Lee R. Petillon, *Raising Capital for Small Companies*, Los Angeles Lawyer, Dec. 1992, at 24.

[3] *See* SEC Press Release No. 2007-833, SEC Votes to Adopt Three Rules to Improve Regulation of Smaller Businesses (Nov. 15, 2007), *available at* http://www.sec.gov/news/press/2007/2007-237.htm, *and* SEC Press Release No. 2007-259, SEC Facilitates Smaller Company Access to Capital Markets (Dec. 11, 2007), *available at* http://www.sec.gov/news/press/2007/2007-259.htm.

[4] The SEC also proposed a new private offering exemption under Regulation D, Rule 507, of the Securities Act of 1933. The proposed rule permits a limited form of general solicitation of private securities offerings to "large accredited investors," a new category of accredited investor. (See "Proposed Changes to Regulation D Private Offerings," on page 42.)

[5] *See* http://www.sec.gov/news/press/2007/2007-233.htm.

written form, but it can appear in any written medium such as a newspaper or the Internet. If the issuer believes that the prospective purchaser is a large accredited investor, additional information such as an offering circular or other sales material may be provided in addition to the general announcement.

Securities sold pursuant to Rule 507 would be deemed to be "covered securities" as "sales to qualified purchasers" under Section 18(b)(3) of the Securities Act.[7] This would preempt state regulation except for a notice and fee requirement in each state in which securities are sold.

The proposed rule also would provide that sales cannot be made to persons who are not large accredited investors. Thus a Rule 507 offering could not be conducted simultaneously with another Regulation D offering such as those under Rule 506,[8] unless the offerings were considered to be separate and distinct under the five-factor integration test. Since Rule 506 prohibits the use of general solicitation and advertising, and Rule 507 permits limited general solicitation, neither of the two exemptions would be available if the two offerings were considered to be integrated.

The proposed amendments also revise the definition of "accredited investor" under Rule 501. Amended Rule 501(a)[9] adds investment-owned standards to the present standard, which defines an individual accredited investor as a person with $1 million of net worth (including equity in a home) or an annual income of $200,000 (or $300,000 with one's spouse) in each of the last two years and reasonably expecting the same level of income in the current year.

The amended rule would add, as an alternate standard, ownership of investments of at least $750,000 for individuals. However, joint investments can only include 50 percent of investments held jointly with the spouse unless the spouse's signature is obtained for the investments or the investments are held as community property or joint tenancy. Investments also would exclude the individual's home equity, but the inclusion of home equity in determining net worth remains.

The current net worth, income, and investments thresholds in Rule 501 and Rule 507 would be adjusted every five years starting on July 1, 2012, to reflect any changes from December 31, 2006, in the value of the Personal Consumption Expenditures, Chain-Type Price Index, as published by the Department of Commerce. Amended Rule 501 also adds several entities that qualify as accredited investors: limited liability companies, Indian tribes, labor unions, governmental bodies, and other entities with similar attributes such as joint ventures or college or university endowments—provided these entities have total assets in excess of $5 million or investments in excess of $5 million.

The proposed amendments also liberalize the integration rule applicable to multiple offerings. Rule 502[10] of Regulation D provides an integration safe harbor, in which multiple offerings are not deemed to be integrated into one offering for purposes of determining compliance with Rules 504, 505, and 506 of Regulation D. The proposed amendments reduce the safe harbor's time period between offerings from six months to 90 days.

In a new Rule 502(e),[11] the disqualification provisions previously applicable only to Rule 505[12] offerings would apply to all Regulation D offerings, with the exclusion of broker/dealers, underwriters, and placement agents.

If these changes are adopted by the SEC, the final rule amendment and adopting release will be accessible on the SEC's Web site at http://www.sec.gov.**—L.R.P. & M.T.H.**

[1] 15 U.S.C. §§77a *et seq.*

[2] 17 C.F.R. §230.507.

[3] 17 C.F.R. §230.501.

[4] 17 C.F.R. §230.502(a).

[5] 17 C.F.R. §230.504. Rule 504(b)(1)(iii) permits general solicitation of investors if the offering is registered in a state that provides for registration of securities or if made exclusively according to state law exemptions from registration that permit general solicitation, so long as sales are made only to "accredited investors" as defined in Rule 501(a).

[6] *See* §12a of the Securities Act of 1933, 15 U.S.C. §77l(a).

[7] 15 U.S.C. §77r(a).

[8] 17 C.F.R. §230.506.

[9] 17 C.F.R. §230.501(a).

[10] 17 C.F.R. §230.502.

[11] 17 C.F.R. §230.502(e).

[12] 17 C.F.R. §230.505.

[6] 17 C.F.R. §230.144.

[7] These companies are also known as nonaccelerated filers. This is because companies with public floats exceeding $75 million are subject to accelerated reporting requirements adopted pursuant to the Sarbanes-Oxley Act of 2002.

[8] 15 U.S.C. §§78a *et seq*.

[9] The amendments do not adopt the Advisory Committee's recommendations on the scope of smaller public reporting. The Advisory Committee recommended that changes extend to "smallcap companies," or companies with between $128 million and $787 million market capitalization. These companies represent about 5% of total U.S. equity market capitalization as of March 31, 2005. The committee also urged that the new rules apply as well to "microcap companies," which represent about 1% of total U.S. equity market capitalization. According to the SEC, companies with a public float of less than $75 million roughly correspond to the companies with a market capitalization of less than $128 million.

[10] 17 C.F.R. §230.503.

[11] 15 U.S.C. §77d(1). Resales are permitted by Section 4(1) of the Securities Act for transactions by any person other than an issuer, underwriter, or dealer.

[12] Rule 144(a)(3)(i).

[13] The SEC also 1) adopted the changes to the manner of sale requirements to permit the resale of securities through risk-free principal transactions in certain circumstances (Rule 144(f)(1)(iii), 2) expanded the definition of "brokers' transactions" (Rule 144(g)(3)(iv)), 3) eliminated the manner of sale requirements for resales of debt securities (Rule 144(f)(3)(ii)), and 4) raised the Rule 144(e) volume limitations relating to the resale of debt securities (Rule 144(e)(3)(ii)). The SEC also codified several Rule 144 interpretive positions of the staff of the Division of Corporation Finance, including the "tacking" of holding periods for cashless conversions and exchanges of securities—such as cashless exercises of options and warrants—and the availability of Rule 144 to sales of securities of shell companies.

Further, the SEC amended Rule 145 relating to resales of securities acquired in statutory mergers or reorganizations. Under the preexisting Rule 145(d), the shares issued to acquired company shareholders who are not affiliates of either the acquired company or the acquiring company could be resold without restriction. Affiliates of the acquired entity, but not of the surviving corporation, could sell under the old Rule 145(d) if the seller met certain requirements of Rule 144. The amendments eliminate these restrictions for affiliates of the acquired company except with respect to shell companies and business combination-related shell companies.

[14] Section 10(a)(3) of the Securities Act requires information contained in a prospectus that is used more than 9 months after the effective date to be current according to a date not more than 16 months prior to the effective date. Item 512(a)(1)(i) and (ii) of Regulation S-K requires companies filing a Form S-3 registration statement to undertake to file a post-effective amendment to comply with Section 10(a)(3) of the Securities Act and to reflect the occurrence of facts or events arising after the effective date that, individually or in the aggregate, represent a fundamental change in the information set forth in the registration statement.

[15] 17 C.F.R §230.415.

[16] Initial listing requirements for the NASDAQ Capital Market for companies with net income from continuing operations in the latest fiscal year, or in two of the last three fiscal years, of at least $750,000, require a public float of only $5 million. For those companies that do not meet the $750,000 operating income requirement, public float must have a value of at least $15 million; of those companies, the market capitalization must be at least $50 million, if the company does not have an operating history of at least two years. For those companies with at least two years of operating history that do not meet the $750,000 operating income requirement, there is no market capitalization requirement.

[17] As part of the amendments, the SEC also eliminated completely the requirement that any issuer that issues employee stock options to more than 500 persons and has more than $10 million in total assets register its securities with the SEC and thereby become a reporting company. Under Section 12(g) of the Securities Exchange Act (15 U.S.C. §78l), a company with assets in excess of $10 million and 500 or more holders of equity securities of the company must register that class of equity security with the SEC. Stock options, including those issued to employees under stock option plans, are a separate class of equity security for purposes of the Securities Exchange Act. Thus, prior to the amendments, if a company with more than $10 million in assets issued stock options to 500 or more optionholders, it was required to register the class of equity and become an SEC reporting company.

[18] Although the effective date of the new rules was February 4, 2008, companies that previously qualified as a "small business issuer" may file their next annual report for a fiscal year ending after December 15, 2007, on Form 10-KSB. Thereafter, all filings must be on standard forms.

[19] 17 C.F.R. §229.

[20] *See* Item 10(f)(1) of Regulation S-K.

[21] A nonreporting company that registers its initial public offering calculates its public float by multiplying the estimated offering price by the sum of the shares to be sold in the offering and the number of shares outstanding held by nonaffiliates before the offering.

[22] Once a smaller reporting company's public float exceeds $75 million as of the last day of its second fiscal quarter and it becomes an accelerated filer, it has about three quarters in which to make the transition out of the smaller reporting company disclosure system. It must provide non-scaled disclosure in the quarterly report for the first fiscal quarter following the fiscal year of the public float determination date.

[23] Because Item 310 of Regulation S-K replaces former Item 310 of Regulation S-B, the amendments increased financial statement requirements for issuers that previously were in the category of small business issuers. Prior to the amendments, small business issuers were required to file an audited balance sheet only as of the most recent fiscal year and audited statements of income, cash flows, and changes in stockholders' equity for each of the two fiscal years preceding the date of the most recent audited balance sheet. The amendments add an additional year to the balance sheet requirement for these issuers.

[24] *See* Regulation S-K Item 101 (Description of Business) and Item 303 (Management's Discussion and Analysis of Financial Condition and Results of Operations). Financial information about segments, for example, is not required of smaller reporting companies.

[25] *See* Regulation S-K Item 301 (Selected Financial Data), Item 302 (Supplementary Financial Information), Item 305 (Quantitative and Qualitative Disclosures about Market Risk), and Item 201 (Market Price of and Dividends on Registrant's Common Equity and Related Stockholder Matters).

[26] *See* Regulation S-K Item 402 (Executive Compensation).

[27] *See* Regulation S-K Item 404 (Transactions with Related Persons, Promoters and Certain Control Persons).

[28] *See* Regulation S-K Item 407 (Corporate Governance).

[29] *See* Regulation S-K Item 503 (Prospectus Summary, Risk Factors, and Ratio of Earnings to Fixed Charges).