



# Securities Law Alert

## Developments in securities law

A publication of Nixon Peabody LLP

JULY 2, 2007

### SEC proposes to ease restrictions on use of Form S-3 by smaller public companies

Continuing its recent initiative to develop proposals benefiting smaller public companies, the SEC recently proposed rules that will dramatically expand the number of companies eligible to use Form S-3 for primary offerings. Under the proposals,<sup>1</sup> registrants other than shell companies will be able to use Form S-3 for primary offerings of securities, such as shelf offerings, as long as the offerings stay within the size limitations imposed and satisfy the other eligibility requirements of the form. Under current rules, companies with less than \$75 million in public float are ineligible to use Form S-3 for primary offerings and must instead rely upon Form S-1, which continues to have certain disadvantages as compared to Form S-3, such as prohibiting the use of forward incorporation by reference.

#### Proposed revisions

The proposals will add a new instruction to Form S-3 (Instruction I.B.6.), allowing companies with less than \$75 million in public float to register primary offerings on this form provided that they:

1. have a class of securities registered under Sections 12(g) or 12(b) of the Exchange Act or are required to file reports under Section 15(d) and have timely filed all reports required under these sections for the past 12 months;
2. are not shell companies and have not been shell companies for the past 12 months; and
3. do not sell more than 20% of their public float in primary offerings over any 12 calendar month period.

For primary offerings, the proposals will provide the benefits of Form S-3 not only to those companies listed on a national securities exchange, but also to registrants whose shares trade on the Over-the-Counter Bulletin Board or the Pink Sheets. It is important to note, however, that the proposals will have no impact on the use of Form S-3 for secondary offerings by companies listed on the OTC Bulletin Board or the Pink Sheets. Such offerings are currently prohibited and the SEC chose not to expand eligibility in this area in light of the potential for abuse from primary offerings masquerading as secondary offerings.

---

<sup>1</sup> See SEC Release No. 33-8812, located <http://www.sec.gov/rules/proposed/2007/33-8812.pdf>.

## Calculating public float

One notable aspect of the rule proposals is the timing and manner in which a registrant's public float is calculated for determining the amount of securities that may be sold. In calculating the price used to determine the company's public float, companies would first be required to look at the price at which their shares were last sold, or the average bid and asked prices for the common equity as of a date within 60 days before the date of sale. A registrant would then aggregate all sales from both equity and debt offerings made pursuant to this new rule over the prior 12 months and determine whether the 20% limit has been exceeded. For convertible debt offerings, registrants would look to the value of the underlying equity shares, rather than the market value of the debt. If the 20% limit has not been exceeded, then registrants would be able to sell securities with a value representing the difference between (i) 20% of its public float and (ii) the securities sold in the prior 12 months under this rule.

Because this calculation would be performed immediately before the intended sale, regardless of when the Form S-3 was filed, issuers could have added flexibility in offering securities under this proposal. For instance, a registrant's public float may increase between filing and takedown from a shelf, allowing the issuer to sell more securities on the Form S-3 than when originally filed. Additionally, because companies will look back 12 months from the time of the intended sales in calculating the amount of securities they may sell, offerings that occurred more than 12 months ago will not be included in this calculation, and will not restrict current sales. However, companies should be aware that under the proposals, if their public floats declines over time, they may be precluded from selling additional securities if they exceed the 20% limit at the time of the intended offering.

In the proposing release, the SEC makes clear that registrants meeting the \$75 million public float threshold at the time of filing a Form S-3 will not be penalized for falling below that figure or otherwise restricted on the amount of securities they may sell. In keeping with this theme, the SEC also indicated that a company relying on the new rule whose public float exceeds \$75 million after filing the Form S-3 will be allowed unrestricted use of the Form S-3 for primary offerings, without regard to the 20% limit. Registrants would have to recalculate their public float with each Section 10(a)(3) amendment to the Form S-3, at which point, it will be determined whether the 20% restriction should be imposed.

The proposed SEC rules also make similar changes to Form F-3, used by foreign private issuers to register securities offerings. Comments to the proposals should be sent to the SEC by August 27, 2007. We will provide an update on these proposed rules and any revisions if they are ultimately adopted by the SEC.

If you have any questions or require further information regarding these or other matters, please call your regular Nixon Peabody contact or feel free to contact one of the attorneys listed below:

- in our Boston office, Mary Ellen O'Mara (617-345-6167)
- in our New York City office, Dick Langan (212-940-3140)
- in our Rochester office, Deborah McLean (585-263-1307)
- in our San Francisco office, Steven Plevin (415-984-8462)
- in our Washington, D.C., office, John Partigan (202-585-8535)
- in our Los Angeles office, Richard Jones (213-533-1070)
- in our Silicon Valley office, James Chapman (650-320-7711)

For a complete list of the Securities Law Practice Group members, please refer to the final page of this *Securities Law Alert*.

This *Alert* is provided by Nixon Peabody LLP for education and information purposes only. It is not a full analysis of the matters summarized and is not intended, and should not be construed, as legal advice. This publication may be considered advertising under applicable laws.

Previous issues of *Securities Law Alert* are available at our website at [www.nixonpeabody.com](http://www.nixonpeabody.com).

## Securities Law Practice Team

Please feel free to call or e-mail  
([e-mailname@nixonpeabody.com](mailto:e-mailname@nixonpeabody.com)) any of the Securities Law team  
members listed below.

ATTORNEY	E-MAIL NAME	PHONE
C. Gerhard Anderson, III	ganderson	212-940-3754
Gregory Blasi	gblasi	212-940-3789
H. Bryan Brewer	bbrewer	202-585-8303
Roger Byrd	rbyrd	585-263-1687
James Chapman	jchapman	650-320-7711
Allan Cohen	acohen	516-832-7522
Roger Crane	rcrane	212-940-3190
Scott Cristman	scristman	585-263-1377
Patricia Dolan	pdolan	617-345-6088
Justin Doyle	jdoyle	585-263-1359
Brent Faye	bfaye	415-984-8365
Richa Gautam	rgautam	212-940-3063
Lori Green	lgreen	585-263-1236
Fred Grein	fgrein	617-345-6117
Raymond Gustini	rgustini	202-585-8725
Richard Jones	rjones	213-533-1070
Bradley Kamlet	bkamlet	202-585-8180
William Kelly	wkelly	617-345-1195
Timothy Kober	tkober	212-940-3751
Jennifer Kurtis	jkurtis	212-940-3779
Richard Langan, Jr.	rlangan	212-940-3140
Frank Lee	flee	212-940-3186
James Locke	jlocke	585-263-1613
Alexandra Lopez-Casero	alopezcasero	202-585-8359
Daniel McAvoy	dmavoy	202-585-8194
Christian McBurney	cmcburney	202-585-8358
Deborah McLean	dmclean	585-263-1307
Sheedeh Moayery	smoayery	212-940-3053
Mary Ellen O'Mara	momara	617-345-6167
Richard McGuirk	rmcguirk	585-263-1644
Christopher Mason	cmason	212-940-3017
Laura Ariane Miller	lmiller	202-585-8313
Carolyn Nussbaum	cnussbaum	585-263-1558
Scott O'Connell	soconnell	617-345-1150
Joseph Ortego	jortego	516-832-7564
John Partigan	jpartigan	202-585-8535
Todd Peterson	tpeterson	212-940-3005
Steven Plevin	splevin	415-984-8462
Ronelle Porter	rporter	212-940-3082
Joseph Reynolds	jreynolds	202-585-8389
John Riddle	jriddle	415-984-8238
Bruce Rosenthal	brosenthal	212-940-3009
Jeffrey Selman	jselman	415-984-8277
Gina Sickinger	gsickinger	585-263-1078
David Tamman	dtamman	213-629-6093
Deborah Thaxter	dthaxter	617-345-1326
James Weller	jweller	516-832-7543

Albany, NY  
30 South Pearl Street  
518-427-2650

Boston, MA  
100 Summer Street  
617-345-1000

Buffalo, NY  
40 Fountain Plaza, Suite 500  
716-853-8100

Chicago, IL  
161 N. Clark Street  
312-425-3900

Hartford, CT  
185 Asylum Street  
860-275-6820

Long Island, NY  
50 Jericho Quadrangle, Suite 300  
516-832-7500

Los Angeles, CA  
555 West Fifth Street, FL 46  
213-629-6000

Manchester, NH  
900 Elm Street  
603-628-4000

New York, NY  
437 Madison Avenue  
212-940-3000

Palm Beach Gardens, FL  
7121 Fairway Drive, Suite 203  
561-691-5420

Philadelphia, PA  
1818 Market Street, FL 11  
215-246-3520

Providence, RI  
One Citizens Plaza  
401-454-1000

Rochester, NY  
1100 Clinton Square  
585-263-1000

San Francisco, CA  
One Embarcadero Center  
415-984-8200

Silicon Valley, CA  
2225 E. Bayshore Road, Suite 200  
650-320-7700

Washington, DC  
401 Ninth Street NW, Suite 900  
202-585-8000