



Securities Law Information Memo

June 2009

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SMALL REPORTING COMPANIES; DON'T FORGET THE "SHORT-FORM^{S-3}-WAY" TO RAISING CAPITAL

With sources of capital limited, smaller reporting companies should not overlook the equity markets. The Securities Exchange Commission amended¹ the eligibility requirements for use of short-form registration, to allow smaller reporting companies greater access to the public markets, by permitting them to conduct primary offerings of their securities on Form S-3; a vehicle to capital raising historically available only to issuers with an aggregate non-affiliate equity market capitalization, or "public float," of \$75 million or more.

Primary offerings on Form S-3 provide companies with the ability to register debt or equity securities, or a combination of both, for sale to the public on an interim or delayed basis. After the Form S-3 registration statement is declared effective, the registrant can take registered securities "off the shelf" for sale to the public at any time or from time to time, and without further SEC review, in response to market conditions and other factors; thereby, providing companies

with an efficient and flexible capital raising tool. In addition to providing smaller reporting companies greater flexibility and efficiencies in accessing the public securities markets, short-form registration on Form S-3 permits a company to incorporate by reference material information to investors from its current and future Exchange Act reports in response to the S-3 disclosure requirements, and enables the registrant to price the securities when they are actually sold.

Registration of primary offerings of securities on Form S-3 is available to companies with less than \$75 million in public float, provided they:

- **meet the other registrant eligibility conditions for the use of Form S-3**, including having a class of securities registered under the Securities Exchange Act of 1934 or is required to file reports pursuant to Section 15(d) of the Exchange Act; has been subject to the requirements of Sections 12 or 15(d) of the Exchange Act and has filed all the material required to be filed pursuant to Sections 13, 14 or 15(d) for a period of at least 12 calendar months immediately preceding the filing of

¹ SEC Final Rule, Release No. 33-8878, Revisions to the Eligibility Requirements for Primary Securities Offerings on Forms S-3 and F-3.

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the registration statement on Form S-3; and has timely filed all reports required to be filed during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement on Form S-3 (other than a report that is required solely pursuant to Items 1.01, 1.02, 2.03, 2.04, 2.05, 2.06, 4.02(a) or 5.02(e) of Form 8-K).

- **have a class of common equity securities that is listed and registered on a national securities exchange**, e.g., the New York Stock Exchange and Nasdaq;
- **do not sell more than the equivalent of one-third of their public float in primary offerings pursuant to the limited primary offering instructions to Form S-3 (Instruction I.B.6.) over the previous period of 12 calendar months;** and
- **are not shell companies and have not been shell companies for at least 12 calendar months before filing the registration statement.**

Primary offerings on Form S-3 provide companies with an alternative to other methods of raising capital, such as registration on long-form registration statement Form S-1, which can be prohibitively expensive for raising small amounts of capital, and private offerings of securities, which can result in greater dilution to existing shareholders than public offerings. Further, PIPE transactions (private-investment, public-equity), in which securities are sold in a private transaction, with their resale registered by the company under the Securities Act, can be restrictive depending on the size of the offering. In certain cases, the SEC may consider the purported secondary, resale offering to be a disguised primary offering. If the amount of shares to be registered for resale in the secondary offering is greater than one-third of the registrant's outstanding shares, then it is likely the offering will be deemed a "primary" offering subject to the \$75 million public float requirement, or the above limited primary offering for smaller reporting companies, including the one-third primary offering amount.

If you have any questions about primary offerings on Form S-3 or if we can otherwise be of assistance, please contact the Bond, Schoeneck & King, PLLC member in our Securities Practice Group with whom you work or any of the other members listed below.

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