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SEC'S AMENDMENTS OF PROCEDURES FOR PAYMENT OF FEES

The federal securities laws impose a number of fees. Effective February 4, 2008, the Securities and Exchange Commission amended the procedures for payment of filing fees. First, the responsibility for providing lockbox depository service will switch from Mellon Bank, N.A. to U.S. Bank. The Commission amended its Informal and Other Procedures and Rule 111 under the Securities Act to reflect the change in depository institutions. *(Click here to link to the SEC's final rule release.)*

Second, the Commission amended Rule 111 under the Securities Act, Rule 0-9 under the Exchange Act, and Rule 0-8 under the Investment Company Act to clarify that payment of fees pursuant to these rules may be made by wire transfer, certified check, bank cashier's check, United States postal money order, or bank money order. However, the Commission eliminated the option of making payment by cash or personal check.

Further, the Commission amended Rule 3a of its Informal and Other Procedures under the Securities Act, Exchange Act, and Investment Company Act to eliminate payment by hand delivery and payment by mail directly to the Commission's headquarters in Washington, D.C. The use of Form ID to update a filer's address and the distinction between "restricted" and "unrestricted fees" were also eliminated. In addition, the revised rule incorporates the special instructions for payment of filing fees for Rule 462(b) and Rule 110(d) filings previously included in Rule 111 under the Securities Act.

Rule 3a contains an explanatory note with respect to filing fee accounts. Specifically, the rule designates a filing fee account for each filer who submits a filing requiring a fee on the Commission's EDGAR system or who remits funds to the Treasury-designated lockbox depository in anticipation of paying a filing fee. The note explains that under current law the deposit of money into a filing fee account does not constitute payment of a filing fee. Rather, payment of a filing fee occurs at the time the filing is made, commensurate with the drawing down of the balance of the filing fee account.

In order to facilitate compliance, the amendments consolidate the instructions for remitting fees in one provision and add the above explanatory note in 17 CFR 202.3a with respect to filing fee accounts.

– Richard P. Wolfe & Peter J. Rivas

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SEC ADOPTS NEW ELIGIBILITY REQUIREMENTS FOR FORM S-3

The Securities and Exchange Commission recently expanded the eligibility requirements for "short-form" registration of public offerings using Form S-3. The new requirements enable companies with a public float of less than $75 million to conduct primary securities offerings (i.e., securities offered by or on behalf of a company for its own account) using Form S-3. Prior to the amendment, only companies with a public float of at least $75 million could register primary offerings on Form S-3.

Unlike the "long-form" Form S-1 registration statement, Form S-3 permits incorporation by reference from existing and future SEC filings, and allows companies to conduct "shelf offerings" under Rule 415 of the Securities Act. Using a shelf offering, a company is able to control the timing of offerings, often enabling it to achieve more favorable offering terms and take advantage of market windows. *(Click here to link to the SEC's final rule release).*

Under the new eligibility requirements contained in General Instruction 1.B.6 to Form S-3, a company with a public float of less than $75 million may register primary offerings on Form S-3 provided:

- The company meets the other registrant eligibility conditions for the use of Form S-3;
- The company has a class of common equity securities that is listed and registered on a national securities exchange (OTCBB and Pink Sheets are not eligible);
- The company has not sold more than one-third of its public float in primary offerings under General Instruction I.B.6. of Form S-3 over the previous period of 12 months; and
- The company is not a shell company and has not been a shell company for at least 12 months before filing the registration statement.

To determine the amount of securities that may be sold pursuant to Form S-3 under the new requirements, a company with a public float of less than $75 million must:

- Calculate the public float immediately prior to the intended sale; and
- Aggregate all sales of the company's securities pursuant to primary offerings under new General Instruction I.B.6. of Form S-3 during the previous 12 months (including the intended offering) to determine if the one-third cap is exceeded.

– *Allison C. Bell* & *Allen E. Frederic*

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SEC ADOPTS SIMPLIFIED REPORTING AND DISCLOSURE REQUIREMENTS FOR SMALL BUSINESS ISSUERS

Elimination of Regulation S-B and Creation of "Smaller Reporting Company" Category

As part of a continued effort to address the special characteristics and needs of smaller companies and their investors, on December 19, 2007, the Securities and Exchange Commission adopted amendments to its disclosure and reporting requirements under the Securities Act of 1933 and the Securities Exchange Act of 1934. These amendments, which became effective on February 4, 2008, are designed to streamline the disclosure system for smaller reporting companies, eliminate redundancies, and expand the number of companies that qualify for the SEC's scaled disclosure requirements. The principal changes affected by these amendments include:

- Eliminating Regulation S-B and integrating the scaled set of disclosure requirements formerly contained in Regulation S-B into Regulation S-K and Regulation S-X;
- Establishing a "smaller reporting company" category of registrants eligible to utilize the SEC's scaled disclosure requirements;
- Permitting smaller reporting companies to elect to comply with scaled financial and non-financial disclosure on an item-by-item or "à la carte" basis;
- Eliminating the current "SB" forms, and allowing a phase-out period for small business issuers transitioning to smaller reporting company status;
- Combining elements relating to the accelerated filer definition with qualifying standards for the smaller reporting company determination;
- Permitting all foreign companies to qualify as "smaller reporting companies" if they otherwise qualify and choose to file on domestic company forms and provide appropriate financial statements; and
- Eliminating the transitional small business issuer format.

(Click here to link to the SEC's final rule release.)

Qualifying Standards for Treatment as a "Small Reporting Company"

Companies that have less than $75 million in public equity float will qualify for the scaled disclosure requirements as a "small reporting company" under the revised Regulation S-K rules.

The determination dates adopted by the SEC to assess eligibility as a smaller reporting company are based on the following categories:

- **Reporting Companies with Public Float**: A reporting company will calculate its public float by using the price at which the shares of its common equity were last sold (or the average of the bid and asked prices of its shares in the principal market for the shares) as of the last business day of the company's most recently completed second fiscal quarter, multiplied by the number of outstanding shares held by non-affiliates.

- **Non-Reporting Companies filing an Initial Registration Statement**: In the case of an initial registration statement filed under the Securities Act or the Exchange Act, a non-reporting company will determine its public float as of a date within 30 days of the date of the filing of the registration statement. This is computed by multiplying the aggregate number of its shares of common equity held by non-affiliates before the offering plus, in the case of a Securities Act registration statement, the number of such shares included in the registration statement, by the estimated public offering price of the shares.

The SEC has also provided a revenue test for reporting or non-reporting companies unable to calculate public float (i.e., for companies having no public common equity outstanding or no existing market price for their common equity). These registrants will qualify as small reporting companies if their annual revenues were below $50 million during the previous fiscal year.

Transitional Periods

In order to provide an optional transitional period for companies that were small business issuers as of the effective date of the amendments, these issuers have the option to file their next annual report for the fiscal year ending on or after December 15, 2007, on either the former Form 10-KSB or on Form 10-K using the scaled disclosure requirements now integrated into Regulation S-K. After that next annual report is filed, subsequent periodic reports must be filed on a form that does not have the "SB" designation. Companies qualifying as smaller reporting companies after the effective date will have the option to comply with the scaled disclosure item requirements in their registration statements and periodic reports filed after the effective date of the amendments.

The SEC stated in the release that it intends to provide an informational brochure to assist small business issuers in the transition to the new smaller reporting company requirements. In order to minimize any potential complexity created by moving the Regulation S-B scaled disclosure requirements into Regulation S-K, the SEC is also including an index of these requirements in the definition of "smaller reporting company" at the beginning of Regulation S-K, which will highlight items of that Regulation that contain the scaled disclosure requirements specific to smaller reporting companies.

– *R. Joseph Parkey, Jr.* & *Asher J. Friend*

Please remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues you may contact the head of our Corporate and Securities practice group:

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