

SEC Adopts Amendments to Extend Scaled-Down Disclosure Requirements to “Non Accelerated Filers”

By Vincent A. Vietti and Lauren W. Taylor

On December 17, 2007, the Securities and Exchange Commission (SEC) approved significant changes that will extend the benefits of the current “small business” disclosure requirements to a larger group of public companies. These new rules will:

- eliminate the current category of “small business issuers” and replace it with a new broader category called “smaller reporting companies”
- integrate Regulation S-B’s scaled-down disclosure provisions into Regulation S-K which will be available to smaller reporting companies
- permit smaller reporting companies to elect to comply with the scaled disclosure requirements on an “a la carte” basis
- eliminate current SB forms after a phase-out period for small business issuers to transition into the new forms

The new rules became *effective February 4, 2008*, and will apply to annual reports and proxy statements for fiscal years ended on or after December 15, 2007, as follows:

- **Companies currently qualifying** as “small business issuers” under Regulation S-B will have the option to file their annual report for fiscal years ended on or after December 15, 2007, on either Form 10-KSB, using the current scaled disclosure requirements in Regulation S-B, or Form 10-K, using the new scaled disclosure requirements in Regulation S-K. Subsequent quarterly reports will be filed on Form 10-Q using the new scaled disclosure requirements in Regulation S-K.
- **Companies newly qualifying** as “smaller reporting companies” (generally “non-accelerated filers” that

are subject to Regulation S-K and that had a public float of less than \$75 million as of the end of their most recently completed second fiscal quarter) will have the option of using the new scaled Regulation S-K requirements when filing their annual report for fiscal years ended on or after December 15, 2007.

Expanded Category of “Smaller Reporting Companies”

The SEC’s scaled-down disclosure requirements currently set forth in Regulation S-B are available only to “small business issuers.” Current rules define “small business issuers” as companies with both a public float and annual revenues of less than \$25 million. The new rules eliminate this category of issuers and create a new broader category of issuers to be known as “smaller reporting companies” that will consist of companies with a public float of less than \$75 million. As a result, “smaller reporting companies” will include both “small business issuers” (who already are eligible to use the Regulation S-B reporting requirements) and “non-accelerated filers” (who do not qualify as “large accelerated filers” or “accelerated filers” and have a public float of less than \$75 million). It is anticipated that over 1,500 additional companies will be eligible to use the SEC’s simplified disclosure rules.

Determining Eligibility; Entering and Exiting “Smaller Reporting Company” Status

Companies currently filing periodic reports with the SEC will determine eligibility for smaller reporting company status based on their public float measured as of the last business day of their most recently completed second fiscal quarter. Reporting and non-

reporting issuers without a public float will determine eligibility based on whether revenue for their last fiscal year was greater than \$50 million. A non-reporting company filing an initial registration statement under either the Securities Act or the Exchange Act will determine its eligibility for smaller reporting company status by calculating its public float as of a date within 30 days of the date of the initial filing of such registration statement.

The new rules also simplify the procedure for entering and exiting smaller reporting company status as follows:

- A smaller reporting company whose public float exceeds \$75 million as of the last business day of its second fiscal quarter (or if it has no public float, revenue of more than \$50 million during its last fiscal year) would transition out of smaller reporting company and into the larger company disclosure system beginning with its Form 10-Q for the first fiscal quarter of its next fiscal year.
- A larger reporting company that has previously failed to qualify as a smaller reporting company whose public float falls below \$50 million as of the last business day of its second fiscal quarter (or if it has no public float, revenue of less than \$40 million during its last fiscal year) would transition into the smaller reporting company disclosure system beginning with its Form 10-Q for that second fiscal quarter.

Integration of Regulation S-B Disclosure Provisions into Regulation S-K

The new rules eliminate Regulation S-B and integrate the non-financial disclosure and reporting requirements of Regulation S-B into the comparable sections of Regulation S-K. The SEC accomplished this integration by amending 12 items of Regulation S-K to contain separate disclosure standards for smaller reporting companies. Item 310 of Regulation S-B (financial statements), for which there was no S-K equivalent, will be replaced by a new Article 8 of Regulation S-X which will require two years of audited balance sheet data as opposed to the current one year. Although this represents an increased level of financial disclosure, the SEC concluded that it would not place an undue burden on issuers as the data

should be readily available for the purpose of preparing other financial statements.

The new rules will allow smaller reporting companies to select on an item-by-item, or “a la carte” basis, whether it will comply with the new scaled disclosure requirements in Regulation S-K for smaller reporting companies, or with the more rigorous disclosure requirements in Regulation S-K that apply to other companies. These new rules will give each smaller reporting company both the flexibility to determine at its option whether it takes advantage of one, some or all of Regulation S-K’s new scaled disclosure requirements, and will permit such companies to switch back and forth among requirements from one filing period to the next. The only exception is that smaller reporting companies must comply with the lower disclosure threshold for “Related Party Transactions” applicable to smaller reporting companies.

Issuers transitioning down to smaller reporting company status and choosing to comply with the scaled disclosure requirements in Regulation S-K will be subject to less comprehensive disclosure including: (i) two rather than three years of financial statements and related discussion; (ii) elimination of contractual obligation table; (iii) elimination of quantitative and qualitative disclosure about market risk; (iv) elimination of selected financial data table; (v) elimination of stock performance graph; (vi) compensation disclosure of three rather than five named executive officers covering two rather than three years, (vii) elimination of compensation discussion and analysis and four of the seven compensation tables; and (viii) elimination of compensation committee interlock disclosure.

Elimination of “SB” Forms

Finally, the amendments eliminate the current “SB” forms, such as Forms 10-KSB, 10-QSB and SB-2, after a transition period. As a result, most smaller reporting companies will use Form S-1 for public offerings, thereby giving them the opportunity to incorporate by reference their previously filed periodic reports, which was not an option in the SB forms. After February 4, 2008, issuers will be required to file amendments to Securities Act registration statements

on a non-SB form, but for six months small business issuers can still comply with the S-B item requirements.

SEC Formally Proposes One-Year Extension of Auditor Attestation Requirement Mandated by SOX Section 404

By Vincent A. Vietti

As reported in our last Newsletter, SEC Commissioner Christopher Cox recently announced his intention to seek a one-year delay for smaller companies to comply with the outside auditor attestation report required by Section 404(b) of

Sarbanes-Oxley. As expected, on February 1, 2008, the SEC formally proposed to extend by one year the compliance date for smaller public companies such that smaller public companies will first be required to provide outside auditor attestation reports in their annual reports for fiscal years ending on or after December 15, 2009.

In its proposal, the SEC concluded that smaller public companies should not be required to incur the cost and expense of preparing to comply with the auditor attestation requirement until (i) the Public Company Accounting Oversight Board issues its final guidance on

auditing internal controls of smaller public companies, and (ii) the SEC completes its study regarding whether the auditor attestation requirement imposed by Sarbanes-Oxley is being implemented in a manner that will be cost effective for smaller reporting companies. The comment period for the proposal ends on or about March 1, 2008, and we expect that the SEC will adopt the proposal in short order.

For more information about this *Newsletter*, contact the author at 609.896.4571 or vvietti@foxrothschild.com, or visit us on the web at www.foxrothschild.com.

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