

SEC Proposes Rules to Modernize Smaller Company Capital Raising and Disclosure Requirements

The Securities and Exchange Commission has recently proposed rules to modernize existing regulations governing private placements of securities for all companies and registration and reporting requirements for smaller reporting companies.

Expanded Eligibility to Use Form S-3 and Shelf Registration

The SEC has proposed making Form S-3 and Form F-3, the short form registration statements, available for primary offerings by companies with less than \$75 million of public float, provided the company: (i) does not sell more than 20% of its public float in primary offerings on these forms in any one-year period; (ii) has timely filed all SEC reports for the past year; and (iii) is not a shell company at the time of filing, and has not been a shell company at any time in the last year before filing. The proposal would allow public companies with a public float below \$75 million to take advantage of the benefits of shelf registration for primary offerings, albeit subject to restrictions.

Amendments to Securities Act Rules 144 and 145

The SEC has proposed amendments to Rule 144 to shorten the holding period for restricted securities of reporting companies to six months; eliminate restrictions on resale of securities by non-affiliates of reporting companies after a six-month period (up to 12 months if the holder engages in certain hedging transactions); and eliminate restrictions on resale by non-affiliates of non-reporting companies after a 12-month period. The threshold for triggering a Form 144 filing would increase for affiliates, and non-affiliates would no longer be required to file a Form 144. The SEC also proposed amendments to Rule 145 to eliminate the “presumptive underwriter” doctrine in business combination transactions, other than transactions involving shell companies.

Exempting Compensatory Stock Options under Section 12(g) of the Exchange Act

The SEC has proposed new exemptions for compensatory employee stock options so Exchange Act registration requirements would not be triggered solely by a company’s compensation decisions. Under a proposed amendment to Section 12(g) of the Exchange Act, non-reporting companies would be exempt from registering compensatory stock options issued under a written plan, provided that: (i) eligible option holders are limited to employees, directors, consultants and advisors; (ii) transferability of the shares received upon exercise of such options is restricted; and (iii) risk and financial information comparable to that required under Rule 701 is disclosed to option holders and holders of shares received upon exercise of such options. The SEC also proposed an exemption from the registration of stock options issued by reporting companies where the common stock underlying the stock options is registered.

Amendments to Regulation D under the Securities Act

The SEC has proposed a new exemption from the Securities Act’s registration provisions under Rule 507 of Regulation D. Companies could sell securities to a new category of investors called “Rule 507 qualified purchasers” through limited adver-

tising without registration. Rule 507 qualified purchasers would include: (i) certain institutional investors; (ii) individuals who own \$2.5 million in investments or have an annual individual income of \$400,000 or aggregate income of \$600,000 with their spouses; and (iii) directors, executive officers and general partners of the company, without regard to a monetary threshold.

The proposed amendments would also increase the number of investors qualified as “accredited investors” by revising the existing definition to include individuals with \$750,000 and institutions with \$5 million of owned investments. The thresholds for accredited investors would be adjusted for inflation beginning in 2012.

The SEC has proposed to decrease Regulation D’s integration safe harbor from six months to 90 days and to update “bad actor” disqualifications such that they apply to all offerings under Regulation D.

The SEC has also proposed that companies be required to file a new simplified and restructured Form D electronically when they sell securities without registration in reliance on an exemption under Regulation D.

Regulatory Relief and Scaled Disclosure for Smaller Companies

The SEC has proposed expanding eligibility for its lessened disclosure and reporting requirements for smaller companies to all companies with up to \$75 million of public float. The SEC has proposed combining the “small business issuer” and “non-accelerated filer” categories of smaller companies into one category called “smaller reporting companies.” In connection with this proposal, the SEC would rescind its “SB” forms and integrate current Regulation S-B disclosure requirements into the disclosure requirements of Regulation S-K to simplify reporting requirements for smaller companies.

Contact Information

If you would like to learn more about the proposed amendments and their implications, please contact your usual legal advisor at Ropes & Gray.

