

## Revisions to the Eligibility Requirements for Primary Securities Offerings on Forms S-3 and F-3

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### Client Advisory

February 7, 2008 by [Guy P. Lander](#), [Stephen V. Burger](#) and [Evangelos Kramvis](#) The SEC recently amended the eligibility criteria for using Forms S-3 and F-3 for registered securities offerings. These forms enable U.S. and non-U.S. issuers to register primary securities offerings (i.e., offerings by issuers), including shelf offerings, without regard to the size of their public floats or the ratings of their debt.<sup>[1]</sup> The new conditions are effective now. Form S-3 and Form F-3 are the "short forms" that permit incorporation by reference, i.e., incorporating certain information from past and future filings made by the issuer under the Securities Exchange Act of 1934 (the "Securities Exchange Act"), instead of printing the information into the registration statement. By permitting "forward" incorporation by reference (i.e., incorporating later filed information), Forms S-3 and F-3 enable companies to conduct continuous primary offerings for up to three years "off the shelf" under Rule 415 under the Securities Act of 1933 (the "Securities Act"). Once a shelf registration statement is declared effective by the SEC, shelf offerings generally are not subject to further SEC staff review"). This can reduce or even eliminate the delay and costs associated with preparing and filing post-effective amendments to a registration statement. An issuer's ability to take securities off the shelf as needed gives it a significant financing alternative to other widely available methods, such as private placements sold at a discount for illiquidity or "private investments in public equity" ("PIPES"). Formerly, a company was able to register its cash offerings on Form S-3 or F-3 only if its "public float" was \$75 million or more<sup>[2]</sup>. Now, the new General Instruction I.B.6. to Form S-3, and the new General Instruction I.B.5. to Form F-3 permit the use of Forms S-3 and F-3 by an issuer with less than a \$75 million public float to register offerings of its securities if it:

- has been subject to the reporting requirements of Section 12 or 15(d) of the Securities Exchange Act, and has filed all material required to be filed with the SEC for a period of at least twelve calendar months immediately preceding the filing of the registration statements on Form S-3 and Form F-3,
- has filed in a timely manner most reports required to be filed, other than certain Form 8-K filings, during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement,
- has a class of common equity securities that is listed and registered on a national securities exchange,
- does not sell more than one-third of its public float in primary offerings under Form S-3 or F-3 over the previous 12 calendar months<sup>[3]</sup>, and
- has not been a shell company for at least 12 calendar months before filing the registration statement.<sup>[4]</sup>

Additionally, to use Form F-3, an issuer must be a foreign private issuer that has filed at least one annual report on Form 20-F (or 40-F). To ascertain the amount of securities that may be sold under Form S-3 by issuers with a public float below \$75 million, the new rule requires a two-step process:

- determining the issuer's public float immediately before the intended sale; and
- aggregating all sales of the issuer's equity and debt<sup>[5]</sup> securities that were primary offerings under General Instruction I.B.6. during the previous 12- month period, including the intended sale, to determine whether the one-third cap would be exceeded.

Issuers must compute their public float using the price at which their common equity was last sold, or the average of the bid and asked prices of their common equity, in the principal market for the common equity as of a date within 60 days before the date of sale. Then, to calculate the aggregate market value of securities sold during the preceding 12 calendar months, issuers must add together the gross sales price (of debt or equity) for all primary offerings under General Instruction I.B.6. during the preceding 12 calendar months. Based on that calculation, an issuer may sell securities with a value up to, but not greater than, the difference between one-third of its public float and the value of securities sold in primary offerings under General Instruction I.B.6. in the prior 12 calendar months. If an issuer's public float increases to a level that equals or exceeds \$75 million after its Form S-3 or F-3 becomes effective, the one-third cap is lifted and additional sales may be made without numerical restraints. In that case, under Rule 401 under the Securities Act, issuers must also re-compute their public float each time an amendment to the Form S-3 is filed to update the registration statement as required by Section 10(a)(3) of the Securities Act. If the issuer's public float as of the date of the filing of the annual report falls back to less than \$75 million, the one-third cap will be re-imposed for all later sales made under General Instruction I.B.6., and will remain in place until the issuer's float equals or exceeds \$75 million again. For securities that are convertible into or exercisable for equity shares, such as convertible debt or warrants, issuers must calculate the amount of securities they may sell in any period of 12 calendar months, based on the aggregate market value of the underlying equity shares in lieu of the market value of the convertible securities. The aggregate market value of the underlying equity shares will be based on the maximum number of shares into which the securities sold in the prior 12 calendar months are convertible as of a date within 60 days before the date of sale, multiplied by the same per share market price of the issuer's equity used for purposes of calculating its public float under Instruction 1 to new General Instruction I.B.6. of Form S-3.

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[1] See Securities Act Adopting Release No. 33-8878 (December 19, 2007) at <http://www.sec.gov/rules/final/2007/33-8878.pdf>.

[2] A company's public float is the aggregate market value of its voting and non-voting common equity held by non-affiliates of the company. An affiliate of, or person "affiliated" with a specified person, is a person that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person specified.

[3] The SEC adopted a corresponding amendment to Rule 401(g) under the Securities Act to provide that violations of the one-third cap would also violate the requirements as to proper form under Rule 401, even though the registration statement previously had been declared effective.

The one-third cap imposed by new General Instruction I.B.6. to Form S-3 only relates to other primary offerings conducted pursuant to General Instruction I.B.6. Accordingly, an issuer that is temporarily prevented from using Form S-3 for shelf offerings to raise capital would not be foreclosed from registering a primary offering of securities on Form S-1 or in private placements.

[4] Shell companies are prohibited from registering securities in primary offerings on Form S-3 or Form F-3 unless they meet the minimum \$75 million float threshold of General Instruction I.B.1. to Form S-3. Rule 405 under the Securities Act defines a "shell company" as a issuer, other

than an asset-backed issuer, that has (a) no or nominal operations and (b) either, (a) no or nominal assets, (b) assets consisting solely of cash and cash equivalents, or (c) assets consisting of any amount of cash and cash equivalents and nominal other assets.

This prohibition also applies to “blank check companies” as defined in Rule 419 of the Securities Act.

[5] As adopted, the method of calculating the one-third cap on sales is the same whether the issuer is selling equity or debt securities, or a combination of both. Therefore, eligible issuers will also be able to offer non-investment grade debt on Form S-3.

#### **related professionals**

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