

January 2008

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

On December 19, 2007, the Securities and Exchange Commission adopted amendments to the eligibility requirements for primary securities offerings on Forms S-3 and F-3 under the Securities Act of 1933, as amended (the "Securities Act"). The amendments, which became effective January 28, 2008, change the eligibility requirements for using Form S-3 for primary offerings. The amendments permit registrants who do not meet the present \$75 million public float threshold to use Form S-3, so long as they comply with certain offering size limitations, are not shell companies and otherwise satisfy the eligibility requirements of the form. The Form F-3 eligibility requirements have been amended to mirror the new Form S-3 eligibility requirements.

Eligibility Requirements

Registrants with less than \$75 million in public float will now be able to register using Form S-3, provided they:

- meet the other registrant eligibility conditions for the use of Form S-3¹;

¹ The eligibility conditions for Form S-3 are:

1. The registrant is organized under the laws of the U.S. or any state or territory or the District of Columbia and has its principal business operations in the U.S. or its territories.
2. The registrant has a class of securities registered pursuant to Section 12(b), or a class of equity securities registered pursuant to Section 12(g), of the Securities Exchange Act of 1934 (the "Exchange Act") or is required to file reports pursuant to Section 15(d) of the Exchange Act.
3. The registrant:
 - a) has been subject to the requirements of Section 12 or 15(d) of the Exchange Act and has filed all the material required to be filed pursuant to Section 13, 14 or 15(d) of the Exchange Act for a period of at least twelve months immediately preceding the filing of the registration statement on Form S-3; and
 - b) has filed in a timely manner all reports required to be filed during the twelve months and any portion of a month immediately preceding the filing of the registration statement, other than a report that is required solely pursuant to Item 1.01, 1.02, 2.03, 2.04, 2.05, 2.06, 4.02(a) or 5.02(e) of Form 8-K. If, during the twelve months, and any portion of a month immediately preceding the filing of the registration statement, the registrant has used Rule 12b-25(b) under the Exchange Act with respect to a report or a portion of a report, that report or portion thereof has actually been filed within the time period prescribed by that rule.
4. Neither the registrant nor any of its subsidiaries have, since the end of the last fiscal year for which certified financial statements of the registrant and its consolidated subsidiaries were included in a report filed pursuant to Section 13(a) or 15(d) of the Exchange Act: (a) failed to pay any dividend or sinking fund installment on preferred stock; or (b) defaulted: (i) on any installment or installments on indebtedness for borrowed money, or (ii) on any rental on one or more long term leases, which defaults in the aggregate are material to the financial position of the registrant and its subsidiaries, taken as a whole.

- have a class of common equity securities that is listed and registered on a national securities exchange²;
- do not sell more than the equivalent of one-third of their public float in primary offerings under General Instruction I.B.6. of Form S-3 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.

One-Third Threshold

Calculation of the offering size limitation requires a two-step process:

- determination of the registrant's public float immediately prior to the intended sale; and
- aggregation of all sales of the registrant's securities pursuant to primary offerings under General Instruction I.B.6. of Form S-3 in the previous 12-month period (including the intended sale) to determine whether the one-third cap would be exceeded.

The public float must be computed by reference to the price at which the registrant's common equity was last sold, or the average of the bid and asked prices of its common equity, in the principal market for the common equity as of a date within 60 days prior to the date of sale. To calculate the aggregate market value of securities sold during the preceding 12-month period, registrants must add together the gross sale price for all primary offerings pursuant to new General Instruction I.B.6. to Form S-3 during the preceding 12-month period. Based upon this calculation, registrants will be permitted to sell securities with a value up to, but not exceeding, the difference between one-third of their public float and the value of securities sold in primary offerings on Form S-3 under new General Instruction I.B.6. in the prior 12-month period.

The aggregate gross sales price includes sales of both equity and debt offerings on Form S-3. For securities that are convertible into or exercisable for equity shares, such as convertible debt or warrants, registrants must calculate the amount of securities they may sell in any 12-month period by reference to the aggregate market value of the underlying equity shares instead of the market value of the convertible securities. The aggregate market value of the underlying

² A "national securities exchange" is a securities exchange that has registered with the SEC under Section 6 of the Exchange Act. There are currently ten national securities exchanges: the New York Stock Exchange, the American Stock Exchange, Nasdaq, the Boston Stock Exchange, the Chicago Board Options Exchange, the Chicago Stock Exchange, the International Securities Exchange, the National Stock Exchange, NYSE Arca and the Philadelphia Stock Exchange.

equity is to be based on the maximum number of shares into which the securities sold in the prior 12-month period are convertible as of a date within 60 days prior to the date of sale, multiplied by the same per share market price of the registrant's equity used for purposes of calculating its public float pursuant to Instruction 1 to new General Instruction I.B.6. of Form S-3.

Determination of whether the one-third threshold has been exceeded is made at the time of sale. If, at the time of sale, the sale of securities, together with all securities sold in the preceding 12-month period, does not exceed one-third of the registrant's public float calculated within 60 days of the sale, then the transaction would not violate new General Instruction I.B.6. to Form S-3, even if the registrant's public float later drops to a level such that the prior sale now accounts for over one-third of the new lower public float. In order to keep track of the securities sold under General Instruction I.B.6., registrants must disclose in each prospectus filed with the SEC their updated calculation of public float and the amount of securities offered pursuant to this instruction during the prior 12-month period that ends on, and includes, the date of the prospectus. Pursuant to a corresponding amendment to Rule 401(g) under the Securities Act, offerings above the one-third threshold would violate both the form requirements of Form S-3 and the requirements as to proper form under Rule 401, despite the registration statement having been previously declared effective.

Calculation of the one-third threshold may be difficult as the amount of the public float can fluctuate. Because the one-third threshold is calculated based upon the registrant's public float immediately prior to a contemplated sale, not upon the public float at the time of the initial filing of the registration statement, the amount of securities that the issuer is permitted to sell may increase or decrease as the public float increases or contracts. Registrants who meet the \$75 million public float threshold at the time their registration statement is filed are not subject to restrictions on the amount of securities they may sell under the registration statement, even if subsequent to the effective date of the Form S-3, but prior to the update required under Section 10(a)(3) of the Securities Act, their public float falls below \$75 million. Similarly, the one-third threshold limitation will be lifted on additional sales in the event that the registrant's public float increases to \$75 million or more subsequent to the effective date of its registration statement. If the registrant's public float is less than \$75 million as of the date of the filing of the annual report, the one-third threshold restriction will be reimposed for all subsequent sales and will remain in place until the registrant's public float again increases to \$75 million or more. Due to the variability in calculating the one-third threshold, we suggest contacting counsel to assist in this calculation.

Shell Companies

To register securities in primary offerings on Form S-3, a shell company

must meet the minimum \$75 million public float threshold of General Instruction I.B.1. A former shell company that cannot meet the \$75 million public float requirement, but which otherwise satisfies the Form S-3 registrant requirements, will become eligible to use Form S-3 provided that:

- it has not been a shell company for at least 12 calendar months;
- it has filed information that would be required in a registration statement on Form 10 or Form 20-F, as applicable, to register a class of securities under Section 12 of the Exchange Act; and
- it has been timely reporting for 12 calendar months.

This memorandum is a nontechnical summary of some complex legal requirements. In an effort to achieve relative simplicity, a number of details, refinements and exceptions have been omitted, and this memorandum should not be considered a legal opinion upon which you should place reliance in taking specific actions. Please contact the Partners in our Corporate Department for further advice and assistance.