The Securities and Exchange Commission recently published Release No. 33-8876, “Smaller Reporting Company Regulatory Relief and Simplification,” adopting scaled disclosure requirements for smaller businesses reporting to the SEC. The amendments expand the number of companies eligible for scaled disclosure by creating a new class of companies, “smaller reporting companies,” that qualify for scaled disclosure. The new rules eliminate Regulation S-B, and move scaled disclosure requirements to Regulation S-K or the newly-created Article 8 of Regulation S-X.

Small Reporting Companies

Under the new rules, companies that have less than $75 million in public common equity float (i.e., market value of shares held by non-affiliates) will qualify as smaller reporting companies and be eligible to use scaled disclosure. Companies already reporting to the SEC will calculate their public float as of the last business day of their most recently completed second fiscal quarter. Non-reporting companies filing a registration statement would calculate their public float as of a date within 30 days of the filing date of the registration statement’s filing date. Companies that are not able to calculate their public float, such as companies with no outstanding common equity or no market price for their shares, can also qualify as smaller reporting companies if their annual revenues were less than $50 million during their most recently completed fiscal year. Non-U.S. companies will be eligible to qualify as smaller reporting companies if they otherwise meet the applicable float or revenue test, choose to file on domestic company forms, and provide financial statements prepared in accordance with U.S. Generally Accepted Accounting Principles. Investment companies and asset-backed issuers are not eligible for smaller reporting company status (as was the case for small business issuers under Regulation S-B).

Entering and Exiting Smaller Reporting Company Status

Under the new rules, if a company that had been a larger reporting company determines it has become a smaller reporting company as of the last business day of its most recently completed second fiscal quarter, it will be permitted to transition to the scaled disclosure requirements beginning with the Form 10-Q applicable to that quarter. If a smaller reporting company is required to transition to the larger reporting system after its determination date calculation, however, it will not be required to satisfy the larger reporting company disclosure requirements until the first quarter of the fiscal year after the year in which it determined that it no longer qualified as a smaller reporting company. Once a company fails to qualify for smaller company status, it will remain unqualified and be required to report as a larger company unless it determines that its public float was less than $50 million as of the last business day of its second fiscal quarter. Where a company is unable to calculate its public float, it will qualify for scaled disclosure until it exceeds $50 million in annual revenues. Once a company fails to qualify as a smaller reporting company on the basis of the revenue test, the company will not qualify as a smaller reporting company until it has revenues of less than $40 million in its last fiscal year.

Checking the “Smaller Reporting Company” Box

Under the new rules, if a company qualifies as a smaller reporting company, it will be required to check the new “smaller reporting company” box on
the cover of the registration statement, Form 10-K, or Form 10-Q, regardless of whether it chooses to rely on the new scaled disclosure requirements.

**Elimination of Regulation S-B and Movement of Scaled Disclosure Items to Regulation S-K and Regulation S-X**

The new rules eliminate the current “SB” forms, as well as Regulation S-B. Twelve nonfinancial scaled disclosure requirements have been moved from Regulation S-B to Regulation S-K. In addition, the scaled financial statement requirements in Item 310 of Regulation S-B have been moved into the new Article 8 of Regulation S-X and amended to require that smaller reporting companies disclose two years of comparative audited balance sheet data instead of one year, as currently required by Item 310. Notable amendments to Regulation S-K and Regulation S-X disclosure requirements are summarized below.

**Item 101 (Description of Business).** A new paragraph (h) has been added to require a less detailed description of the company’s business. In addition, smaller reporting companies will be required to report business development activities for three years, instead of the five year disclosure required of larger companies.

**Item 201 (Market Price of and Dividends on Registrant’s Common Equity and Related Stockholder Matters).** Instruction 6 to paragraph (e) has been revised to reflect that smaller reporting companies are not required to provide a performance graph.

**Item 301 (Selected Financial Data); Item 302 (Supplementary Financial Information).** A new paragraph (c) has been added to each item providing that the requirements of these items do not apply to smaller reporting companies.

**Item 303 (Management’s Discussion and Analysis of Financial Condition and Results of Operations).** A new paragraph (d) has been added requiring that smaller reporting companies will be required to provide only two years of analysis if the company is presenting only two years of financial statements, instead of the three years of analysis required of larger companies. In addition, smaller reporting companies will not be required to provide tabular disclosure of contractual obligations.

**Item 305 (Quantitative and Qualitative Disclosures About Market Risk).** A paragraph has been added providing that the requirements of Item 305 will not apply to smaller reporting companies.

**Item 402 (Executive Compensation).** New paragraphs (l) through (r) have been added to set forth the smaller reporting company disclosure requirements for executive and director compensation. Smaller reporting companies will be required to provide: (i) executive compensation disclosure for three named executive officers (specifically including the principal executive officer but not the principal financial officer), rather than five officers for larger companies; (ii) the Summary Compensation Table disclosure for two years, rather than the three years required for larger companies; (iii) two of the other six tables required of larger companies; and (iv) an alternative narrative disclosure. Smaller reporting companies will not be required to provide a Compensation Discussion and Analysis or footnote disclosure of the grant date fair value of equity awards in the Director Compensation Table.

**Item 404 (Transactions with Related Persons, Promoters, and Certain Control Persons).** Item 404 has been amended to provide that smaller reporting companies will not be required to disclose policies and procedures for reviewing related person transactions. Smaller reporting companies will be required to provide: (i) disclosure regarding a transaction in which a related person has a direct or indirect material interest where the amount involved exceeds the lesser of 1% of a smaller reporting company’s total assets or $120,000; (ii) additional specific information about underwriting discounts and commissions and corporate parents; and (iii) disclosure regarding promoters and certain control persons.

**Item 407 (Corporate Governance).** Paragraph (g) has been added to Item 407 to provide that smaller reporting companies will not be required to provide Compensation Committee Interlock and Insider Participation Disclosure or a Compensation Committee Report. In addition, they will not need to provide an Audit Committee Report until the first annual report after their initial registration statement becomes effective.
Item 503 (Prospectus Summary, Risk Factors, and Ratio of Earnings to Fixed Charges). Paragraph (e) has been added to Item 503 to provide that smaller reporting companies are not required to provide information regarding the ratio of earnings to fixed charges when the company issues debt, or the ratio of combined fixed charges and preference dividendstoearningswhenthecompanyissuespreferred securities. In addition, new instructions to the risk factor disclosure requirements in Forms 10, 10-K, and 10-Q provide that smaller reporting companies will not be required to include Item 503 risk factor disclosures in those filings. Nonetheless, we believe that many small reporting companies will continue to include risk factors in these filings in an effort to take advantage of the safe harbor for forwarding-looking information.

Item 504 (Use of Proceeds). Instruction 6 to Item 504 has been revised to clarify that new Article 8 of Regulation S-X, rather than the other articles of Regulation S-X, will govern whether financial statements of businesses proposed to be acquired must be included in the applicable filings of smaller reporting companies.

Item 601 ( Exhibits). A new paragraph (c) has been added to Item 601 to reflect that smaller reporting companies need not provide Exhibit 12 (Statements re Computation of Ratios).

Other Regulation S-K Items. Item 102 (Description of Property) will be amended to include references to the Industry Guides. Item 401 (Directors, Executive Officers, Promoters and Control Persons) of Regulation S-K differs from Item 401 of Regulation S-B in one way. In addition having to disclose any bankruptcy or insolvency petition filed against a business of which a director, nominated director, or executive officer of the reporting company was a general partner or executive officer on or within two years prior to the filing date of such petition, all reporting companies (including smaller reporting companies) must disclose any bankruptcy or insolvency petition made by or directly against any of these individuals.

Article 8 of Regulation S-X. Financial statement disclosure rules for smaller reporting companies have been moved to new Article 8 of Regulation S-X. Under the new rules, smaller reporting companies will be required to report two years of comparative audited balance sheet data (rather than one year’s data, which was required by Regulation S-B), as well as two years of income statements, cash flow statements, and statements of changes in stockholders’ equity.

Amendments to Rule 3-05 of Regulation S-X. Technical amendments have been made to Rule 3-05(b)(2)(iv) of Regulation S-X. Rule 3-05 of Regulation S-X requires that companies include in their registration statements and Form 8-K reports financial statements of businesses acquired or to be acquired. The number of years of a target company’s audited financial statements required to be included is determined using the definition of “significant subsidiary” in Rule 1-02(w) of Regulation S-X. Prior to the amendment, if a target company’s latest fiscal year revenues were less than $25 million, and three years of financial statements would otherwise be required, disclosure of the financial statements for the earliest of the three fiscal years could be omitted. Under the new rules, the threshold has been increased to $50 million in annual revenues (to comport with the $50 million revenue standard to qualify as a smaller reporting company).

Electing Scaled Disclosure on an “a la Carte” Basis

Under the new rules, smaller reporting companies will be permitted to elect to comply with scaled financial and non-financial disclosure on an item-by-item or “a la carte” basis. In addition, smaller reporting companies may elect to follow scaled financial statement requirements or to provide the larger company financial statement presentation on a quarterly basis. By contrast, Regulation S-B required small business issuers to elect the full fiscal year’s financial presentation in their first quarterly report of the fiscal year.

Although smaller reporting companies are generally free to pick and choose between the reporting requirements for smaller and larger companies, where an item contains a disclosure requirement specifically for smaller reporting companies, a smaller reporting company will be required to disclose under that requirement, even if that requirement is more rigorous than the requirement for larger companies and the company otherwise has not elected to report using scaled disclosure. This is a departure from the former regime, which provided that companies either reported under Regulation S-K or reported as a small business
issuer under Regulation S-B. For example, under Item 404 of Regulation S-K, smaller reporting companies, unlike larger companies, are required to disclose additional specific information about underwriting discounts and commissions and corporate parents. Under the new rules, a smaller reporting company would be required to provide this additional Item 404 disclosure, even where it otherwise was providing the disclosures required of larger reporting companies. In addition, the SEC notes that in accordance with Rule 12b-20 of the Securities Exchange Act of 1934, even where smaller reporting companies choose to make scaled disclosures, they are nonetheless required to provide any additional material information necessary to prevent the reported information from being misleading.

**Transition to Regulation S-K**

Under the new rules, the S-B forms will be phased out rather than eliminated outright. Companies that qualify as smaller reporting companies will have the option to use the new scaled Regulation S-K requirements when filing their next periodic report due after the effective date of the amendments. Companies currently qualifying as small business issuers under Regulation S-B will have the option to file their annual report for their first fiscal year ending on or after December 15, 2007, on either Form 10-KSB, complying with the disclosure requirements in Regulation S-B, or Form 10-K, with the option to use new scaled disclosure requirements of Regulation S-K. After a small business issuer files its next annual report, it will be required to file quarterly reports on Form 10-Q and annual reports on Form 10-K, and may elect to use the new scaled disclosure requirements of Regulation S-K. For example, for calendar year small business issuers, the annual report for the year ended December 31, 2007, may be filed on Form 10-KSB, and the quarterly reports for 2008 on Form 10-QSB, transitioning to Form 10-K and Form 10-Q with the annual report for the year ending December 31, 2008. The SEC’s adopting release, including the new rules regarding scaled disclosure for smaller reporting companies, can be found at:


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