

# Corporate Finance & Acquisitions Update

## January 1 Deadline Approaching for Direct Registration System Compliance – You May Need to Amend Your Bylaws

On August 8, 2006, the United States Securities and Exchange Commission (“SEC”) approved rule changes proposed by the American Stock Exchange (“AMEX”), the New York Stock Exchange (“NYSE”), and the NASDAQ Stock Market (“NASDAQ”) that require listed securities to be eligible to participate in the Direct Registration System (“DRS”). All securities *initially* listed on or after January 1, 2007 on AMEX, NASDAQ, or NYSE (each, an “Exchange” and collectively, the “Exchanges”) must be eligible for the DRS, except for securities of companies which already have securities listed on the same Exchange and securities of companies that transfer the listing of their shares from another registered U.S. securities exchange. **On and after January 1, 2008, companies must comply with the DRS eligibility requirements for all of their securities listed on the Exchanges.** To comply, companies may have to amend their bylaws by year end to remove provisions that mandate the issuance of paper certificates for all shares of stock. The new rules do not apply to non-equity securities which are book-entry only.

### The Direct Registration System

The DRS provides electronic direct registration of securities in a stockholder’s name on the books for the transfer agent or issuer as an alternative to a physical certificate or “street name” registration. “Street name” registration is when a security is registered in the name of the stockholder’s brokerage firm, and the brokerage firm holds the security for benefit of the stockholder in electronic (“book-entry”) form. Under the DRS, stockholders can elect to have their securities registered directly on the issuer’s records in their own names in book-entry form. A stockholder who holds a security in the DRS will receive a statement from the issuer or its transfer agent evidencing ownership. The stockholder can subsequently transfer the DRS book-entry position electronically to his or her broker/dealer. The Depository Trust Company (“DTC”) currently operates the only DRS that complies with the SEC’s rules.

### DRS Eligibility

While the new rules do not require companies to participate in the DRS, all securities listed on the AMEX, NASDAQ, and NYSE must be *eligible* to participate in the DRS. To be eligible to participate in the DRS, companies must:

1. Use a transfer agent that is a participant in the DRS;
2. Ensure that the transfer agent instructs the DRS operator to designate the company’s securities as “direct registered eligible securities;” and
3. Ensure that the company’s governing documents (such as its articles of incorporation and bylaws) allow for the issuance of uncertificated securities.

Companies should first determine whether their transfer agent meets the DTC’s requirements for DRS transfer agents. A list of such transfer agents is available [here](#). Transfer agents may become DTC participants by completing an application, submitting the application to the DRS Program Administration of the DTC and receiving a DTC participant account number.

Companies should next ensure that their transfer agent instructs DTC to

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designate the company's securities as "direct registered eligible securities." DTC must receive the requests in writing at least ten (10) business days prior to the securities issue "going live" for DRS processing. DTC has informally indicated that it will provide participating transfer agents with the instruction form and e-mail contact information for such requests.

Finally, companies should ensure that their articles of incorporation and bylaws allow for "uncertificated shares," and, if necessary, amend these governing documents. Colorado law allows corporations to issue shares without certificates, unless otherwise provided by the bylaws. Thus, Colorado companies should review their bylaws to ensure that they do not prohibit uncertificated shares. Delaware law provides that shares of a corporation must be represented by certificates, unless a resolution by the board of directors authorizes uncertificated shares. Thus, Delaware companies should review their bylaws to ensure that they do not prohibit uncertificated shares and should ensure that uncertificated shares are authorized by board action. Prior to amending their articles of incorporation or bylaws, companies will need to determine whether their board of directors has the authority to unilaterally amend such documents. Generally, the bylaws allow the board of directors to amend the bylaws in such manner, but amendments to the articles of incorporation require a vote of the stockholders.

Companies should consult counsel prior to amending their governing documents or preparing board resolutions. While any amendments to bylaws must be made with reference to the bylaws then in effect, the attached **Exhibit A** sets forth an example of the types of amendments that companies may wish to make to their bylaws to enable DRS eligibility.

A company that amends its articles of incorporation or bylaws must file a Form 8-K disclosing that amendment within four (4) business days after the adoption date.

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The DGS Corporate Finance & Acquisitions Group has worked extensively with boards and companies to work through difficult securities exchange and corporate governance issues, and would be happy to consult with you on your needs in this area.

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