

November 16, 2007

## SEC Revises Rule 144 to Shorten Holding Periods and Reduce Restrictions on Non-Affiliates

At an open meeting on November 15, 2007, the Securities and Exchange Commission (SEC) approved amendments to substantially revise the Rule 144 safe harbor for resales of restricted securities. The revisions to the rule include:

- **New Six-Month Holding Period for Public Securities:** Any holder of restricted securities of an issuer that files periodic reports under the Securities Exchange Act of 1934 (Exchange Act) will be able to resell the restricted securities as soon as six months after acquiring the securities.
- **One-Year Holding Period for Non-Public Securities:** Holders of restricted securities of issuers that do not file Exchange Act reports will be subject to a one-year holding period.
- **Non-Affiliates Have Fewer Limitations:** Holders who are non-affiliates of the issuer will not be subject to any volume limitations or manner of sale requirements.
- **Debt Securities:** Debt securities will no longer be subject to the manner of sale restrictions of Rule 144. In addition, the volume limitations for debt securities have been relaxed.
- **Form 144:** Holders who are non-affiliates of the issuer will no longer be required to file a Form 144. The thresholds for transactions by affiliates of an issuer have been increased so that affiliates selling more than 5,000 shares or shares valued at more than \$50,000 in reliance on Rule 144 will still be required to file a Form 144 to report such transaction.

The amendments will become effective 60 days after publication in the *Federal Register*. The effective date and the text of the interpretive guidance and adopted rules are not yet available; accordingly, the descriptions provided in this special alert are based on SEC press releases and statements made by the commissioners and SEC staff at the open meeting.

### Background

Rule 144 provides a “safe-harbor” exemption from registration of securities under the Securities Act of 1933 for sales of restricted securities, with the aim of assuring that the securities being resold were not initially acquired with the view towards public redistribution without SEC registration. The rule was

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last revised in 1997 to shorten the required holding periods. At that time, the SEC solicited comment on whether to reduce the holding periods further and whether it should make other changes such as eliminating Form 144 or abolishing the presumptive underwriter rule, but it did not take action until now.

The amendments to Rule 144 were adopted along with several other proposals focused on streamlining the capital formation process, especially for smaller companies. In a statement after the adoption of the amendments yesterday, Chairman Cox said, “Today’s rule amendments will enable smaller companies to raise capital more effectively and ease some of the burdens of our reporting and disclosure requirements, and they will ensure that investors in these companies are paying for important investor protections and not red tape.”

## Amendments to Rule 144

The new holding periods under amended Rule 144 will depend on whether the holder had been an affiliate of the issuer within the past three months and on whether the issuer files reports under the Exchange Act. The chart below shows the application of the revised rule.

If issuer <b>does</b> file Exchange Act Reports	
If the holder <b>is</b> an affiliate of the issuer	If the holder <b>is not</b> an affiliate of the issuer and has not been an affiliate for at least three months
<p>Restricted securities must be held for at least six months</p> <p>After holding period, holder may resell restricted securities subject to:</p> <ul style="list-style-type: none"> <li>• Issuer continuing to file Exchange Act reports</li> <li>• Volume restrictions (which have been relaxed for debt securities)</li> <li>• Manner of sale restrictions (revised from current rule, with a modified manner of sale restriction for equity securities and no manner of sale restriction for debt securities)</li> <li>• Form 144 required to be filed if sales exceed 5,000 shares or \$50,000 in a three-month period</li> </ul>	<p>Restricted securities must be held for at least six months</p> <p>After holding period, but before expiration of one year, holder may have unlimited resales of restricted securities, subject to:</p> <ul style="list-style-type: none"> <li>• Issuer continuing to file Exchange Act reports</li> <li>• No filing requirement</li> </ul> <p>After one year:</p> <ul style="list-style-type: none"> <li>• Unlimited public resales of securities</li> <li>• No filing requirement</li> </ul>

### If issuer *does not* file Exchange Act Reports

If the holder <i>is</i> an affiliate of the issuer	If the holder <i>is not</i> an affiliate of the issuer and has not been an affiliate for at least three months
One-year holding period After holding period, holder may make resales of restricted securities subject to (as described above): <ul style="list-style-type: none"><li>• Current reporting</li><li>• Volume restrictions</li><li>• Manner of sale restrictions</li><li>• Form 144 required to be filed</li></ul>	One-year holding period After holding period, holder may have unlimited resales of restricted securities No filing requirement

## Filing Requirements

The SEC has taken a significant step in simplifying the filing requirement under Rule 144 by increasing the number of shares sold or dollar value of securities sold before a Form 144 is required. In addition, persons that have not been affiliates of an issuer for at least three months prior to a sale of securities will no longer have any filing requirement under Rule 144.

## Rule 145 Amendments

The amendment also revised Rule 145 by eliminating the presumptive underwriter rule, except for transactions involving a shell company, and harmonizing the resale requirement in Rule 145 with the resale provisions for the securities of a shell company in Rule 144. Prior to elimination, the presumptive underwriter rule stated that affiliates of corporations that engage in a merger or sale of assets in exchange for securities are deemed to be underwriters for purposes of the Securities Act of 1933, unless they sold their securities in accordance with certain of the requirements of Rule 144 or in a registered transaction.

## Future of Form 144

When the rule changes were proposed in June, the SEC solicited comments on the elimination of Form 144 by merging the required information into Form 4 and changing the filing deadline for Form 144 to match the filing deadline for Form 4. However, at the November 15 meeting, the SEC staff said that the changes to Form 4 would require complicated programming changes to the EDGAR filing system that they were not presently prepared to address. The staff did, however, note that the commentators on the proposed rule generally supported the elimination of Form 144, and they have tabled the elimination of Form 144 as a “project for another day.”

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