

SECURITIES ALERT

SEC OVERHAULS RULE 144



On November 15, 2007, the Securities and Exchange Commission (SEC) approved major changes to Rule 144. Most significantly, the revisions will shorten the holding period for resales of restricted securities of reporting companies¹ from one year to six months. In addition, all restrictions on resale will end after one year for non-affiliates of both reporting and non-reporting companies.

The rule changes will allow restricted securities to enter the public markets more quickly, thereby increasing the liquidity of privately sold securities for investors and reducing the cost to companies of raising capital through private placements. The amendments are scheduled to take effect 60 days after publication in the Federal Register. The final rule has not yet been published and the following discussion is based on the SEC proposing release, statements made at the SEC's November 15 open meeting and the SEC's press release announcing the results of the open meeting.

HIGHLIGHTS OF RULE 144 AMENDMENTS

The amendments to Rule 144 will—

- shorten the holding period for restricted securities of reporting companies from one year to six months
- allow non-affiliates² of reporting companies to freely resell restricted securities that have been held for six months, subject only to the requirement that there be current public information about the company
- eliminate all restrictions on resales of restricted securities by non-affiliates that have been held for at least one year
- eliminate Form 144 filing requirements for non-affiliates and raise the Form 144 filing thresholds for affiliates

¹ “Reporting companies” are issuers that have been, for at least 90 days immediately prior to the sale, subject to the reporting requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934 (Exchange Act).

² In general, references to a non-affiliate in this alert mean any person who is not an affiliate of the issuer and has not been an affiliate during the preceding three months.

- for debt securities, eliminate the “manner of sale” requirement and relax the volume limitations by adding a new alternative test that permits the resale of up to 10 percent of a tranche in any three-month period
- codify certain SEC staff interpretations relating to Rule 144.

The SEC’s press release referred to above also stated that the manner of sale requirements for resales of equity securities by affiliates will be revised in the final rule, but no additional details were provided. In its final form, the amended rule does not include two changes that were proposed by the SEC in the proposing release. The SEC chose not to adopt a rule change that would have required tolling of the holding period during any time that the holder had engaged in hedging transactions. Also, the SEC elected not to combine Form 144 filings with Form 4 filings as originally proposed, but stated that it may do so in the future. A chart summarizing the major changes to Rule 144 is included in [Appendix A](#) of this alert.

In addition to the Rule 144 amendments, the SEC also approved significant amendments to Rule 145 that eliminate all resale restrictions on securities acquired in most business combination transactions subject to the Rule.

SHORTENED HOLDING PERIOD FOR RESTRICTED SECURITIES

Under amended Rule 144, the holding period for public resales of restricted securities of reporting companies is shortened from one year to six months. This shortened holding period applies to both affiliates and non-affiliates. After the six-month holding period is satisfied, a person who has not been an affiliate of the reporting company for three months may freely resell restricted securities, subject only to compliance with the Rule 144(c) requirement that the company be current in its SEC filings.³ After one year, a person who has not been an affiliate of the reporting company for three months may resell restricted securities free from all Rule 144 requirements. As under the current rule, “tacking” of holding periods by non-affiliates is permitted.⁴

Affiliates of reporting companies will continue to be subject to all applicable Rule 144 requirements after the six-month holding period is satisfied, including the public information, volume limitation, manner of sale and Form 144 filing requirements.

With respect to non-reporting companies, a non-affiliate will continue to be subject to a one-year holding period, but thereafter may freely resell without any Rule 144 restrictions. Affiliates of non-reporting companies continue to be subject to a one-year holding period and thereafter may resell restricted securities in accordance with all applicable Rule 144 requirements, including the public information, volume limitation, manner of sale and Form 144 filing requirements.

RELAXED RESALE REQUIREMENTS FOR NON-AFFILIATES

As discussed above, non-affiliates of reporting companies who have satisfied the six-month holding period may freely resell restricted securities, subject only to compliance with the Rule 144(c) requirement that the company be current in its SEC filings, and after one year may resell restricted securities free from all Rule 144 requirements. Therefore, a non-

³ Rule 144(c) requires that a reporting company have filed all reports required to be filed under the Exchange Act during the 12 months preceding the sale of the securities (or such shorter period that the issuer was required to file such reports), other than Form 8-K reports.

⁴ Rule 144(d)(1) provides that the holding period commences on the “later of the date of the acquisition of the securities from the issuer or from an affiliate of the issuer.” Therefore, in determining how long restricted securities have been held, a non-affiliate who buys restricted securities from another non-affiliate can include the period of time the securities were held by the prior owner, as well as the period of time the securities were held by any other prior owners in an unbroken chain of ownership by non-affiliates.

affiliate of a reporting company need not comply with the prior rule's volume limitation, manner of sale and Form 144 filing requirements at all and need only comply with the public information requirement during the holding period of six months to one year.

Non-affiliates of non-reporting companies who have satisfied the one-year holding period may resell restricted securities free from all other Rule 144 requirements.

RELAXED REQUIREMENTS FOR RESALES OF DEBT SECURITIES

The rule changes eliminate the Rule 144(f) manner of sale requirements for debt securities⁵ and also permit an alternative method for satisfying the Rule 144(e) volume limitations for resales of debt securities.

Rule 144(f) generally requires that a sale be effected only with a market maker, or through a transaction with a broker in which the broker does not solicit orders to buy or receive any payment other than a usual broker's commission. The SEC determined that these requirements, which are designed to prevent special selling efforts and compensation arrangements typically associated with a distribution, were not appropriate with respect to debt securities because debt securities are generally traded in dealer transactions in which the dealer is seeking buyers. The rule change will allow more flexibility in the resale of debt securities, including the ability to resell in privately negotiated transactions.

Rule 144(e) generally limits the amount of restricted securities that can be resold by a holder during any three-month period to the greater of one percent of the shares or other units of the class outstanding or the average weekly trading volume during the four calendar weeks preceding filing of the Form 144, as reported on all national securities exchanges and/or quoted on an inter-dealer quotation system. Because debt securities typically trade only in the over-the-counter market, the applicable volume test for debt securities is often limited to one percent of the outstanding amount. As amended, Rule 144 will provide an additional alternative volume test permitting the resale of up to 10 percent of a tranche of debt securities during any three-month period.

FORM 144 FILING REQUIREMENTS

Under the current rule a selling security holder must file a Form 144 if the intended sale exceeds either 500 shares or \$10,000 within a three-month period. Under the amended rule, the requirement to file a Form 144 is eliminated entirely for non-affiliates, and the filing threshold for sales by affiliates is raised to the lesser of 5,000 shares or \$50,000.

CODIFICATION OF SEC STAFF INTERPRETATIONS

The amended rule codifies certain staff positions previously issued by the Division of Corporation Finance in order to simplify the rule by making these staff positions more transparent and readily available to the public.

AMENDMENTS TO RULE 145

Rule 145 provides that exchanges of securities in connection with reclassifications, mergers, consolidations and asset transfers where a shareholder vote is required constitute a "sale" of securities and thus registration (or an exemption therefrom) is required for the sale. The rule also provides that any party to the transaction (other than the issuer) or any person who is an affiliate of such party at the time of the shareholder vote is presumed to be an underwriter subject to the resale restrictions of Rule 145, which substantially incorporate the restrictions of Rule 144. Amended Rule 145 eliminates the presumptive underwriter provisions of Rule 145 for all transactions covered by the rule, except those involving shell companies (other than business combination related shell companies).

⁵ The term "debt securities" also includes non-participatory preferred stock and asset-backed securities.

With respect to shell companies, amended Rule 145(d) provides that the persons and parties that are deemed presumed underwriters may resell their securities in the same way that affiliates of a shell company may resell their securities under amended Rule 144. Such presumed underwriters may resell securities received in the Rule 145 transaction only after the shell company has ceased to be a shell company and one of the following conditions is met—

- the current public information, volume limitation and manner of sale requirements of Rule 144(c), (e), (f) and (g) are met and at least 90 days have elapsed since the securities were acquired in the transaction
- such person is not, and has not been for at least three months, an affiliate of the issuer, at least six months have elapsed since the securities were acquired and the current public information requirement of Rule 144(c) is satisfied
- such person is not, and has not been for at least three months, an affiliate of the issuer, and at least one year has elapsed since the securities were acquired.

CONTACT INFORMATION

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APPENDIX A⁶

	Affiliate or Person Selling on Behalf of an Affiliate	Non-Affiliate (and Has Not Been an Affiliate during the Prior Three Months)
Restricted Securities of Reporting Companies	<p><u>During six-month holding period</u> – no resales under Rule 144 permitted.</p> <p><u>After six-month holding period</u> – may resell in accordance with all Rule 144 requirements including–</p> <ul style="list-style-type: none"> • Current public information • Volume limitations • Manner of sale for equity securities • Filing of Form 144. 	<p><u>During six-month holding period</u> – no resales under Rule 144 permitted.</p> <p><u>After six-month holding period, but before one year</u> – may resell in accordance with the current public information requirement.</p> <p><u>After one year</u> – unlimited public resale under Rule 144; need not comply with other Rule 144 requirements.</p>
Restricted Securities of Non-Reporting Companies	<p><u>During one-year holding period</u> – no resales under Rule 144 permitted.</p> <p><u>After one-year holding period</u> – may resell in accordance with all Rule 144 requirements including–</p> <ul style="list-style-type: none"> • Current public information • Volume limitations • Manner of sale for equity securities • Filing of Form 144. 	<p><u>During one-year holding period</u> – no resales under Rule 144 permitted.</p> <p><u>After one-year holding period</u> – unlimited public resale under Rule 144; need not comply with other Rule 144 requirements.</p>

⁶ This chart is adapted from the chart included in the SEC proposing release, Securities Act Release No. 33-8813, 72 FR at 36828.