

Securities and Exchange Commission Adopts Amendments to Rules 144 and 145

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FENWICK & WEST LLP**Executive Summary**

For the first time since 1997, the SEC has made significant amendments to Rules 144 and 145 under the Securities Act of 1933 (the "Securities Act"). The goal of the amendments is to increase the liquidity of privately sold securities and decrease the cost of capital by reducing holding periods and other resale restrictions. Notably, the amendments:

- Shorten to six months the holding period for "restricted securities" of issuers that are subject to the reporting requirements of the Securities Exchange Act of 1934 (the "Exchange Act");
- Continue to subject restricted securities of issuers that are not subject to the Exchange Act reporting requirements to a one-year holding period prior to any public resale;
- Reduce the restrictions applicable to the resale of securities by non-affiliates;
- Simplify the manner of sale requirements;
- Increase the Form 144 filing thresholds;
- Eliminate the presumptive underwriter provision in Rule 145; and
- Revise resale requirements in Rule 145(d).

The amendments also specifically address, and simplify, the resale of debt securities, do not generally apply to shell company securities and make other technical changes to the rules.

The effective date of the amendments is February 15, 2008. The adopting release can be found on the SEC's website at <http://www.sec.gov/rules/final/2007/33-8869.pdf>.

Overview of Rules 144 and 145**Rule 144**

The Securities Act requires registration of all offers and sales of securities unless an exemption from registration is available. Section 4(1) of the Securities Act provides such an exemption for transactions by any person other than an issuer, underwriter or dealer.

Rule 144 provides a framework for securing the section 4(1) exemption for the resale of restricted securities (securities acquired from the issuer or from an affiliate of the issuer in a transaction not involving any public offering) or control securities (securities held by an affiliate of the issuer).

Rule 144 states that a selling security holder will not be deemed to be engaged in a distribution of securities, and therefore not an underwriter, with respect to such securities, thus making available the Section 4(1) exemption if the resale satisfies specified conditions. The conditions include the following:

- There must be adequate current public information available about the issuer;
- If the securities being sold are restricted, the security holder must have held the security for a specified holding period;
- The amount of securities sold within any 90 day period must be within specified sales volume limitations;
- The resale must comply with manner of sale requirements; and
- The selling security holders must file Form 144 for other than *de minimus* sales.

Prior to the amendments, if the securities had been held by a non-affiliate for more than two years, the non-affiliate could resell the restricted securities without regard to these conditions.

Rule 145

Securities Act Rule 145 requires registration of securities issued in business combination transactions, unless an exemption is available. Rule 145(c) deems persons who were parties to such a transaction, other than the issuer or its affiliates, to be underwriters. Rule 145(d) permits the resale, subject to specified conditions, of securities received in such transactions by persons deemed underwriters. An important consequence of Rule 145 has been that affiliates of the target company in a registered stock-for-stock merger have been subject to resale restrictions notwithstanding their lack of any ongoing affiliation with the acquiring company.

The Amendments to Rule 144

For the first time, the amendments to Rule 144 treat securities issued by Exchange Act reporting companies differently than those issued by non-reporting companies. Furthermore, the amendments differentiate between affiliates and non-affiliates in terms of the resale restrictions that are applicable to each for resales of restricted securities. Specifically, under the amendments:

- The holding period for restricted securities has been shortened to six months for restricted securities of Exchange Act reporting companies, but remains one year for restricted securities of non-reporting companies.
- After the six-month holding period is met, non-affiliates' sales of reporting company securities will no longer be subject to volume limitations, manner of sale requirements or the filing of Form 144. As such, the only remaining resale provision for non-affiliate sales is the current public information requirement in Rule 144(c), which will apply for an additional six months after the six-month holding period requirement is met. Affiliates may resell restricted securities of a reporting company after a six month holding period, subject to the Rule 144 resale provisions - current public information, volume limitations, slightly relaxed manner of sale requirements and filing of Form 144 if higher thresholds are met.
- After a one year holding period is met, non-affiliates of the company, whether it be a reporting company or not a reporting company, may resell without restriction.
- The manner of sale requirements that apply to resales of equity securities of affiliates will permit the resale of securities through riskless principal transactions and the Rule 144(g) definition of "brokers' transactions" will cover the posting of bid and ask quotes in alternative trading systems.
- The thresholds that trigger a Form 144 filing requirement are raised to 5,000 shares or \$50,000 of securities within a three-month period.

The Amendments to Rule 145

The amendments to Rule 145 eliminate the presumed underwriter provision in Rule 145(c) and harmonize the requirements in Rule 145(d) with the amended provisions in Rule 144. By eliminating the presumptive underwriter rule, the amendments eliminate the restrictions on the resale of shares received by acquired company stockholders in registered stock-for-stock mergers unless

the stockholder is an affiliate of the issuer or one of the parties to the transaction is a "shell company." If one of the parties to the transaction is a shell company, such party (other than the issuer) and the affiliates of either party will continue to be regarded as underwriters of the securities issued and can sell under the following conditions:

- Such persons will be able to resell securities they receive subject to the current public information, volume limitation and the amended manner of sale requirements of Rule 144 after 90 days.
- After six months, target company stockholders who are non-affiliates of the issuer will be permitted to resell their securities subject only to the current public information condition.
- After one year, target stockholders who are non-affiliates of the issuer will be permitted to resell their securities without limitation.

Codification of Staff Positions

The amendments codify several interpretations previously adopted by the Staff of the SEC, including:

- Holders may tack the Rule 144 holding period in connection with transactions made solely to form a holding company and in connection with conversions and exchanges of securities of the same issuer.
- Upon a cashless exercise of options or warrants that have been acquired for value, the newly acquired underlying securities are deemed to have been acquired when the corresponding options or warrants were purchased.
- A pledgee of securities may sell pledged securities without having to aggregate the sale with sales by other pledgees of the same securities from the same pledgor.
- A selling security holder who satisfies Rule 10b5-1(c) may modify the representations on Form 144 to indicate that he or she had no knowledge of material adverse information about the issuer as of the date on which the holder adopted the written trading plan or gave the trading instructions.

Conforming Amendments

Elements of Rule 144 are incorporated into other SEC rules and the SEC made conforming changes to these rules, including changes to Regulation S and Rule 701.

Regulation S

In connection with the amendments to Rule 144, the SEC amended Regulation S to conform the distribution compliance period in Rule 903(b)(3)(iii) for Category 3 reporting issuers to the amendments to the Rule 144 holding period. As a result, U.S. reporting issuers will be subject to a distribution compliance period of six months under Regulation S.

Rule 701

The limitations for resales by non-affiliates under Rule 701 include references to paragraphs (e) and (h) of Rule 144, which under the amendments no longer apply to resales by non-affiliates. The SEC amended Rule 701 to remove references to Rule 144 volume limitations and Form 144 requirements from Rule 701.

Changes to Rule 144 Related to Resales of Debt Securities by Affiliates

The amendments will eliminate the manner of sale requirements for resales of debt securities held by affiliates. Furthermore the Rule 144(e) volume limitations for debt securities will be raised to permit the resale of debt securities in a three-month period in an amount that does not exceed ten percent of a tranche in which the securities were issued.

For additional information, please contact Dan Winnike, Chair, Corporate Group at dwinnike@fenwick.com, 650.335.7657.

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