

Rule 144 Adopting Release

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The SEC published Release No. 33-8869 adopting significant amendments to existing Rule 144 under the Securities Act of 1933 on Thursday, December 6, 2007, with the intent of increasing the liquidity of restricted securities and decreasing the cost of capital raising activities for smaller companies. The amendments reduce the holding period for sales of restricted securities and substantially reduce the resale restrictions for non-affiliates. The manner of sale requirements currently in effect under Rule 144 are amended with respect to sales of equity securities and eliminated with respect to sales of debt securities. The volume limitations applicable to resales of debt securities are relaxed, the Form 144 filing thresholds are increased, and several SEC staff interpretations are codified. These amendments will become effective on February 15, 2008, and are applicable to securities acquired before or after that date.

Simplification of Preliminary Note

The SEC revised the Preliminary Note to Rule 144 to incorporate plain English principles and make the Note easier to understand. The revision is slightly different than what was initially proposed. The Note still explains the legal theory behind Rule 144 and its relationship to other provisions, including the definition of underwriter in Section 2(a)(11) of the Securities Act, but now it also clarifies that a person selling restricted securities on behalf of themselves or an affiliate will not be deemed an underwriter if the sale is conducted in accordance with Rule 144. The new Note also explains that Rule 144 does not affect the availability of any other registration exemption and that the safe harbor provided by Rule 144 will not be available for transactions that, while in technical compliance with Rule 144, are part of a scheme to avoid registration requirements.

Holding Period

The SEC is adopting a six-month holding period for the resale of restricted securities of reporting companies by affiliates and non-affiliates. Restricted securities of non-reporting issuers will have a one-year holding period. The SEC believes that these new holding periods are appropriate given the differences in the amount of information available for reporting and non-reporting companies.

Tolling Provision

The SEC proposed to reintroduce the tolling provision, eliminated in 1990, out of concern about the impact of hedging activities on the allocation of risk with respect to restricted securities. Under the proposal, the holding period would have been suspended while a restricted security holder engaged in any hedging transactions. This proposal was met with objections from commentators, and the SEC decided not to adopt the tolling provision amendments. The SEC feared that its adoption would unduly complicate Rule 144 requirements, leading to a significant increase in companies' compliance costs.

Resale by Non-Affiliates

The Rule 144 revisions substantially reduce the resale restrictions applicable to non-affiliates who have not been affiliates for at least three months. After the six-month holding period for reporting company securities, a non-affiliate may make unlimited public resales so long as the public information requirement is met. After holding securities of reporting and non-reporting companies for one year, a non-affiliate may make unlimited public resales under Rule 144 without complying with any other Rule 144 requirements, including the manner of sale restrictions, volume limitations and Form 144 filing requirements.

Resales by Affiliates

Affiliates are subject to the same holding periods as non-affiliates, but must comply with additional resale restrictions. After holding restricted securities of reporting companies for six months and non-reporting companies for one year, an affiliate may resell securities in accordance with the current public information requirements, the manner of sale requirements for equity securities, volume limitations and Form 144 filing requirements.

Amendments to Manner of Sale Requirements

The manner of sale requirements applicable to resales of equity securities by affiliates are amended. Rule 144(f) now permits the resale of equity securities through riskless principal transactions in which trades are executed at the same price. The broker-dealer must still meet the requirements of Rule 144(g), other than the requirement that the broker-dealer do no more than execute the order form as an agent of the affiliate. The definition of “broker transaction” in Rule 144(g) has also been amended to clarify that certain postings of bid and ask quotations in alternative trading systems will not be deemed solicitations.

The manner of sale requirements applicable to resales of debt securities by affiliates have been eliminated. The Rule 144 definition of debt securities includes non-participatory preferred stock and asset-backed securities, as well as other nonconvertible debt securities.

Volume Limitations for Debt Securities

Rule 144(e) has been amended to allow the resale of debt securities in an amount that does not exceed 10% of a tranche or class, when combined with all sales of securities in the same tranche or class for the account of the same selling security holder within any three-month period.

The SEC provided a table summarizing the new resale restrictions, see Appendix on page 5.

Increased Form 144 Filing Thresholds

The thresholds for filing Form 144 within a three-month period have been increased from 500 shares or \$10,000 to 5,000 shares or \$50,000. The dollar amount, which had not been adjusted since 1972, was raised to account for inflation. The SEC chose

a 5,000-share threshold instead of the 1,000-share threshold initially proposed it more appropriate for transactions that did not meet the \$50,000 threshold. The Form 144 filing requirements will now apply only to affiliates and those who were affiliates within three months of the resale of securities. While not adopting amendments to coordinate Form 144 filing requirements with Form 4 filing requirements, the SEC noted that it expects to issue a separate release to provide affiliates subject to both requirements with greater flexibility in satisfying their filing obligations.

Codification of Staff Positions

The SEC codified the following interpretive positions previously issued by the Staff of the Division of Corporate Finance:

1. Securities acquired pursuant to Section 4(6) of the Securities Act are considered “restricted securities.”
2. Rule 144(d) is amended to allow the tacking onto holding periods of restricted securities acquired from the predecessor of a holding company so long as the securities of the holding company were issued solely in exchange for the predecessor’s securities as part of the reorganization, security holders receive the same class of securities with the same proportional interest in the holding company as they held in the predecessor and the rights and interests of the security holders are substantially the same, and immediately following the reorganization the holding company has no significant assets other than those of the predecessor and its existing subsidiaries.
3. Rule 144(d)(3)(ii) is amended to allow the tacking onto holding periods in the event of an exchange or conversion of securities if the new securities were acquired from the issuer solely in exchange for securities of the same issuer, even if the surrendered securities were not convertible or exchangeable by their terms. If the original securities did not permit cashless exercise and were later amended, for consideration to allow exchange or conversion, the newly acquired securities will be deemed to have been acquired on the date of that amendment.

4. Upon a cashless exercise of options or warrants, the acquired underlying securities are deemed to have been acquired when the corresponding options or warrants were acquired. Options or warrants that did not permit cashless exercise when issued and were later amended for consideration will be treated the same as the exchanged or converted securities described in the previous paragraph. Tacking on of holding period will not be allowed for options or warrants that are not purchased for cash or property, such as options or warrants from an employee benefit plan, because they do not create the investment risk that would justify tacking.
5. A pledgee of securities may sell the pledged securities without aggregating the sales of the same securities by other pledgees so long as the pledgees are not the same “person” under Rule 144(a)(2) and the pledgees are not acting in concert.
6. Rule 144 is available for the resale of restricted or unrestricted securities that were initially issued by a reporting or non-reporting shell company (other than a business combination related shell company) or an issuer that has been at any time previously a reporting or non-reporting shell company if the following conditions are met:
 - the issuer is no longer a shell company;
 - the issuer is subject to Exchange Act reporting requirements and has made all required Exchange Act filings for the preceding 12 months (or for such shorter period that the issuer was required to make Exchange Act filings), other than Form 8-K reports; and
 - at least one year has elapsed from the time that the issuer initially filed current Form 10 information reflecting its status as an entity that is not a shell company.

In the adopting release, the SEC indicated that a startup company (a company with a limited operating history) would not be deemed a shell company because its operations are not nominal.

7. Security holders relying on Exchange Act Rule 10b5-1(c) in connection with the sale of securities (*e.g.*, sales made pursuant to Rule 10b5-1 compliant trading plan) may modify the Form 144 representation to indicate that the holder had no knowledge of material nonpublic information about the issuer as of the date on which the security holder adopted a written trading plan or gave trading instructions in compliance with Rule 10d5-1(c).

Rule 145 Amendments

The presumptive underwriter provision of Rule 145(c) is eliminated except with respect to Rule 145(a) transactions involving shell companies. Now, other than the issuer, any party to a Rule 145(a) transaction involving a shell company, including affiliates of such a party, will be deemed an underwriter.

Amendments to Harmonize Rule 144 Changes with Other Rules

The SEC amended the Regulation S distribution compliance periods for U.S. reporting issuers to conform to the new Rule 144 holding periods. Securities Act Rule 190 is amended to provide that Rule 144 is available for the sale of securities in a resecuritization if the underlying securities are restricted securities and at least two years have passed since the date the securities were acquired from the issuer or an affiliate of the issuer. The resale restrictions of Securities Act Rule 701 were also conformed to the new provisions of Rule 144.

The full text of SEC Release No. 33-8869 is available at <http://www.sec.gov/rules/final/2007/33-8869.pdf>.

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Appendix

	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 Issuers	<p>During six-month holding period - no resales under Rule 144 permitted.</p> <p>After six-month holding period - 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 requirements for equity securities; and • Filing of Form 144. 	<p>During six-month holding period - no resales under Rule 144 permitted.</p> <p>After six-month holding period but before one year - unlimited public resales under Rule 144 except that the current public information requirement still applies.</p> <p>After one-year holding period - unlimited public resales under Rule 144; need not comply with any other Rule 144 requirements.</p>
Restricted Securities of Non-Reporting Issuers	<p>During six-month holding period - no resales under Rule 144 permitted.</p> <p>After six-month holding period - 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 requirements for equity securities; and • Filing of Form 144. 	<p>During six-month holding period - no resales under Rule 144 permitted.</p> <p>After one-year holding period - unlimited public resales under Rule 144; need not comply with any other Rule 144 requirements.</p>