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SEC Liberalizes Resale Restrictions Under Rules 144 and 145

By Dionne M. Rousseau and Jessica F. Natali

Effective February 15, 2008, the Securities and Exchange Commission (the “SEC”) has adopted amendments to Rules 144 and 145 under the Securities Act of 1933 (the “Act”) in an effort to decrease the cost of capital for public and private issuers by providing additional liquidity to holders of privately sold securities. (Click [here](#) to link to the SEC’s release regarding these amendments). These amendments are applicable to securities acquired before or after February 15, 2008.

These amendments (1) shorten from one year to six months the holding period requirement under Rule 144 for restricted securities of issuers that are subject to the reporting requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934, as long as public information about the issuer is available; (2) eliminate all restrictions applicable to the resale of restricted securities by non-affiliates after one year from the acquisition of the securities; (3) eliminate the manner of sale requirements and amend the volume limitations in connection with the resale of restricted debt securities; (4) increase the Form 144 filing thresholds; and (5) eliminate the “presumptive underwriter” provision in Rule 145 (except for transactions involving shell companies).

Background

Rule 144 provides a safe harbor from registration under the Act for the resale of (1) restricted securities and (2) “control securities,” subject to certain conditions. Generally speaking, restricted securities are securities that have been acquired in transactions exempt from registration under the Act. Control securities are securities held by affiliates of the issuer regardless of whether the affiliate acquired the securities in a registered or exempt transaction. Prior to these amendments, Rule 144 permitted the resale of restricted securities and control securities without registration if the resale complied with the following conditions:

- There was adequate current public information available about the issuer of the securities;
- If the securities being resold were restricted securities, the security holder held the security for one year, regardless of whether the issuer was a public or private issuer;
- The resale was within specified sales volume limitations;
- The resale complied with the manner of sale requirements (that are designed to not disrupt the trading market for the securities by prohibiting the solicitation of orders to buy and the payment of compensation other than customary bro-

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ker's commissions); and

- The selling security holder filed a Form 144 if the amount of securities sold during a three month period exceeded \$10,000 or 500 shares.

Rule 144 permitted a non-affiliate to publicly resell restricted securities without being subject to these limitations after a two-year holding period.

New Six Month Holding Period for Restricted Securities of Public Issuers

The amendments allow non-affiliates (who have also not been an affiliate during the prior three months) to sell an unlimited amount of restricted securities of reporting issuers after a six month holding period, and prior to one year after acquisition of the securities, so long as there is adequate current public information available about the issuer pursuant to Rule 144(c). After one year from acquisition, the securities can be resold free of any restrictions under Rule 144. In addition, affiliates or persons selling on behalf of affiliates may also sell restricted securities of reporting issuers after a six-month holding period, but must do so in accordance with all other Rule 144 requirements, including the condition that current information about the issuer of the securities be publicly available, the limitations on the amount of securities that may be sold in any three-month period, the manner of sale requirements for equity securities, and the Form 144 notice requirement. The SEC did not adopt its proposal to reintroduce to Rule 144 a tolling provision that would have suspended the holding period for restricted securities of reporting issuers while a security holder engaged in certain hedging transactions.

One Year Holding Period for Restricted Securities of Private Issuers

The amendments continue to allow non-affiliates to sell restricted securities of non-reporting issuers after holding the securities for one year. However, after one year, no other restrictions are applicable. Affiliates or persons selling on behalf of affiliates may resell restricted securities of non-reporting issuers after one year, but must do so in accordance with all other Rule 144 requirements, including current public information, volume limitations, manner of sale requirements for equity securities, and the filing of Form 144.

Affiliates Remain Subject to Restrictions When Reselling Equity Securities

After any required holding period if the securities are restricted, affiliates or persons selling on behalf of affiliates remain subject to the requirements of Rule 144 with respect to the resale of equity securities, including the manner of sale requirements. The amendments liberalize the manner of sale requirements by permitting certain risk-less principal transactions, where a broker or dealer, after having received an order from

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a customer, purchases the security as principal in the market to satisfy the order. In addition, brokers will be permitted to insert bid and ask quotations for the security in an alternative trading system under certain conditions.

No Manner of Sale Restrictions and Increased Volume Limitations for Debt Securities

Finding that the manner of sale requirements placed an unnecessary burden on the resale of fixed income securities, the SEC eliminated all manner of sale restrictions related to debt securities, including non-participatory preferred stock and asset-backed securities. In addition, the amendments allow affiliates to resell up to ten percent of a tranche (or class when the securities are non-participatory preferred stock) of debt securities, together with all sales of securities of the same tranche sold for the account of the selling security holder within a three-month period.

New Form 144 Filing Thresholds - \$50,000 or 5,000 Shares

Affiliates are still required to make notice filings on Form 144 in connection with the resale of securities. However, the amendments increase the Form 144 filing dollar threshold to \$50,000 from \$10,000 and the share threshold to 5,000 shares from 500 shares.

[See summary of the amendments to Rule 144 on the following page.]

Summary of Amended Resale Restrictions under Rule 144

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

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Elimination of the Presumptive Underwriter Provision in Rule 145

Rule 145(a) provides that exchanges of securities in connection with certain business combination transactions will be deemed a sale as defined by the Act. As a result, the sale must be registered under the Act unless the sale qualifies for an exemption from registration. Prior to the amendments, Rule 145(c) deemed any party to the transaction (other than the issuer) or an affiliate of such party to be an underwriter with respect to the resale of securities acquired in the transaction, regardless of whether such party was an affiliate of the combined entity subsequent to the transaction. This “presumptive underwriter” provision required such parties to comply with Rule 145(d) in connection with resales of the acquired securities, which imposed restrictions similar to those in Rule 144.

The amendments eliminate the “presumptive underwriter” provision of Rule 145(c), except when a party to the Rule 145(a) transaction is a shell company. Now, former affiliates of an acquired company who are not affiliated with the combined company subsequent to the transaction will no longer be presumed to be an underwriter in connection with the resale of the acquired securities, except when a party to the transaction is a shell company.

Please remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues you may contact the head of our Corporate and Securities practice group:

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