

January 14, 2008

SEC Amends Rules 144 and 145 to Provide Increased Liquidity to Restricted Securityholders

On December 6, 2007, the Securities and Exchange Commission (the "SEC") published Release No. 33-8869, amending Rules 144 and 145 under the Securities Act of 1933, as amended (the "Securities Act") and the Securities Exchange Act of 1934, as amended (the "Exchange Act").

Rules 144 and 145 under the Securities Act provide safe harbors for resales of securities under certain conditions. The amendments improve liquidity for investors who acquire "restricted securities," which are typically securities not acquired in a public offering, by shortening holding periods and easing restrictions on public resales.

The SEC revised the Preliminary Note to both rules explaining that the safe harbors provided are not available with respect to any transaction or series of transactions that, while in technical compliance with the rule, is part of a plan to evade the registration requirements of the Securities Act. The Preliminary Note also clarifies that persons selling restricted securities on behalf of themselves or an affiliate will not be deemed underwriters if the sale is conducted in accordance with Rule 144.

These amendments will become effective on February 15, 2008, and will apply to securities acquired before or after that date.

Reduced Holding Period for Reporting Companies

The amendment to Rule 144 reduces the holding period for restricted securities of a reporting company under Rule 144 from **one year to six months** for both affiliates and non-affiliates, provided that the issuer has been a reporting company for at least 90 days before the sale of the securities. Because this shortened holding period would make hedging transactions significantly easier, the SEC originally proposed to suspend, or toll, the holding period during any period in which the holder engages in certain hedging activities, with a maximum holding period of one year, regardless of any hedging activity. The SEC decided not to adopt the tolling provision amendments due to objections from commentators.

The current one-year holding period continues to apply to non-reporting companies.

Resales by Affiliates under Rule 144

Under the amendment, affiliates of reporting companies are prohibited from resales of securities during the six-month holding period but may resell in accordance with the requirements of Rule 144 after the holding period ends. Resales by affiliates of non-reporting companies are prohibited during the one-year holding period but are allowed in accordance with the Rule 144 requirements after the holding period ends.

Resales by Non-Affiliates under Rule 144

The amended rule permits a person who has not been an affiliate of a reporting company for three months prior to the sale of the securities to resell restricted securities after the six-month holding period,

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subject only to the current public information requirement of Rule 144. After a one-year holding period, those who are non-affiliates (and have not been for three months prior to the sale) may engage in unlimited public resale of restricted securities of both reporting and non-reporting companies under Rule 144.

Amendments of Manner of Sale Requirements

In a Rule 144 sale, securities must be sold in “brokers’ transactions,” with brokers acting as gatekeepers to ensure selling shareholders comply with the requirements of Rule 144.

Equity Securities: The amended Rule 144 permits the resale of equity securities through riskless principal transactions in which trades are executed at the same price. The amended rule also expands the definition of a “brokers’ transaction” for purposes of such resale to clarify that certain postings of bid and ask quotations in alternative trading systems will not be deemed solicitations.

Debt Securities: The SEC believes that the fixed income securities market does not have the same potential for abuse as the equity market and therefore the amendment eliminates the manner of sale limitations for resales of debt securities by affiliates. The SEC has also amended the Rule 144 definition of debt securities to include non-participating preferred stock and asset-backed securities.

The following table summarizes the new resale restrictions:

	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> may resell in accordance with all Rule 144 requirements, including:</p> <ul style="list-style-type: none"> • Current public information; • Volume limitations;(1)¹ • 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 under Rule 144 except that the current public information requirement still applies.</p> <p><u>After one-year holding period:</u> unlimited public resales under Rule 144; 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 six-month holding period:</u> may resell in accordance with all Rule 144</p>	<p><u>During six-month holding period:</u> no resales under Rule 144 permitted.</p> <p><u>After one-year holding period:</u> unlimited public resales under Rule</p>

¹ The number of shares you may sell during any three-month period can’t exceed the greater of 1% of the outstanding shares of the same class being sold, or if the class is listed on a stock exchange or quoted on Nasdaq, the greater of 1% or the average reported weekly trading volume during the four weeks preceeding the filing of Form 144. Over-the-counter stocks, including those quoted on the OTC Bulletin Board and the Pink Sheets, can only be sold using the 1% measurement. 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 for the account of the same selling securityholder within any three-month period.

	requirements including: <ul style="list-style-type: none"> • Current public information; • Volume limitations;⁽¹⁾ • Manner of sale requirements for equity securities; and • Filing of Form 144. 	144; need not comply with any other Rule 144 requirements.
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Form 144 Thresholds and Overlap with Form 4

Finally, the SEC increased the filing thresholds found in Rule 144(h). Currently, a selling securityholder must file Form 144 if the intended sale exceeds 500 shares or \$10,000 within a three-month period. The SEC eliminated the Form 144 filing requirement for non-affiliates and increased the thresholds for affiliates to 5,000 shares or \$50,000.

Because affiliates are often insiders under Section 16 of the Exchange Act, the SEC had solicited comments on how best to coordinate the required content and filing deadlines of Form 144 and Form 4, as well as how to permit persons who are subject to Section 16 of the Exchange Act to satisfy their Rule 144 filing requirement, at their option, by filing a Form 4. The SEC did not adopt amendments to coordinate Form 144 filing requirements with Form 4 filing requirements, but noted that it expects to issue a separate release to provide greater flexibility for affiliates who are subject to both requirements.

Codification of Several Staff Positions

The SEC also codified various staff positions issued by the Division of Corporation Finance, as follows:

1. Securities acquired from the issuer pursuant to an exemption from registration under Section 4(6) of the Securities Act are “restricted securities” under Rule 144.
2. In transactions made solely to form a holding company, holders may tack the period the securities are held before the transaction provided that the following conditions are met:
 - a. The newly formed holding company’s securities were issued solely in exchange for the securities of the predecessor company as part of a reorganization into a holding company structure;
 - b. Securityholders receive securities of the same class evidencing the same proportional interest in the holding company with substantially the same rights as the predecessor company securities; and
 - c. Immediately following the transaction, the holding company has no significant assets other than securities of the predecessor.
3. If securities sold were acquired from the issuer solely in exchange for other securities of the same issuer, the newly acquired securities will be deemed to have been acquired at the same time as the securities surrendered for conversion or exchange, even if the securities surrendered were not convertible or exchangeable by their terms. The newly acquired securities will be deemed to have been acquired on the date that the original securities were so amended if the original securities do not permit cashless conversion or exchange by their terms, the parties amend the securities to provide for cashless conversion, and the securityholder provides consideration other than securities of the issuer for the amendment.

4. Upon a cashless exercise of options or warrants, the newly acquired underlying securities will be deemed to have been acquired when the corresponding options or warrants were acquired, even if the options or warrants originally did not provide for cashless exercise by their terms. If the original options or warrants do not permit cashless exercise by their terms and the holder provides consideration, other than solely securities of the issuer, to amend the options or warrants to allow for cashless exercise, then the amended options or warrants will be deemed to have been acquired on the date that the original options or warrants were so amended. This provision does not apply to certain options or warrants that are not purchased for cash or property (e.g., employee stock options).
5. A pledgee of securities may sell the pledged securities without having to aggregate the sale with that of other pledgees of the same securities from the same pledgor, as long as the pledgees are not acting in concert.
6. Rule 144 is not available for resales by companies that are, or previously were, “shell companies” (including blank check companies) until:
 - a. The issuer has ceased to be a shell company;
 - b. The issuer is subject to the reporting requirements of the Exchange Act;
 - c. The issuer has filed all reports during the preceding 12 months; and
 - d. At least one year has passed since the issuer filed a notification with the SEC that it is not a shell company.

The definition of “shell company” for this purpose would be expanded from the definition in Rule 405, since it would apply to any “issuer” rather than any “registrant.”

7. A selling securityholder who satisfies Rule 10b5-1(c) may modify the Form 144 representation 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. The securityholder must specify that date and indicate that the representation speaks as of that date.

Amendments to Rule 145

Rule 145 under the Securities Act currently provides that exchanges of securities in connection with a reclassification, merger, consolidation or transfer of assets subject to a shareholder vote constitute sales of those securities and deem persons party to such transactions (other than the issuer and their affiliates) to be underwriters. Resales by these presumed underwriters are restricted under Rule 145(d). The SEC eliminated the presumptive underwriter provision in Rule 145(c), except for Rule 145(a) transactions involving shell companies (other than a business-combination-related shell company). Amended Rule 145(c) now provides that any party, other than the issuer, to a Rule 145(a) transaction involving a shell company (other than a business-combination-related shell company), including any affiliate of such party, who publicly offers or sells securities of the issuer acquired in connection with the transaction, will continue to be deemed an underwriter.

Text of Releases

The final rule release may be found on the SEC's website by clicking [here](#). The items summarized above are only a few of the specific issues addressed by the release. We urge you to read the release in its entirety and contact any of the individuals listed below if you have questions on any of the items.



This legal alert was prepared by Sutherland Asbill and Brennan LLP's Securities/ Corporate Governance practice group. If you have any questions or would like additional information, please contact the Sutherland attorney with whom you work.

The attorneys in Sutherland's Securities/Corporate Governance Group are listed below.

Washington DC

Steven B. Boehm	202.383.0176	steven.boehm@sablaw.com
James M. Cain	202.383.0180	james.cain@sablaw.com
Cynthia M. Krus	202.383.0218	cynthia.krus@sablaw.com
Harry S. Pangas	202.383.0805	harry.pangas@sablaw.com
Douglas J. Leary	202.383.0703	doug.leary@sablaw.com
John J. Mahon	202.383.0515	john.mahon@sablaw.com
Lisa A. Morgan	202.383.0523	lisa.morgan@sablaw.com
Owen J. Pinkerton	202.383.0254	owen.pinkerton@sablaw.com
Hannah L. Friedberg	202.383.0121	hannah.friedberg@sablaw.com
Anne W. Gray	202.383.0966	anne.gray@sablaw.com
Payam Siadatpour	202.383.0278	payam.siadatpour@sablaw.com
Maeve M. Ulrick	202.383.0915	maeve.ulrick@sablaw.com

Atlanta

James L. Henderson	404.853.8086	jim.henderson@sablaw.com
George L. Cohen	404.853.8035	george.cohen@sablaw.com
Charles D. Ganz	404.853.8125	charles.ganz@sablaw.com

SUTHERLAND

Thomas C. Herman	404.853.8089	tom.herman@sablaw.com
Mark D. Kaufman	404.853.8107	mark.kaufman@sablaw.com
Robert J. Pile	404.853.8487	robert.pile@sablaw.com
Herbert J. Short, Jr.	404.853.8491	herbert.short@sablaw.com
Brian M. Murphy	404.853.8178	brian.murphy@sablaw.com

New York

Robert E. Copps	212.389.5045	robert.copps@sablaw.com
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