

## The SEC Adopts Significant Amendments to Rules 144 and 145 under the Securities Act of 1933

November 19, 2007

On November 15, 2007, in an open meeting the Securities and Exchange Commission (the "SEC") adopted<sup>1</sup>, with some important revisions, substantially all the proposed amendments<sup>2</sup> (the "Amendments") to Rules 144 and 145 under the Securities Act of 1933 (the "Securities Act"). The Amendments, among other things, significantly shorten the holding period applicable to affiliates and non-affiliates that seek to resell restricted securities of reporting companies pursuant to Rule 144 and substantially reduce the other Rule 144 requirements applicable to resales by non-affiliates. The SEC believes these amendments will increase the liquidity of privately sold securities and decrease the cost of capital for all companies without compromising investor protection. The Amendments will be effective 60 days after their publication in the Federal Register.

The Amendments include the following important changes to Rules 144 and 145:

- For resales under Rule 144 of restricted securities of reporting companies,<sup>3</sup> after a six-month holding period (previously one year), *affiliates* may resell if the Rule 144 conditions relating to current public information, volume limitations, manner of sale (for equity securities only)<sup>4</sup> and Form 144 notices are satisfied, and *non-affiliates* may resell if the current public information condition is satisfied. After one year, *non-affiliates* may resell under Rule 144 without any restrictions.
  - The SEC did not adopt a proposed "tolling" provision that, in connection with resales of restricted securities of reporting companies, would have required any affiliate or non-affiliate engaged in certain hedging activities during the six-month

<sup>1</sup> See SEC press release at <http://www.sec.gov/news/press/2007/2007-233.htm>. The final adopting release is not available but is expected to be released by the SEC soon.

<sup>2</sup> See Securities Act Proposing Release No. 33-8813 (June 22, 2007), 72 FR 36822, <http://www.sec.gov/rules/proposed/2007/33-8813fr.pdf> (July 5, 2007).

<sup>3</sup> A reporting company is an issuer that is, and has been for at least 90 days before the sale, subject to the reporting requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934 (the "Exchange Act").

<sup>4</sup> The Amendments have eliminated the manner of sale requirements of Rule 144(f) with respect to debt securities, non-participating preferred stock and asset-backed securities. The SEC's press release referred to above also indicates the manner of sale requirements for sales of equity securities by affiliates will be "revised," although the SEC gave no details to such revision. The final adopting release should contain those details.

holding period to toll, or extend, its holding period up to an additional six months for the amount of time during which the hedging activities continued. The SEC stated that it was convinced by the numerous comments to the proposing release that the difficult and costly operational problems in tracking complex hedging transactions would frustrate the benefits sought to be achieved by the shortened six-month holding period, and that there was an absence of sufficient evidence that hedging activities resulted in the prohibited "distribution" of securities under Rule 144.

- For resales under Rule 144 of restricted securities of non-reporting companies, after a one-year holding period (previously one year as well), *affiliates* may resell if the Rule 144 conditions relating to current public information, volume limitations, manner of sale (for equity securities only) and Form 144 notices are satisfied, and *non-affiliates* may resell under Rule 144 without any restrictions.
- The thresholds that require filing a Form 144 notice by affiliates have been increased from 500 shares or \$10,000 to 5,000 shares or \$50,000. The Form 144 notice requirement has been eliminated for non-affiliates.
- The manner of sale limitations under Rule 144 have been eliminated with respect to debt securities, non-participating preferred stock and asset-backed securities.
- Several positions on Rule 144 of the SEC Staff have been codified.
- The presumptive underwriter provision in Rule 145 has been eliminated, except for transactions involving a blank check or shell company. The resale provisions of Rule 145(d) have been revised.

At the open meeting, the SEC stated that it had received numerous comments in response to its question on how best to harmonize the filing requirements of Form 144 and Form 4 by any affiliate who wishes to rely on Rule 144 and is also subject to the filing requirements under Section 16 of Exchange Act.<sup>5</sup> The SEC stated that while it agrees that such harmonization is

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<sup>5</sup> The Form 144 is required to be filed by affiliates concurrently with either placing with a broker an order to execute a sale of securities in reliance upon Rule 144 or the execution directly with a market maker of such a sale. Because the Form 4 filing deadline is two business days after the transaction is executed, affiliates selling securities under Rule 144 often are required to file a Form 4 just a few days after they file a Form 144 to report information regarding the same sale of securities.

essential, because of lack of time to address the substantial logistical changes required, including technical changes to the EDGAR filing system, it was not adopting any amendments in this regard at this time. However, the SEC stated that it intends to propose amendments in the near future to coordinate the filing of Form 144 and Form 4 by affiliates.

A chart summarizing the revised holding periods and the other applicable requirements under Rule 144 for affiliates and non-affiliates is attached hereto as Annex A.

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Questions concerning the matters discussed above may be directed to any of the attorneys listed below or to any Dewey & LeBoeuf LLP attorney with whom you regularly consult.

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ANNEX A

Affiliate or Person Selling on Behalf of an Affiliate

	Holding Period 144(d)	Current Public Information 144(c)	Volume Limitations 144(e)	Manner of Sale Requirements 144(f)	Filing of Form 144 144(h)
<i>Restricted Securities of Reporting Companies</i>	<i>First six (6) months</i>  • No resales permitted	---	---	---	---
	<i>After initial six (6) months</i>  • Limited resales permitted	Comply	Comply	Comply	Comply
<i>Restricted Securities of Non-Reporting Companies</i>	<i>First twelve (12) months</i>  • No resales permitted	---	---	---	---
	<i>After initial twelve (12) months</i>  • Limited resales permitted	Comply	Comply	Comply	Comply

**Non-Affiliate (and Has Not Been an Affiliate During the Prior Three Months)**

	<b>Holding Period 144(d)</b>	<b>Current Public Information 144(c)</b>	<b>Volume Limitations 144(e)</b>	<b>Manner of Sale Requirements 144(f)</b>	<b>Filing of Form 144 144(h)</b>
<b><i>Restricted Securities of Reporting Companies</i></b>	<i>First six (6) months</i> <ul style="list-style-type: none"><li>No resales permitted</li></ul>	---	---	---	---
	<i>After initial six (6) months</i> <ul style="list-style-type: none"><li>Unlimited resales permitted</li></ul>	Comply	Need not comply	Need not comply	Need not comply
	<i>After initial twelve (12) months</i> <ul style="list-style-type: none"><li>Unlimited resales permitted</li></ul>	Need not comply	Need not comply	Need not comply	Need not comply
<b><i>Restricted Securities of Non-Reporting Companies</i></b>	<i>First twelve (12) months</i> <ul style="list-style-type: none"><li>No resales permitted</li></ul>	---	---	---	---
	<i>After initial twelve (12) months</i> <ul style="list-style-type: none"><li>Unlimited resales permitted</li></ul>	Need not comply	Need not comply	Need not comply	Need not comply