

**SEC PROPOSES LIBERALIZATION OF REALES OF RESTRICTED
SECURITIES UNDER RULES 144 AND 145**

The Securities and Exchange Commission recently proposed amendments shortening the holding periods and easing other requirements of Rules 144 and 145 under the Securities Act of 1933.¹ Rule 144 provides a safe harbor from registration for the resale of “restricted” securities and resales of securities by an issuer’s affiliates, frequently referred to as “control” securities.² Rule 145 establishes limitations on the resale of securities acquired by certain persons in business combination transactions.

Summary

If adopted in the form proposed, the amendments to Rule 144 would:

- for affiliates, shorten from one year to six months the holding period for limited resales of restricted securities of companies that file reports under the Securities Exchange Act of 1934 (“Reporting Companies”);³
- for non-affiliates, permit unrestricted resales as soon as six months following the purchase of securities of Reporting Companies, provided that resales within a year of such purchase would be subject to a current public information requirement. The holding period for unlimited sales by non-affiliates would be reduced to one year for non-Reporting Companies;
- for both affiliates and non-affiliates, toll the holding period for up to an additional six months if the security holder has engaged in certain transactions to “hedge” the market risk of its restricted security holding;
- raise the thresholds that trigger Form 144 filing requirements for affiliates and eliminate such requirements entirely for non-affiliates;
- eliminate the manner of sale limitations with respect to resales of debt securities by affiliates and entirely for non-affiliates; and

¹ See Securities Act Release No. 8813, File No. S7-11-07 (June 22, 2007), available at: www.sec.gov/rules/proposed.shtml.

² Restricted securities are securities acquired in private placements and certain other offerings exempt from registration under the Securities Act. See Rule 144(a)(3). Securities held by an affiliate are control securities regardless of how the affiliate acquired the securities.

³ For purposes of the proposed new rules, a Reporting Company would be an issuer that has been, for at least 90 days immediately prior to the sale, subject to the reporting requirements of Exchange Act Section 13 or 15(d). Securities of companies that are not Reporting Companies would continue to be subject to a one-year holding period before any public sale.

- codify certain SEC staff interpretations relating to Rule 144.

If adopted in the form proposed, the amendments to Rule 145 would:

- eliminate the “presumptive” underwriter provision in connection with business combination transactions, except with respect to transactions involving “blank check” or “shell” companies; and
- revise the resale provisions of Rule 145(d) to conform them to the proposed amendments to Rule 144.

Appendix I provides a comparison of the current versus the proposed regulations.

Background

Securities Act Section 4(1) exempts from the Securities Act registration requirement transactions by any person other than an issuer, underwriter or dealer. Securities Act Section 2(a)(11) defines an underwriter as “any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking.” This broad definition makes it difficult to establish when the resale of a security would be permitted under Section 4(1).

Rule 144 provides a safe harbor from this definition of “underwriter” to help security holders determine whether the Section 4(1) exemption is available for their resales of securities. A security holder (other than the issuer or a dealer) that satisfies Rule 144’s conditions in connection with a sale of securities is deemed not to be an “underwriter,” and, accordingly, the Section 4(1) exemption is available for the transaction.

Rule 144 Changes

Non-Affiliate Sales of Restricted Securities. The SEC proposes to substantially ease compliance with Rule 144 by non-affiliates.

- *Existing Rule 144.* Under the existing rule, a non-affiliate may sell restricted securities of a company that satisfies the current public information requirements if the non-affiliate has held the securities for one year and makes the sales in compliance with the manner of sale, volume limitations and Form 144 reporting conditions of Rule 144. A person who has not been an affiliate of the issuer for at least three months and has held restricted securities for two years may sell the securities without any limitation, regardless of whether the issuer satisfies the current public information requirements. In either case, in satisfying the one- and two-year holding periods, non-affiliates may “tack” their own holding periods to those of other non-affiliates from whom they have bought the restricted securities. Tacking is not allowed, however, in the case of a purchase from an affiliate; such a purchase starts new one- and two-year holding periods.

- *Proposed Amendments.* Under the proposed amendments, a person who has not been an affiliate of the issuer for three months and holds restricted securities of a Reporting Company current in its SEC filings may resell the securities without any restriction after satisfying a six-month holding period (subject to a new tolling provision if the security holder has hedged his position). If such non-affiliate has held restricted securities for at least one year, he may resell the securities without restriction regardless of whether the issuer is a Reporting Company and of whether there is current public information. Tacking onto holding periods by non-affiliates would continue to be allowed in each case.

Sales of Restricted Securities by Affiliates. The SEC also proposes to ease compliance with Rule 144 for affiliates.

- *Existing Rule 144.* Currently, an affiliate selling under Rule 144 must have held the restricted securities for one year and must make sales in compliance with the current public information, manner of sale, volume limitations and Form 144 reporting requirements. An affiliate holding securities that are not restricted (*e.g.*, securities it has bought in the open market) may sell the securities under Rule 144 without any holding period, but must comply with the current public information, manner of sale, volume limitations and Form 144 reporting requirements.
- *Proposed Amendments.* For affiliates that comply with the current public information, manner of sale, volume limitations and reporting requirements, the SEC would (i) reduce the holding period for resales of restricted securities of Reporting Companies from one year to six months, with a provision to increase the holding period to a maximum of one year when engaged in certain hedging transactions; and (ii) for restricted securities of a company that is not a Reporting Company,⁴ allow sales by affiliates after a one-year holding period. The SEC would eliminate the manner of sale limitations for debt securities for sales by affiliates.

Hedging Transactions. Because of the reduced holding periods under the proposed amendments, a security holder's ability to shift his economic risk of investment through hedging activities would be made easier. Accordingly, to help ensure that the security was held for investment purposes and not with a view to distribution, the SEC would toll the holding period, for both affiliates and non-affiliates, for up to an additional six months if the security holder has engaged in certain transactions to "hedge" the market risk of its restricted security holding, a restriction not imposed under the current regulations.⁵ The holding period would be capped at a

⁴ A company that is not a Reporting Company would be able to meet the current public information test by complying with (i) the information requirements in Exchange Act Rule 15c2-11, which regulates market makers and requires that they maintain current information about the companies in whose shares they make a market, or (ii) in the case of insurance companies, providing the information specified in Exchange Act Section 12(g)(2)(G)(i).

⁵ The SEC proposes in new paragraph (d)(3)(xi) of Rule 144 to exclude from the requisite holding period any period in which the security holder had a short position, or had entered into a "put equivalent position," as

maximum of one year. Information regarding hedging transactions would have to be disclosed in a Form 144 filing.

The effect of the tolling provision for hedging, however, would require a person seeking to tack its holding period to that of the person from whom it bought the securities to determine whether the previous owner had hedged its position during the holding period unless the current seller “reasonably believes” the former owner had not hedged its position.

Filing Form 144. Currently, the filing threshold for Form 144 is the lesser of 500 shares or \$10,000. The proposed amendments would eliminate Form 144 reporting entirely for non-affiliates and for affiliates would raise the threshold to the lesser of 1,000 shares or \$50,000. To further simplify the filing requirements, the SEC is proposing to permit affiliates who are required to file Forms 4 to elect to satisfy their Form 144 filing requirement by timely filing a Form 4 and to revise the Form 144 filing deadline to coincide with the later filing deadline for Form 4. Changes to Form 4 would have to incorporate the disclosure requirements imposed by Form 144.

Other Proposed Changes. As part of the release, the SEC proposes to simplify the Preliminary Note and text of Rule 144 and to codify certain SEC staff interpretations relating to Rule 144, including interpretations regarding the creation of a holding company structure, holding periods for conversions and exchanges, and holding periods for the cashless exercise of options and warrants.⁶ The proposing release also solicits comment on whether the SEC should revise Item 701 of Regulation S-K to require disclosure in registration statements and periodic reports regarding the resale status of securities issued in unregistered transactions at the time the company first issues the securities.

Rule 145 Changes

The SEC also proposes to modify the “presumptive underwriter” provision in Rule 145(c), which currently deems persons that are parties to reclassifications, mergers, consolidations or transfers of assets that are subject to a shareholder vote to be underwriters, thereby requiring such persons to register their resales of securities acquired in the transaction or otherwise sell such securities in a transaction exempt from registration. The proposed amendments would generally eliminate this provision, except for such transactions involving a shell company, other than a business combination related shell company, as those terms are defined in Rule 405 under Securities Act Regulation C. Any party to such a transaction

defined by Exchange Act Rule 16a-1(h), with respect to the same class of securities (or in the case of nonconvertible debt, with respect to any nonconvertible debt securities of the same issuer). Rule 16a-1(h) defines a “put equivalent position” as a derivative security position that increases in value as the value of the underlying equity decreases, including, but not limited to, a long put option and a short call option position.

⁶ See, for example, the recent SEC Compliance and Disclosure Interpretations regarding Rule 144 available at <http://www.sec.gov/divisions/corpfin/guidance/rule144interp.htm>.

involving a shell company, other than the issuer, or any person who is an affiliate of such party at the time such transaction is submitted for vote or consent, who publicly offers or sells securities of the issuer acquired in connection with any such transaction would be deemed to be an underwriter.

Under the current rule, persons presumed underwriters under Rule 145 are permitted to resell their securities under Rule 145(d). The SEC would harmonize the resale restrictions in Rule 145(d) with the resale restrictions for securities of shell companies as proposed in Rule 144.⁷

Comments Requested

The deadline for commenting on these proposals is September 4, 2007.

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⁷ The SEC proposes to add a new paragraph (i) to Rule 144 to make the rule's safe harbor unavailable for resales of securities of certain shell companies, other than business combination related shell companies.

Appendix I

Comparison of Current vs. Proposed Regulations

	<u>Current Regulations</u>	<u>Proposed Amendments</u>
Non-Affiliate	<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 limitations, and ● Filing of Form 144. <p>- Unlimited resales after holding restricted securities for <u>two years</u> if they have not been affiliates during the prior three months.</p> <p>No tolling of holding period as a result of hedging transactions.</p>	<p>Reporting Companies. <u>During six-month holding period*</u> - no resales under Rule 144 permitted.</p> <p><u>After six-month holding period*</u> but before one year - may resell in accordance with the current public information requirement.</p> <p><u>After one year</u> - unlimited public resale under Rule 144; need not comply with other Rule 144 requirements. Tolling provision does not apply.</p> <p>Non-Reporting Companies. <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 under Rule 144; need not comply with other Rule 144 requirements. Tolling provision does not apply.</p>
Affiliate or Person Selling on Behalf of an Affiliate	<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 limitations, and ● Filing of Form 144. <p>No tolling of holding period as a result of hedging transactions.</p>	<p>Reporting Companies. <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, ● Manner of sale limitations for equity securities, and ● Filing of Form 144. <p>Non-Reporting Companies. <u>During one-year holding period</u> - no resales under Rule 144 permitted.</p>

	<u>Current Regulations</u>	<u>Proposed Amendments</u>
		<p><u>After one-year holding period</u> - may resell in accordance with all Rule 144 requirements except holding period, including:</p> <ul style="list-style-type: none"> ● Current public information, ● Volume limitations, ● Manner of sale limitations for equity securities, and ● Filing of Form 144. <p>Tolling provision does not apply.</p>
		* Specific provision tolling the holding period could make it longer when engaged in certain hedging transactions. Maximum one-year holding period.
Manner of Sale Restrictions	Apply to resale of any type of security under Rule 144.	Would not apply to resale of debt securities by affiliates or to any resale by non-affiliates.
Form 144	Filing threshold at the <i>lesser</i> of 500 shares or \$10,000.	With respect to affiliates, filing threshold at the <i>lesser</i> of 1,000 shares or \$50,000. Option to satisfy filing requirement through Form 4 filing. No Form 144 filing required for non-affiliates.
Rule 145	Presumptive underwriter provision applies to all Rule 145(a) transactions.	Presumptive underwriter provision applies only to Rule 145(a) transactions involving shell companies, with revised resale requirements in Rule 145(d) to conform to Rule 144 amendments.