

**SEC EASES REQUIREMENTS OF RULES 144 AND 145  
REGARDING REALES OF RESTRICTED AND CONTROL SECURITIES**

The Securities and Exchange Commission recently issued final rules shortening the holding periods and easing other requirements of Rules 144 and 145 under the Securities Act of 1933.<sup>1</sup> Rule 144 provides a safe harbor from registration for resales of “restricted” securities and resales of securities by an issuer’s affiliates, frequently referred to as “control” securities.<sup>2</sup> Rule 145 establishes limitations on the resale of securities acquired by certain persons in business combination transactions.

**Summary**

The amendments were adopted substantially as proposed. A controversial proposal to toll the holding periods for certain hedging activities was eliminated in the final rules (although the SEC will continue to monitor the situation). The final rules also expand the types of sales that qualify under the manner of sale requirements applicable to affiliates and increase the volume limitations for sales of debt securities by affiliates. Appendix I provides a comparison of the current versus the new regulations.

The amendments to Rule 144:

- 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”);<sup>3</sup>
- 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 are subject to the current public information requirement. The holding period for unlimited sales by non-affiliates is reduced to one year for non-reporting companies;

---

<sup>1</sup> See Securities Act Release No. 8869, File No. S7-11-07 (December 6, 2007), available at [www.sec.gov/rules/final/2007/33-8869.pdf](http://www.sec.gov/rules/final/2007/33-8869.pdf).

<sup>2</sup> 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.

<sup>3</sup> For purposes of the new rules, a reporting company is an issuer that has been, for at least 90 days immediately prior to the Rule 144 sale, subject to the reporting requirements of Exchange Act Section 13 or 15(d). Securities of companies that are not reporting companies continue to be subject to a one-year holding period before any public sale.

- 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;
- expand the types of sales that qualify under the manner of sale requirements applicable to affiliates;
- increase the volume limitations for sales of debt securities by affiliates; and
- codify certain SEC staff interpretations relating to Rule 144.

The final rules similarly reduce the distribution compliance period in Rule 903(b)(iii) for Category 3 issuers (U.S. reporting companies) under Regulation S from one year to six months.

The amendments to Rule 145:

- 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 to the amendments to Rule 144.

We expect that the final rules will become effective in mid-February 2008, 60 days after they are published in the Federal Register. The revised holding periods and other amendments will apply retroactively to securities acquired before the effective date of the final 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 is 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 changes will 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 limitation 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.
- *Amendments.* Under the 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. 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 will continue to be allowed in each case.

*Sales of Restricted Securities by Affiliates.* The rules also 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 limitation 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 limitation and Form 144 reporting requirements.
- *Amendments.*
  - *Holding Periods.* For affiliates that comply with the current public information, manner of sale, volume limitation and reporting requirements, the rules (i) reduce the holding period for resales of restricted securities of reporting companies from

one year to six months; and (ii) for restricted securities of a company that is not a reporting company,<sup>4</sup> allow sales by affiliates after a one-year holding period.

- *Manner of Sale.* The rules eliminate the manner of sale limitations for debt securities (including non-participatory preferred stock). Resales of equity securities that comply with the manner of sale limitations have been expanded to include “riskless principal transactions” in which trades are executed at the same price, and the rules clarify that the posting of bid and ask quotations in alternative trading systems will not be deemed a solicitation in violation of the “brokers’ transaction” definition.<sup>5</sup>
- *Volume Limitations for Debt Securities.* In response to a request for comment in the proposing release, the final rules adopt a more flexible volume limitation for sales of debt securities. New Rule 144(e) permits the resale of debt securities of any tranche or class in any three-month period in an amount that does not exceed 10% of the tranche or class.

*Filing Form 144.* Currently, the filing threshold for Form 144 is the lesser of 500 shares or \$10,000. The amendments eliminate Form 144 reporting entirely for non-affiliates and for affiliates raise the threshold to the lesser of 5,000 shares (increased from 1,000 shares in the proposal) or \$50,000. The rules amend Form 144 so that the representation made by sellers who have adopted Rule 10b5-1(c) plans regarding “no nonpublic material adverse information” is made as of the date of the adoption of the plan (rather than the date of the filing of the Form 144), as previously permitted by the SEC staff. The final rules do not combine Forms 4 and 144, as proposed; instead, the SEC states that it expects to issue a separate release in the future to address these filing requirements.

*Other Changes.* The rules simplify the Preliminary Note and text of Rule 144 and 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. The rules also now prohibit reliance on Rule 144 for resales of securities of a “reporting or non-reporting shell company” (other than a business combination-related shell company) or a former shell company, unless the former shell company meets certain conditions. The final rules conform the distribution compliance period in Rule 903(b)(iii) for Category 3 issuers (U.S. reporting companies) under Regulation S to the

---

<sup>4</sup> A company that is not a reporting company is able to meet the current public information test (i) by complying with 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).

<sup>5</sup> To qualify under this prong of the definition of brokers’ transaction, the broker must have published *bona fide* bid and ask quotations for the security in the alternative trading system on each of the last 12 business days.

changes in the Rule 144 initial holding period prohibiting resales, similarly reducing such distribution compliance period from one year to six months.

***Practice Notes:***

- The SEC stated, in adopting these rules, that it expects the eased requirements under the new rules to provide greater liquidity for holders of restricted and control securities and thereby provide issuers with greater financing flexibility. Parties should take this increased flexibility into consideration when negotiating registration rights and related terms.
- Persons should review existing registration rights agreements that contemplate future reductions in holding periods under the rules by excluding from the definition of registrable securities shares that are eligible for resale under Rule 144(k) or comparable provisions. Any outstanding resale registration statements that are no longer required should be withdrawn.
- With the significantly reduced holding periods for non-affiliates, we expect the need for registered exchange offers and resale registration statements in connection with offerings by companies under Rule 144A to be reduced, as these offerings already contemplate the securities remaining restricted for periods of up to a year before penalties kick in. It remains to be seen how the market will react to these new provisions.

**Rule 145 Changes**

The rules 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 amendments 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 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 is deemed to be an underwriter.

Under the current rule, persons presumed to be underwriters under Rule 145 are permitted to resell their securities under Rule 145(d). The rules harmonize the resale restrictions in Rule 145(d) with the resale restrictions for securities of shell companies in the Rule 144 amendments.

\* \* \* \* \*

If you have any questions regarding this memorandum, please contact Roger D. Blanc (212-728-8206, [rblanc@willkie.com](mailto:rblanc@willkie.com)), Jeffrey S. Hochman (212-728-8592, [jhochman@willkie.com](mailto:jhochman@willkie.com)), Martin R. Miller (212-728-8690, [mmiller@willkie.com](mailto:mmiller@willkie.com)), Larry E. Bergmann (202-303-1103, [lbergmann@willkie.com](mailto:lbergmann@willkie.com)) or the attorney with whom you regularly work.

Willkie Farr & Gallagher LLP is headquartered at 787 Seventh Avenue, New York, NY 10019-6099 and has an office located at 1875 K Street, NW, Washington, DC 20006-1238. Our New York telephone number is (212) 728-8000 and our facsimile number is (212) 728-8111. Our Washington, DC telephone number is (202) 303-1000 and our facsimile number is (202) 303-2000. Our website is located at [www.willkie.com](http://www.willkie.com).

December 12, 2007

Copyright © 2007 by Willkie Farr & Gallagher LLP.

All Rights Reserved. This memorandum may not be reproduced or disseminated in any form without the express permission of Willkie Farr & Gallagher LLP. This memorandum is provided for news and information purposes only and does not constitute legal advice or an invitation to an attorney-client relationship. While every effort has been made to ensure the accuracy of the information contained herein, Willkie Farr & Gallagher LLP does not guarantee such accuracy and cannot be held liable for any errors in or any reliance upon this information. Under New York's Code of Professional Responsibility, this material may constitute attorney advertising. Prior results do not guarantee a similar outcome.

Appendix I

Comparison of Current vs. New Regulations

	<u>Current Regulations</u>	<u>Amendments</u>
<p><b>Non-Affiliate (and has not been an Affiliate for three months)</b></p>	<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"> <li>● Current public information,</li> <li>● Volume limitations,</li> <li>● Manner of sale limitations, and</li> <li>● Filing of Form 144.</li> </ul> <p>- Unlimited resales after holding restricted securities for <u>two years</u> if not an affiliate during the prior three months.</p>	<p><b>Reporting companies:</b> <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, subject to the current public information requirement.</p> <p><u>After one-year holding period</u> - unlimited public resales under Rule 144; need not comply with other Rule 144 requirements.</p> <p><b>Non-reporting companies:</b> <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.</p>
<p><b>Affiliate or Person Selling on Behalf of an Affiliate</b></p>	<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"> <li>● Current public information,</li> <li>● Volume limitations,</li> <li>● Manner of sale limitations, and</li> <li>● Filing of Form 144.</li> </ul>	<p><b>Reporting companies:</b> <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"> <li>● Current public information,</li> <li>● Volume limitations,</li> <li>● Manner of sale limitations for equity securities, and</li> <li>● Filing of Form 144.</li> </ul> <p><b>Non-reporting companies:</b> <u>During one-year holding period</u> - no resales under Rule 144 permitted.</p>

	<u>Current Regulations</u>	<u>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"> <li>● Current public information,</li> <li>● Volume limitations,</li> <li>● Manner of sale limitations for equity securities, and</li> <li>● Filing of Form 144.</li> </ul>
<b>Manner of Sale Restrictions</b>	Apply to resales of any type of security under Rule 144 (other than resales by non-affiliates after two-year holding period).	<p>Do not apply to resales of debt securities by affiliates or to any resales by non-affiliates.</p> <p>Permit riskless principal transactions and brokers' transactions involving bid and ask quotations on alternative trading systems.</p>
<b>Volume Limitations</b>	Restrict resales (other than resales by non-affiliates after two-year holding period) during any three-month period to the greater of (i) 1% of the class outstanding and (ii) the average weekly trading volume in such securities.	<p>Current limitations retained for equity securities; for debt securities, rules permit resales in any three-month period in an amount that does not exceed 10% of the tranche or class.</p> <p>Do not apply to any resales by non-affiliates.</p>
<b>Form 144</b>	Filing threshold at the <i>lesser</i> of 500 shares or \$10,000.	<p>With respect to affiliates, filing threshold at the <i>lesser</i> of 5,000 shares or \$50,000.</p> <p>No Form 144 filing required for non-affiliates.</p>
<b>Rule 145</b>	Presumptive underwriter provision applies to all Rule 145(a) transactions.	Presumptive underwriter provision applies <i>only</i> to Rule 145(a) transactions involving shell companies, with the revised resale requirements in Rule 145(d) conformed to the Rule 144 amendments.