

January 28, 2008

Corporate and Securities Update:

SEC Adopts Amendments to Rule 144 and Rule 145

The Securities and Exchange Commission has adopted significant amendments to Rule 144 and Rule 145 under the Securities Act of 1933, which become effective on February 15, 2008. The most important of these changes substantially shortens the holding period after which a non-affiliate may resell restricted securities without complying with the requirements of Rule 144. The SEC's adopting release (33-8869) is available at <http://www.sec.gov/rules/final/2007/33-8869.pdf>.

Background. Rule 144 provides a non-exclusive safe harbor exemption from the registration requirements of the Securities Act for the sale of two types of securities: "control securities" and "restricted securities." Control securities are securities owned by affiliates of the issuer, including directors, executive officers and certain substantial stockholders. Restricted securities are securities that have been acquired, directly or indirectly, from the issuer or an affiliate of the issuer in a transaction not involving a public offering. Rule 144 operates by setting forth conditions under which a selling security holder will not be deemed an underwriter, and therefore entitled to rely on the exemption from registration under the Securities Act for transactions "by any person other than an issuer, underwriter or dealer." The conditions involve the availability of issuer current public information, restrictions on the manner of sale, volume limitations, Form 144 filings, and, in the case of restricted securities, a holding period. Under Rule 144(k), a person who is not, and for at least three months before the sale was not, an affiliate of the issuer may sell restricted securities after holding them for a specified period without complying with any of the other conditions. In the past, the minimum holding period under Rule 144 was one year, and the holding period under Rule 144(k) was two years.

Rule 145 generally provides that the issuance of securities in a business combination transaction is a sale that must comply with the registration requirements of the Securities Act or be exempt from registration, but in the past it also set forth a "presumptive underwriter doctrine" treating every affiliate of any party to a business combination transaction as an underwriter with respect to the securities he or she acquired in the business combination. As a result of this doctrine, an affiliate's resale of securities received in the business combination transaction was subject to the registration requirements of the Securities Act, unless he or she sold in accordance with certain provisions of Rule 144.

Amendments. The amendments to Rule 144:

- Shorten to six months the holding period for restricted securities of issuers that have been subject to the reporting requirements of the Securities Exchange Act of 1934 for at least 90 days;
- Allow a non-affiliate, who has not been an affiliate within the past three months, to resell restricted securities without complying with any other requirements of Rule 144:
 - after the six-month holding period, if there is current public information about the issuer and the issuer is a reporting company; and
 - after a one-year holding period, if there is not current public information or in the case of a non-reporting issuer;
- Eliminate the volume limitations, manner of sale restrictions and Form 144 requirement for any resale of reporting company securities by non-affiliates;

- Eliminate the manner of sale restrictions for any resales of debt securities;
- Increase the volume limitations for any resales of debt securities; and
- Increase the sales thresholds triggering a Form 144 filing to 5,000 shares or \$50,000 within a three-month period.

Rule 145 has been amended to limit the “presumptive underwriter” provision to a business combination involving a shell company.

The SEC did not adopt a proposed amendment to Rule 144 that would have tolled the holding period for restricted securities during any period the security holder engaged in hedging transactions. This particular proposal elicited significant negative comment.

The amendments also codify a number of the SEC staff’s positions, primarily regarding when the holding period for one security can be tacked to that of a predecessor. The seller’s representation contained in Form 144 has also been revised to reflect the use of 10b5-1 plans.

For Further Information

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