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SEC Amends Rules 144 and 145 to Shorten the Holding Period Requirement for Affiliates and Non-affiliates

On December 6, 2007, the Securities and Exchange Commission ("SEC") amended Rules 144 and 145 under the Securities Act of 1933 (the "Securities Act") to shorten the holding period required for restricted securities of reporting companies under Rule 144, eliminate the presumptive underwriter provision in Rule 145 and revise the resale requirements in Rule 145(d).[1] As the SEC noted in the proposing release, the revisions are intended to increase the liquidity of privately sold securities and reduce companies' cost of capital, while maintaining investor protections.[2] These amendments will be effective February 15, 2008 and will apply to securities acquired before or after that date. The following memorandum contains a summary of Rules 144 and 145 and the adopted amendments thereto. A table included in the SEC adopting release which summarizes the key changes in Rule 144 is set forth on Annex A.

I. Rule 144 and the SEC's Amendments

A. Rule 144

Any person selling a security which is not exempt from the registration requirements of the Securities Act must register the sale or rely on an exemption for the transaction. Section 4(1) of the Securities Act provides an exemption for any person other than an issuer, underwriter or dealer. Rule 144 provides a non-exclusive safe harbor from the definition of "underwriter." If a selling security holder satisfies all of Rule 144's conditions, the security holder is deemed not to be an "underwriter" and therefore the sale transaction is exempt from the Securities Act's registration requirements.

B. Adopted Amendments to Rule 144

The SEC adopted several changes to Rule 144 that shorten the holding period and modify other provisions of the Rule which sellers desiring to avail themselves of the Rule 144 safe harbor must meet. The new measures include:

1. Amending the holding period for restricted securities

Rule 144 previously required persons owning restricted securities[3] to hold the securities for at least one year prior to any resale in reliance on the safe harbor afforded by the rule. The new rule:

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1 *See Revisions to Rules 144 and 145*, SEC Release No. 33-8869; File No. S7-11-07 (December 6, 2007), available at http://www.sec.gov/rules/final/2007/33-8869.pdf. (the "Adopting Release")

2 *See Revisions to Rule 144 and Rule 145 to Shorten Holding Period for Affiliates and Non-affiliates*, SEC Release No. 33-8813; File No. S7-11-07 (June 22, 2007), available at http://www.sec.gov/rules/proposed/2007/33-8813.pdf.

3 "Restricted securities" is defined in Rule 144(a)(3) generally as "securities acquired directly or indirectly from an issuer, or from an affiliate of an issuer, in a transaction or chain of transactions not involving any public offering."

- shortens the holding period from one year to six months for restricted securities of reporting issuers.[4]
- maintains the current one year holding period for restricted securities of non-reporting issuers.

2. Reducing the resale restrictions on non-affiliates

Under the previous rule, non-affiliates were required to (1) hold their restricted securities for one year, and (2) comply with all applicable conditions of Rule 144 when selling securities they had held between one and two years. The SEC's amendments reduce the restrictions on non-affiliates in two respects:

- After the six-month holding period but before one year, non-affiliates holding restricted securities in reporting companies may resell them freely, subject only to the Rule 144(c) requirement that current information regarding the issuer of the securities be publicly available.
- After satisfying a twelve-month holding period, non-affiliates of non-reporting issuers can resell their restricted securities freely.

3. Easing provisions applicable to resale of debt securities

a. Elimination of manner of sale provisions. The amended rule eliminates the manner of sale limitations for debt securities. Previously, Rule 144(f) imposed manner of sale limitations that (1) required securities to be sold in brokers' transactions or in transactions with a market maker, (2) prohibited the seller from soliciting orders to buy securities in connection with Rule 144 transactions, and (3) prohibited the seller from making a payment in connection with the offer or sale of securities to persons other than the broker who executes the order to sell the securities. The amended definition of debt securities in Rule 144 includes non-participatory preferred stock and asset-backed securities, as well as other types of nonconvertible debt securities.

b. Easing debt securities volume limitation. The amendment also relaxes the Rule 144(e) volume limitations for debt securities by creating a new ten percent limitation provision. The provision permits the resale of debt securities in an amount that does not exceed ten percent of a tranche of debt securities (or class when the securities are non-participatory preferred stock), together with all sales of securities of the same tranche sold for the account of the selling security holder within a three-month period.

4. Amending the manner of sale limitations for equity securities

The amendments include two changes to the Rule 144(f) manner of sale requirements for equity securities. First, the amended rule permits the resale of securities through riskless principal transactions. Second, the rule amends the Rule 144(g) definition of "broker transactions" for purposes of the manner of sale requirements to cover the posting of bid and ask quotations for a security in an alternative trading system.

5. Increasing the Form 144 filing thresholds

Under Rule 144(h), a selling security holder must file Form 144 if the security holder's intended sale or sales exceeds either 500 shares or $10,000 within a three-month period.[5] The SEC's new rule raises the Form 144 filings dollar threshold for affiliates' sales to $50,000 and raises the share threshold to 5,000 shares.

As part of its proposed amendments, the SEC solicited comments on whether it should coordinate the Form 144 filing requirements with Form 4 filing requirements. The SEC did not adopt those changes, but it expects to

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[4] A company is a reporting issuer provided "[t]he issuer is, and has been for a period of at least 90 days immediately before the sale, subject to the reporting requirements of section 13 or 15(d) of the Exchange Act and has filed all required reports under section 13 or 15(d) of the Exchange Act, as applicable, during the 12 months preceding such sale (or for such shorter period that the issuer was required to file such reports), other than Form 8-K." Rule 144(c)(1).

[5] An "affiliate" is defined in Rule 144 as "a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, [the] issuer." Rule 144(a)(1).

issue a separate release later to provide affiliates that are subject to both the Form 4 and Form 144 filing requirements with greater flexibility in satisfying their requirements.

6. Additional Changes

In addition to the revisions listed above, the SEC adopted amendments to simplify and clarify the Preliminary Note to Rule 144, as well as other parts of the Rule. The SEC also codified several staff interpretations relating to Rule 144. A list of the positions so codified is set forth on Annex B.

C. Proposed Tolling Provision Not Adopted

In response to numerous negative comments, the SEC did not adopt a provision of the proposed rule which would have tolled, or suspended, the holding period while the security holder engaged in certain hedging transactions with respect to restricted securities. This result continued the approach to the calculation of the Rule 144 holding period in place since 1990. The SEC noted that it would revisit this issue "if [it] observe[d] abuse relating to the hedging activities of holders of restricted securities."[6]

II. Rule 145 and the SEC's Amendments

A. Rule 145

Rule 145 provides that exchanges of securities in connection with reclassifications of securities, mergers, consolidations or transfers of assets that are subject to shareholder vote constitute sales of those securities and must, therefore, be registered under the Securities Act. Under the former rule's "presumptive underwriter provision," persons who were parties to these transactions, other than the issuer, and affiliates of such parties were deemed underwriters, and were therefore restricted in their ability to resell the securities they obtained through these transactions.

B. Adopted Amendments to Rule 145

The SEC adopted amendments to Rule 145 that eliminate the presumptive underwriter provision and revise the resale provisions. The changes to Rule 145 include:

- Eliminating the presumptive underwriter provision except when a party to a Rule 145(a) transaction is a shell company.[7] Under the new Rule 145(c), any party, other than an issuer, to a Rule 145(a) transaction involving a shell company (but not 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.

- Harmonizing the resale requirements in Rule 145(d) with the proposed provisions in Rule 144 that would apply to securities of shell companies.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Jon Mark at (212) 701-3100 or jmark@cahill.com; John Schuster at (212) 701-3323 or jschuster@cahill.com; Yafit Cohn at (212) 701-3089 or ycohn@cahill.com; or Daniel Fisch at (212) 701-3724 or dfisch@cahill.com.

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6 Adopting Release at 26-27.

7 A "shell company" is defined in Rule 405 as "a registrant, other than an asset-backed issuer as defined in Item 1101(b) of Regulation AB, that has (1) no or nominal operations; and (2) either: (i) no or nominal assets; (ii) assets consisting solely of cash and cash equivalents; or (iii) assets consisting of any amount of cash and cash equivalents and nominal other assets."

ANNEX A

	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	During six-month holding period no resales under Rule 144 permitted. After six-month holding period may resell in accordance with all Rule 144 requirements including: • Current public information, • Volume limitations, • Manner of sale requirements for equity securities, and • Filing of Form 144.	During six-month holding period no resales under Rule 144 permitted. After six-month holding period but before one year – unlimited public resales under Rule 144 except that the current public information requirement still applies. After one-year holding period unlimited public resales under Rule 144; need not comply with any other Rule 144 requirements.
Restricted Securities of Non-Reporting Issuers	During one-year holding period no resales under Rule 144 permitted. After one-year holding period may resell in accordance with all Rule 144 requirements, including: • Current public information, • Volume limitations, • Manner of sale requirements for equity securities, and • Filing of Form 144.	During one-year holding period no resales under Rule 144 permitted. After one-year holding period unlimited public resales under Rule 144; need not comply with any other Rule 144 requirements.

ANNEX B

The SEC codified seven staff positions, including:

(1) securities acquired from an issuer pursuant to an exemption from registration under Section 4(6) of the Securities Act are considered “restricted securities” under Rule 144(a)(3);

(2) holders may tack the Rule 144 holding period in connection with transactions made solely to form a holding company;

(3) if securities to be sold were acquired from the issuer solely in exchange for other securities of the same issuer, the newly acquired securities shall 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;

(4) upon a cashless exercise of options or warrants, the newly acquired underlying securities are 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;

(5) for purposes of calculating the Rule 144(e) volume limitation condition for a pledgee of securities, so long as the pledgee is not the same “person” under Rule 144(a)(2), a pledgee of securities may sell the pledged securities without having to aggregate the sale with sales by other pledgees of the same securities from the same pledgor, as long as there is no concerted action by those pledgees;

(6) Rule 144 will not be available for the resale of securities initially issued by either a reporting or non-reporting shell company (other than a business combination related shell company) or an issuer that has been at any time previously a reporting or non-reporting shell company, unless the issuer is a former shell company that meets certain conditions;

(7) a selling security holder 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 staff positions were adopted as proposed or substantially as proposed.