

Amendments To Rule 144 Ease Resale Restrictions

On November 15, 2007, the Securities and Exchange Commission (the “SEC”) voted unanimously to adopt certain amendments to Rule 144 (“Rule 144”) promulgated under the Securities Act of 1933, as amended (the “Securities Act”), in order to enable smaller companies to raise capital more effectively and to ease some of the burden caused by reporting and disclosure requirements. The amendments to Rule 144, which become effective as of February 15, 2008, will affect affiliates and non-affiliates of reporting companies as follows:

- Shorten the mandatory holding period for restricted securities for both affiliates and non-affiliates to six months;
- Substantially simplify Rule 144 compliance for non-affiliates by allowing non-affiliates to freely resell restricted securities after satisfying a six-month holding period (subject only to the Rule 144(c) public information requirement until the securities have been held for one year), and by allowing non-affiliates of both reporting and non-reporting companies to freely resell restricted securities after satisfying a 12-month holding period without any additional compliance requirements;
- Eliminate the manner of sale limitations for debt securities, relax the volume limitations for debt securities and revise the manner of sale requirements for equity securities;
- Raise the thresholds that trigger Form 144 filing requirements from 500 shares or \$10,000 to 5,000 shares or \$50,000;
- Simplify and streamline the Preliminary Note and text of Rule 144; and
- Codify certain staff interpretations related to Rule 144.

Under Rule 144, an affiliate of an issuer is a person or entity that controls, is under common control with or

is controlled by the issuer. For practical purposes, officers, directors and significant equity holders of an issuer are typically considered to be affiliates. Although there is no statutory threshold for what ownership level is significant, the rule of thumb for the Rule 144 affiliate analysis is that ownership of 10% or more of an issuer’s outstanding equity securities will cause a holder to be considered an affiliate. This rule of thumb may not always apply, depending on the specific facts and circumstances of any situation.

Rule 144 Prior To The New Amendments

Pursuant to the Securities Act, every sale of securities must be either registered or made pursuant to an exemption from registration. In the absence of registration, many resales are done in reliance on Rule 144, which provides an exemption for resale through a broker to the public, if a number of conditions are met. Prior to the new amendments to Rule 144, the five conditions required for reliance on Rule 144 as a “safe harbor” exemption were:

1. **Holding Period under Rule 144(d).** If securities are acquired in the marketplace, they are not restricted, and there is no required period that the securities must be held by the purchaser before they can be resold. However, if the securities are restricted, there is a mandatory holding period before they can be resold under the Rule 144 “safe harbor” exemption. Securities are restricted when they are acquired directly or indirectly from the issuer, or from an affiliate of the issuer, in a transaction or chain of transactions not involving any public offering, or when they are acquired subject to other resale limitations. Prior to the new amendments to Rule 144, restricted securities were required to be held by both affiliates and non-affiliates for at least one year, beginning when

the securities were bought and fully paid for, before they could be resold.

- 2. Adequate Current Public Information under Rule 144(c).** Unless otherwise exempt, adequate current public information about the issuer of the restricted securities being sold must be available before any sale can be made. Generally, this condition is satisfied when the issuer has complied with the periodic reporting requirements of the Securities Exchange Act of 1934 (the “Exchange Act”).
- 3. Trading Volume Limitations under Rule 144(e).** Unless otherwise exempt, the number of shares of restricted securities that may be sold during any three-month period by a non-affiliate cannot exceed the greatest of: (i) 1% of the outstanding shares of the class being sold, (ii) the average weekly reported volume of trading in the security on all national securities exchanges and/or reported through the automated quotation system of a registered securities association during the preceding four calendar weeks or (iii) the average weekly volume of trading in the security pursuant to an effective transaction reporting plan or effective national market system plan during the preceding four calendar weeks. In the case of sales by affiliates, the volume limitations apply to all sales of securities of the class (whether or not restricted) during the applicable period.
- 4. Ordinary Brokerage Transactions under Rule 144(f).** Unless otherwise exempt, securities must be sold in “brokers transactions,” or in transactions directly with a “market maker,” as that term is defined in Section 3(a)(38) of the Exchange Act. Additionally, the current rule prohibits a seller from: (1) soliciting or arranging for the solicitation of orders to buy the securities in anticipation of, or in connection with, the Rule 144 transaction; or (2) making any payment in connection with the offer or sale of the securities to any person other than the broker who executes the order to sell the securities.
- 5. Filing Notice With the SEC under Rule 144(h).** Under the current Rule, if the amount of

securities to be sold in reliance on the Rule during any three month period involves more than 500 shares or an aggregate dollar amount greater than \$10,000, notice is required to be filed with the SEC on Form 144 no later than the time that the order is placed. The sale then has to take place within three months of the filing of the Form. If the securities are to be sold beyond that period, a new or amended notice is required to be filed.

Under current Rule 144, non-affiliates who have been non-affiliates for at least three months at the date of sale, and who have held fully paid restricted securities for at least two years, can freely sell the securities without regard to the above five conditions under Rule 144(k).

The New Amendments To Rule 144

The new amendments to Rule 144 relax some of the conditions required for reliance on Rule 144 as a “safe harbor” exemption. In the new amendments, the SEC has made the following changes to Rule 144:

- **Reduction of the Mandatory Holding Period Requirement under Rule 144(d) for Restricted Securities of Reporting Companies.** The minimum holding period for restricted securities of reporting companies held by both affiliates and non-affiliates is shortened from one year to six months in the case of companies which have been subject to the reporting requirements of the Exchange Act for at least ninety days. The minimum holding period remains one year in the case of companies which have not been subject to the reporting requirements of the Exchange Act for at least ninety days. As under the current Rule 144, the holding period does not commence until the purchase price has been fully paid.
- **Simplification of Rule 144 Compliance for Non-Affiliates Selling Restricted Securities of Reporting Companies.** Non-affiliates wishing to sell restricted securities of reporting companies, after the mandatory holding period of six months, may freely resell those restricted securities, subject only to compliance with the Rule 144(c) public information requirement. Non-affiliates are no longer required to comply with the

trading volume, brokerage transaction and notice conditions discussed above for reliance on the Rule 144 “safe harbor” exemption. Those requirements, however, remain applicable to all sales by affiliates under the Rule, subject to the modifications discussed below.

- **Elimination of Manner of Sale Limitations for Debt Securities, Relaxation of the Volume Limitations for Debt Securities and Revision of Manner of Sale Requirements for Equity Securities.** The current limitations on manner of sale were intended to ensure that special selling efforts and compensation arrangements usually associated with a distribution were not present in a Rule 144 sale. However, the SEC has determined that while completely eliminating the manner of sale limitations for equity securities may lead to abusive transactions, the fixed income securities market does not raise the same concerns, and the manner of sale provisions may place an unnecessary burden on the resale of such securities. Therefore, under the new amendments to Rule 144, the SEC has eliminated the manner of sale limitations for debt securities, relaxed the volume limitations for debt securities and revised the manner of sale requirements for equity securities.
- **Increase of the Form 144 Filing Thresholds.** Under the new amendments to Rule 144, only affiliates of the issuer are required to file a notice of proposed sale on Form 144 when relying on the Rule 144 “safe harbor” exemption, and the thresholds that trigger the Form 144 filing requirement have been raised to 5,000 shares or an aggregate dollar amount greater than \$50,000 in any three-month period.
- **Reduction of Requirements Applicable to Non-Affiliates under Rule 144(k).** Non-affiliates wishing to sell restricted securities of both reporting companies and non-reporting companies

after one year are no longer required to comply with any of the five conditions discussed above for reliance on Rule 144 as a “safe harbor” exemption.

- **Simplification of the Preliminary Note and Text of Rule 144.** The purpose of the Preliminary Note is to briefly explain the benefits of complying with Rule 144. After determining that the Preliminary Note was complex and confusing to many readers, the SEC simplified and streamlined the language of both the Preliminary Note and the text of Rule 144 in an attempt to make it easier for readers to understand.
- **Codification of Certain Staff Interpretations Relating to Rule 144.** To simplify Rule 144, the SEC has codified certain staff interpretations issued by the Division of Corporation Finance in order to make those staff interpretations more transparent and readily available to the public, including the commonly relied upon SEC staff interpretation that when securities are acquired upon the exercise or conversion of a derivative security on a cashless or exchange basis, the holder will be entitled to “tack” the holding period of the derivative securities to the underlying securities for purposes of resale under Rule 144. Another codification provides that securities issued by a shell company may not be sold in reliance on Rule 144, with exceptions for securities of an issuer that becomes a shell company after the initial issuance of the securities to be sold and securities issued originally by a shell company that later ceased to be a shell company, where the company is subject to the periodic reporting requirements of the Exchange Act, has filed all required reports during the preceding 12 months (or any shorter period during which the company has been subject to the reporting requirements) and has filed current “Form 10 information” with the SEC reflecting that it is no longer a shell company.

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The new amendments to Rule 144 adopted by the SEC will become effective as of February 15, 2008. The following chart summarizes the main changes to be effected by the amendments.

	Rule 144 Prior to the New Amendments	New Amendments to Rule 144
Holding Period Requirements for Restricted Securities of Reporting Companies	Affiliates and Non-Affiliates are subject to a one-year holding period during which no resales are permitted under Rule 144.	Affiliates and Non-Affiliates are subject to a six-month holding period during which no resales are permitted under Rule 144.
	After one year, Affiliates may resell if they comply with all Rule 144 conditions.	After six months, Affiliates may resell if they comply with all Rule 144 conditions.
	After one year but before two years, Non-Affiliates may resell if they comply with all Rule 144 conditions.	After six months but before one year, Non-Affiliates may resell if they comply with the Rule 144(c) current public information condition.
	After two years, Non-Affiliates may resell without any restrictions.	After one year, Non-Affiliates may resell without any restrictions.
Holding Period Requirements for Restricted Securities of Non-Reporting Companies	Affiliates and Non-Affiliates are subject to a one-year holding period during which no resales are permitted under Rule 144.	Affiliates and Non-Affiliates are subject to a one-year holding period during which no resales are permitted under Rule 144.
	After a one-year holding period but before two years, Non-Affiliates must comply with all requirements of Rule 144.	After one year, Non-Affiliates may resell without any restrictions.
	After two years, Non-Affiliates may resell without any restrictions.	
Form 144 Filing Thresholds	Affiliates must file a Form 144 if any proposed sale will involve more than 500 shares or an aggregate dollar amount greater than \$10,000 in any three-month period.	Affiliates must file a Form 144 if any proposed sale will involve more than 5,000 shares or an aggregate dollar amount greater than \$50,000 in any three-month period.

	Rule 144 Prior to the New Amendments	New Amendments to Rule 144
	After a one-year holding period but before two years, Non-Affiliates must file a Form 144 if any proposed sale will involve more than 500 shares or an aggregate dollar amount greater than \$10,000 in any three-month period.	Non-Affiliates are not required to file a Form 144.
	After two years Non-Affiliates are not required to file a Form 144.	