

SEC Adopts Rule 144 and Rule 145 Amendments

Alert

Introduction

On December 6, 2007, the Securities and Exchange Commission (the "SEC") adopted amendments to Rules 144 and 145 under the Securities Act of 1933, as amended (the "Securities Act").¹ In the adopting release, the SEC stated that it believes that these amendments will increase the liquidity of privately sold securities and decrease the cost of capital for all issuers without compromising investor protection. These amendments are substantially similar to the proposed amendments released in June 2007,² but have eliminated the proposed "tolling" provisions. The amendments are effective as of February 15, 2008 (but apply to securities acquired at any time, even before February 15).

Background of Rule 144

Rule 144 provides a non-exclusive safe harbor for certain sales of securities by affiliates and non-affiliates. The rule is available for resales of "restricted securities" and "control securities." "Restricted securities" are securities acquired, directly or indirectly, from the issuer or from an affiliate of the issuer, in a transaction, or chain of transactions, not involving a public offering. "Control securities" is a term commonly used to describe securities held by an affiliate of the issuer, regardless of how the affiliate acquired the securities. If the selling security holder satisfies all of the applicable conditions of Rule 144, such holder will not be deemed to be an "underwriter" and therefore may use the exemption provided by Section 4(1) of the Securities Act for resale of securities.

Prior to the amendments, pursuant to Rule 144(d), both affiliates and non-affiliates were required to hold restricted securities for one year prior to reselling such securities under Rule 144. After the one year holding period, resales of such securities could occur if the following conditions of Rule 144 were met: availability of adequate current public information about the issuer (Rule 144(c)), volume limitations (1% of the issuer's securities outstanding or weekly trading volume) (Rule 144(e)), manner of sale requirements (ordinary brokerage transactions only) (Rules 144(f) and (g)) and filing of a Form 144 (Rule 144(h)). Control securities that are not restricted securities are not subject to the one year holding period, but affiliates must comply with the aforementioned conditions when reselling such control securities.

Under Rule 144(k), once a non-affiliate (as long as the holder has not been an affiliate during the three months prior to the sale) has held the restricted securities for more than two years, such holder could freely sell such securities without compliance with above-mentioned conditions. Affiliates, however, are not eligible to use Rule 144(k) and therefore must always comply with the applicable Rule 144 conditions for resales of their restricted and control securities.

Amendments to Rule 144

Amendments to Holding Periods

The amendments reduce the holding period applicable to the resale of restricted securities of reporting issuers³ by both affiliates and non-affiliates from one year to six months. The holding period for resales of restricted securities of non-reporting issuers remains at one year.

Reduction of Rule 144 Conditions for Non-Affiliates

Under the amendments, the resale of restricted securities by non-affiliates after the applicable holding period (six months for reporting issuers and one year for non-reporting issuers) will no longer be subject to any other conditions of Rule 144, except that the Rule 144(c) current public information requirement will remain applicable for an additional six months after the initial six-month holding period requirement is met. After one year, a non-affiliate may freely sell restricted securities (of both reporting and non-reporting issuers) without compliance with any of the Rule 144 conditions.

After the expiration of the new applicable holding periods, affiliates still remain subject to compliance with the Rule 144 conditions described above: availability of adequate current public information about the issuer, volume limitations, manner of sale requirements and filing of a Form 144.

In the adopting release, the SEC summarized the revised holding periods and resale restrictions using the following useful chart:

	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	<p><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 requirements for equity securities, and • Filing of Form 144. 	<p><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 except that the current public information requirement still applies.</p> <p><u>After one-year holding period</u> – unlimited public resales under Rule 144; need not comply with any other Rule 144 requirements.</p>
Restricted Securities of Non-Reporting Issuers	<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 requirements for equity securities, and • Filing of Form 144. 	<p><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 under Rule 144; need not comply with any other Rule 144 requirements.</p>

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Manner of Sale Requirements, Volume Limits and Form 144 Amendments

As stated above, under the amendments, affiliates remain subject to the conditions of Rule 144 after the expiration of the applicable holding periods. The amendments have revised certain of those conditions.

First, the manner of sale requirement in Rule 144(f) was revised to permit the resale of equity securities through "riskless principal transactions" in which trades are executed at the same price and the rules of the self-regulatory organization permit the transaction to be reported as riskless.⁴ Second, the definition of "brokers' transactions" contained in Rule 144(g) was expanded to provide that the posting of bid-and-ask quotations in alternative trading systems would not be deemed to be a solicitation that would disqualify a transaction from being a "broker's transaction." The Rule 144 amendments also eliminated the manner of sale requirements for debt securities.

Additionally, the SEC amended Rule 144(e) to raise the volume limitations for debt securities. Under the current rule, the amount of securities sold in a three-month period could not exceed the greater of: (1) one percent of the shares outstanding of the issuer, or (2) the average weekly trading volume. Revised Rule 144(e) permits the resale of debt securities in an amount that does not exceed ten percent of a tranche, together with all sales of securities of the same tranche sold for the account of the selling security holder within a three-month period.

Finally, the amendments have increased the thresholds that trigger the Form 144 filing requirement for affiliates. Under the rules prior to the amendments, Rule 144(h) required a selling security holder to file a notice on Form 144 if the security holder's intended sale exceeded either 500 shares or \$10,000 within a three-month period. Under the amended rules, *only affiliates* are required to file a Form 144 and the Form 144 filing thresholds were increased to 5,000 shares or \$50,000 within a three-month period.

Rule 145 Amendments

Rule 145 under the Securities Act provides that exchanges of securities in connection with reclassification of securities, mergers or consolidations or transfers of assets that are subject to shareholder vote constitute sales of those securities. Prior to the amendments, Rule 145(c) provided that persons who were parties to the transaction or affiliates of such parties (other than the issuer) were deemed to be underwriters. Therefore, these persons would only be permitted to resell these securities acquired in the transaction, even registered securities, in accordance with the Rule 145(d) resale restrictions, which are similar to the resale restrictions under Rule 144.

The amendments eliminate the Rule 145 resale restrictions for persons who would not otherwise be an affiliate of the issuer, other than with respect to transactions involving securities of a shell company. Therefore, target affiliates who receive registered securities in a Rule 145 transaction who are not affiliates of the issuer will be able to immediately resell their securities.

Conforming Amendments to Regulation S

The final rule release also amends Regulations S to conform the Category 3 (U.S. reporting issuers) distribution compliance period in Rule 903(b)(3)(iii) to the new Rule 144 six-month holding period.

Should you have any questions regarding the foregoing, please contact Herman H. Raspé at 212.336.2301 (hhraspe@pbwt.com), Peter J. Schaeffer at 212.336.2313 (pjschaeffer@pbwt.com) or Alexander Shapiro at 212.336.2935 (ashapiro@pbwt.com).

Endnotes

- ¹ SEC Release No. 33-8869 (December 6, 2007), 72 FR 71546 <http://www.sec.gov/rules/final/2007/33-8869fr.pdf> (December 17, 2007).
- ² SEC Release No. 33-8813 (June 22, 2007), 72 FR 36822 <http://www.sec.gov/rules/proposed/2007/33-8813fr.pdf> (July 5, 2007).
- ³ A reporting issuer is an issuer that has been subject to the reporting requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934, as amended, for a period of at least 90 days before the Rule 144 sale.
- ⁴ New Rule 144(f)(1)(iii) defines a "riskless principal transaction" as a principal transaction where, after having received from a customer an order to buy, a broker or dealer purchases the security as principal in the market to satisfy the order to buy or, after having received from a customer an order to sell, sells the security as principal to the market to satisfy the order to sell.

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