

Revisions to Rule 144 Become Effective

On February 15, 2008, the SEC's previously announced amendments to Rule 144 became effective. The rule revisions ease the burden of reselling restricted securities¹ and apply to securities acquired both before and after the effective date. The manner in which restricted securities may be resold under revised Rule 144 depends on whether the seller is an affiliate of the issuer or has been an affiliate within the three months prior to the sale.

The principal features of the Rule 144 revisions are as follows:

- for both affiliates and non-affiliates, the minimum holding period for restricted securities of issuers who have been public reporting companies for at least 90 days is reduced from one year to six months;
- for issuers other than reporting companies, a one-year holding period continues to apply;
- for non-affiliates, the manner of sale, volume limitation and Form 144 filing requirements have been eliminated and the current public information requirement applies only to sales prior to the first anniversary of the acquisition of the securities;
- for affiliates, the manner of sale, volume limitation, current public information and Form 144 filing requirements continue to apply, but:
 - debt securities (defined to include non-participatory preferred stock and asset backed securities) are not subject to manner of sale restrictions and the volume limitation for debt securities has been increased from 1% to 10% of the tranche or class for all sales in the same tranche or class within a three-month period;
 - the threshold for filing a Form 144 has been increased to trades in excess of 5,000 shares or \$50,000 within a three month period (from 500 shares or \$10,000);
 - the manner of sale restrictions have been expanded to permit "riskless principal" transactions that meet requirements specified in the rule; and
 - bid and ask quotations for the security may be inserted in an alternative trading system if the broker has published bona fide bid and ask quotations for the security in the alternative trading system for each of the last 12 business days.

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1. "Restricted securities," as defined in Rule 144, include securities acquired in private transactions from the issuer or an affiliate of the issuer; compensatory securities issued by private companies under Rule 701(c); securities acquired in Rule 144A transactions; securities of domestic issuers sold in offshore transactions pursuant to Regulation S; and securities issued in other specified transaction categories.

As was previously the case, securities held by affiliates that are not restricted securities must be sold in accordance with applicable resale restrictions but are not subject to a holding period.

The rule revisions also codify a number of existing SEC staff interpretive positions pertaining to Rule 144, including the following:

- holders of restricted securities received upon a cashless exercise, conversion or exchange of securities may tack their holding period to the holding period of the securities surrendered upon exercise, conversion or exchange (but if the securities surrendered were not convertible or exchangeable by their terms or did not provide for cashless exercise, conversion or exchange, the provision of consideration other than securities of the issuer in exchange for the amendment permitting the cashless transaction will result in tacking only to the date of the amendment);
- holders of restricted securities acquired in a holding company reorganization may tack their holding period to the holding period for the securities of the predecessor company as long as no new consideration is provided; the interest in the holding company is of the same class and represents the same ownership proportion as the interest in the predecessor company and affords the holder substantially the same rights; and the holding company's consolidated financial position is substantially the same as the predecessor company;
- a seller under a Rule 10b5-1 trading plan that files a Form 144 may make the requisite representation as to lack of material non-public information effective as of the date the trading plan was adopted (or trading instructions were given) rather than the date the form is signed; and
- Rule 144 is unavailable for securities of companies that are or were shell companies unless the company has ceased to be a shell company, has been a reporting company (and filed all required reports) for 12 months and filed specified information reflecting the cessation of its status as a shell company at least 90 days prior to the Rule 144 sale.

The summary set forth herein is intended to be general in nature and does not constitute legal advice with respect to any particular situation. No legal or business decision should be based solely on its contents.

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February 2008



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