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The SEC Amends Rule 144 and Rule 145 to Allow More Flexibility in Reselling Securities

On December 6, 2007, the Securities and Exchange Commission (SEC) issued final amendments to Rule 144 to shorten the holding periods for restricted securities. The SEC also made changes to ease the burdens to resell securities under Rule 144 and amended Rule 145 to eliminate presumptive underwriter status in most cases. These measures address a number of the recommendations made by the SEC's Advisory Committee on Smaller Public Companies in its final report published in April 2006.

Rule 144 Holding Periods

Rule 144 creates a safe harbor under the Securities Act of 1933 for resales of securities issued under certain exemptions from registration listed in Rule 144(a)(3) ("restricted securities") and for resales of securities held by affiliates of the issuer regardless of how the affiliate acquired the securities ("control securities"). Under Rule 144, restricted securities may be resold after a one-year holding period if a number of requirements are met, including current public reporting by the issuer, volume limitations, manner of sale limitations, and the filing of a Form 144 if more than 500 shares or \$10,000 is sold. Rule 144(k) allows resales of restricted securities by a person who is not an affiliate of the issuer and has not been an affiliate of the issuer for three months prior to the sale without complying with any of the other requirements of Rule 144 after a two year holding period. Control securities (which are not also restricted securities) may be resold if all of the requirements of Rule 144 other than the one year holding period are met.

Under the amendments to Rule 144 adopted by the SEC:

- the holding period for restricted securities of reporting companies for both affiliates and non-affiliates is reduced to six months;
- non-affiliates of reporting companies may freely resell restricted securities after the six-month holding period subject only to the current public reporting requirement;
- after a 12-month holding period, non-affiliates may freely resell restricted securities of a reporting or non-reporting company without any restrictions under Rule 144;
- for resales by affiliates, the manner of sale requirements are revised for equity securities by allowing riskless principal transactions and permitting a broker to insert bid and ask quotations in an alternative trading system and eliminated for debt securities and the volume limitations are relaxed for debt securities; and
- for resales by affiliates, the thresholds that trigger Form 144 reporting requirements are raised from 500 shares or \$10,000 to 5,000 shares or \$50,000.

The SEC's final rules also codify a number of staff interpretations, including:

- clarifying that securities acquired under Section 4(6) of the Securities Act are restricted securities under Rule 144(a)(3);
- providing when holding periods may be tacked upon a reorganization into a holding company structure;

- providing when holding periods may be tack for conversions and exchanges of securities; and
- codifying the staff's interpretation that, upon a cashless exercise of an option or warrant, the underlying securities are deemed to be acquired when the corresponding option or warrant was acquired.

The amendments to Rule 144 take effect on February 15, 2008. The new rules are applicable to securities acquired before or after the effective date of the amendments.

Rule 145 Amendments

The SEC has also amended Rule 145 to eliminate the presumptive underwriter provision other than with respect to transactions involving blank check or shell companies. This means that affiliates of the target company in a registered merger or acquisition transaction (other than a transaction involving a blank check or shell company) can receive freely tradeable securities that are not subject to resale restrictions under Rule 145(d). Customary practice has been to require such affiliates to sign a Rule 145 letter acknowledging the restrictions on the resale of their securities and to place a legend on the certificates and impose stop transfer instructions with respect to the securities. With these amendments, these customary practices can be eliminated. The amendments to Rule 145 take effect on February 15, 2008. The new rules are applicable to securities acquired before or after the effective date of the amendments.

This *Headlines in Securities Law* provides general information about securities issues. It should not be construed as legal advice or a legal opinion. Readers should seek legal counsel concerning specific factual situations confronting them.