

January 8, 2008

## SEC Revises Rules 144 and 145

On December 6, 2007, the Securities and Exchange Commission (the "Commission") issued the final rule on the revisions to Rules 144 and 145 under the Securities Act of 1933. The final rules will be effective on February 15, 2008 and will apply to securities acquired before and after such date.

### Rule 144 Revisions

- **Holding Period for Reporting Companies.** The initial holding period for restricted securities held by affiliates and non-affiliates is six months for companies that are and have been subject to the reporting requirements ("Reporting Companies") of either Section 13(a) or Section 15(d) of the Securities Exchange Act of 1934 (the "Exchange Act") for at least 90 days prior to the Rule 144 sale. The Commission believes that this length of holding period shows that the investor has assumed the economic risk of the restricted securities. This shorter holding period should increase the liquidity of privately sold securities and decrease the cost of capital for Reporting Companies.
- **Holding Period for Non-Reporting Companies.** Due to the Commission's concern that the market does not have sufficient information regarding restricted securities of companies that are not subject, or for recent Reporting Companies, have not been subject for at least 90 days, to the Section 13(a) or Section 15(d) of the Exchange Act reporting obligations ("Non-Reporting Companies"), there is a one year holding period for restricted securities of such companies.
- **Resales by Non-Affiliates of Reporting Companies after Six Months and before One Year.** After the initial six month holding period and before the one year holding period, non-affiliates can resell restricted securities without any limitation so long as the issuer maintains current public information. Therefore, non-affiliates will no longer have to comply with the volume limitations, manner of sale requirements and the filing of a Form 144 that are currently in effect.
- **Resales by Non-Affiliates of Reporting Companies after One Year.** After a one year holding period, non-affiliates can resell restricted securities without any limitation, even if the issuer has not complied with the current public information requirement.
- **Resales by Affiliates of Reporting Companies after Six Months.** After the initial six month holding period, affiliates will be able to sell restricted securities subject to the Rule 144 requirements, including the following:
  - Current public information must be available regarding the issuer;
  - Volume limitations will apply;
  - Manner of sale requirements will apply for equity securities; and
  - Form 144 must be filed.

For affiliates selling restricted equity securities, the Rule 144 change basically will reduce from one year to six months the holding period and keep all other resale restrictions that are currently in place.

- **Resales by Non-Affiliates of Non-Reporting Companies after One Year.** After a one year holding period, non-affiliates of Non-Reporting Companies will be able to resell restricted securities without any limitation.
- **Resales by Affiliates of Non-Reporting Companies after One Year.** After a one year holding period, affiliates of Non-Reporting Companies will be treated the same as affiliates of Reporting Companies and will be able to sell restricted securities subject to the Rule 144 requirements, including the following:
  - Current public information must be available regarding the issuer;
  - Volume limitations will apply;
  - Manner of sale requirements will apply for equity securities; and
  - Form 144 must be filed.
- **Treatment of Debt Securities.** Unlike resales of equity securities, resale of debt securities by affiliates will not be subject to the manner of sale requirements due to the burden that such requirements place on the resale of fixed income securities. In addition, the volume limitations for debt securities will be raised to an amount that does not exceed 10% of a tranche together with all sales of securities of the same tranche sold within a 3 month period. Debt securities are defined to include non-participatory non-convertible preferred stock and asset backed securities in addition to other nonconvertible debt securities.
- **Increase in the Form 144 Filing Thresholds.** The final rules will increase the thresholds for having to file a Form 144 to the sale of \$50,000 of stock within a three month period from \$10,000 or the sale of 5,000 shares of stock within a three month period from 500 shares.
- **Relationship between Form 4 and Form 144.** Although the Commission did not combine the Form 4 and Form 144 into one filing, the Commission expects to amend the Form 4 and Form 144 rules in the future to provide greater flexibility for affiliates in making such filings.
- **Manner of Sale Amendments.** The Commission amended the general manner of sale requirements in two areas:
  - Resales will be permitted through riskless principal transactions in which trades are executed at the same price, exclusive of any explicitly disclosed markup or markdown, commission equivalent, or other fee, and the rules of the self-regulatory organization permit the transaction to be reported as riskless, so long as the broker or dealer meets the requirements for a brokers' transaction other than the requirement that the broker do no more than execute the order to sell the securities as an agent; and
  - With regard to the limitations of brokers' transactions, a broker will be permitted to insert bid and ask quotations in an alternative trading system provided the broker has published bona fide bid and ask quotations for the security in the alternative trading system on each of the last 12 business days.
- **Proposed Tolling Provision.** Although in the preliminary proposal the Commission proposed a tolling provision for the holding period for restricted securities of Reporting Companies which the security holder engaged in certain hedging transactions, the Commission did not include the tolling provision in the final rules since it would unnecessarily complicate Rule 144 and would require security holders or brokers to incur costs for monitoring hedging positions.
- **Summary Chart.** Below is a chart setting forth the resale requirements for affiliates and non-affiliates of Reporting Companies and Non-Reporting Companies during certain time periods.

	Affiliate	Non-Affiliate (and has not been an Affiliate during the prior three months)
<b>Restricted Securities of Reporting Companies</b>	<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"> <li>• Current public information,</li> <li>• Volume limitations,</li> <li>• Manner of sale requirements for equity securities and</li> <li>• Filing of Form 144.</li> </ul>	<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>
<b>Restricted Securities of Non-Reporting Companies</b>	<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"> <li>• Current public information,</li> <li>• Volume limitations,</li> <li>• Manner of sale requirements for equity securities and</li> <li>• Filing of Form 144.</li> </ul>	<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>

#### Rule 145 Revisions

- **Modification of Presumed Underwriter Provision.** The Commission eliminated the presumed underwriter provision except for transactions involving a shell company other than a business combination related shell company. Any party to a Rule 145(a) transaction that is not a shell company will no longer be a presumed underwriter.
- **Presumed Underwriter Resale Restrictions.** If an issuer files Form 10 information reflecting that the issuer is no longer a shell company, any presumed underwriters will be able to resell their securities subject to the current public information, volume limitations and manner of sale requirements set forth in Rule 144 after a 90 day holding period. After a six month holding period, presumed underwriters that are not affiliates of the issuer will be permitted to resell their securities subject only to the current public information requirements set forth in Rule 144. After a one year holding period, non-affiliates will be able to resell their securities without any limitations.

#### Potential Benefits to Issuers

- **The Private Placement Discount Could Be Less.** With non-affiliates being able to sell unlimited amounts of restricted securities issued by Reporting Companies after a six month holding period, subject to the Reporting Companies providing current public information, the illiquidity issue that causes many PIPE transactions to result in common stock being issued at a discount to market value may be less since non-affiliates will be able to sell the

restricted securities without restriction other than the current public information requirement after a six month holding period.

- **Registration Rights Agreement Penalties Could Decrease.** Since registration rights agreements often have a penalty provision if the issuer does not register the stock within a certain period of time and most registration rights agreements only require the stock to be registered if the stock cannot be sold without restrictions, the shortening of the holding periods to six months and one year could decrease the time period in which penalty payments will be applicable for restricted securities held by non-affiliates.
- **Rule 415 Issues Could Be Less.** The shorter holding periods could decrease the impact on non-affiliates of the Commission's crackdown on issuers issuing too much stock in resale registration statements in violation of Rule 415 since non-affiliates will be able to sell unlimited amounts of restricted securities issued by Reporting Companies after a six month holding period, subject to the Reporting Companies providing current public information.

If you should have any questions regarding these interpretations, please contact any of the following members of the Haynes and Boone Public Companies Practice Group.

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