SEWARD & KISSEL LLP

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SEC ADOPTS FINAL RULE AMENDMENTS TO RULE 144

The United States Securities and Exchange Commission (the "SEC") has issued a final release (Release No. 33-8869) amending Rule 144 under the Securities Act of 1933 (the "Securities Act"). Rule 144 is a "safe harbor" for the public resale of restricted securities (*i.e.,* securities acquired privately from the issuer or an affiliate of the issuer) and securities held by affiliates, commonly known as "control securities." The amendments: (i) shorten the holding period for restricted securities of reporting companies from one year to six months; (ii) substantially reduce the restrictions applicable to the resale of securities by non-affiliates following the expiration of the applicable holding period; (iii) amend the manner of sale requirements and eliminate them with respect to debt securities; (iv) amend the volume limitations for debt securities; (v) increase the Form 144 filing requirement thresholds; and (vi) codify several existing SEC staff interpretations relating to Rule 144.

The Rule 144 amendments will become effective on February 15, 2008, and will cover securities issued both before and after the effective date.

(i) SIX-MONTH HOLDING PERIOD REQUIREMENT FOR EXCHANGE ACT REPORTING COMPANIES

The most significant change to Rule 144 is to shorten the holding period for resale of restricted securities of reporting companies by non-affiliates from one year to six months. This shortened holding period is applicable to securities of a public company that has been subject to the reporting requirements of the Securities Exchange Act of 1934 (the "Exchange Act") for a period of at least 90 days prior to the Rule 144 sale.[1] Restricted securities of non-reporting companies (or companies that have not been reporting companies for at least 90 days) remain subject to a one year holding period.

(ii) SIGNIFICANT REDUCTION OF CONDITIONS APPLICABLE TO NON-AFFILIATES

The Rule 144 amendments also significantly reduce the conditions applicable to resales by non-affiliates. Following the six month holding period for securities of reporting companies, or the one year holding period of securities of non-reporting companies, resales of restricted securities by non-affiliates will not be subject to any of the volume limitations, manner of sale restrictions (*i.e.,* sales limited to "broker transactions") or Form 144 filing requirement. Resales of restricted securities of reporting companies after the six month holding period, but prior to the one year anniversary of the acquisition of the securities, will remain subject to the requirement that public information regarding the issuer be available (*i.e.,* that the company is current in its Exchange Act reporting).[2]

The SEC has also clarified that Rule 144 is not available for resales of securities of reporting and non-reporting shell companies.

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[1] The amendments do not change the Rule 144(d) requirement that, if the acquirer takes the securities by purchase, the holding period will not commence until the full purchase price is paid.

[2] Although the Rule 144(e) volume limitations will no longer apply to resales of restricted securities by non-affiliates, an affiliate pledgor, donor or trust settler will be required to aggregate the amount of securities sold for the account of a pledgee, donee or trust, as applicable, even when there is no concerted action in order to determine the amount of securities that is permitted to be sold under Rule 144.

(iii) AMENDMENTS TO THE MANNER OF SALE REQUIREMENTS APPLICABLE TO RESALES BY AFFILIATES; ELIMINATION OF MANNER OF SALE REQUIREMENTS FOR DEBT SECURITIES

Under the Rule 144 amendments, the holding period for resales by affiliates is also reduced from one year to six months for reporting companies. However, in contrast to resales by non-affiliates, resales by affiliates will remain subject to the sale volume limitations, manner of sale restrictions and Form 144 filing requirements currently in effect, with certain limited changes.

Prior to the amendments, Rule 144(f) required securities to be sold in "brokers' transactions" or in transactions directly with a "market maker." The prior rule also prohibited a reseller from (i) soliciting or arranging for the solicitation of orders to buy the securities in anticipation of, or in connection with, the Rule 144 transaction; or (ii) making any payment in connection with the offer or sale of the securities to any person other than the executing broker. Under the amendments to Rule 144, the SEC has made two revisions to the manner of sale requirements that apply to resales of equity securities by affiliates.

First, the amendments change Rule 144(f) to permit the resale of securities 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 a self-regulatory organization (*e.g.,* the New York Stock Exchange or NASDAQ Stock Market) permit the transaction to be reported as riskless. The SEC believes that these riskless principal transactions are equivalent to agency trades.

To qualify as a permissible manner of sale under the amendments, the broker or dealer conducting the riskless principal transaction must meet all the requirements of a brokers' transaction under Rule 144(g), except the requirement that the broker does no more than execute the order or orders to sell the securities as agent for the person for whose account the securities are sold. The broker or dealer must neither solicit nor arrange for the solicitation of customers' orders to buy the securities in anticipation of, or in connection with, the transaction, must receive no more than the usual and customary markup or markdown, commission equivalent, or other fee, and must conduct a reasonable inquiry regarding the underwriter status of the person for whose account the securities are to be sold.

Second, the amendments revise Rule 144(g), which defines "brokers' transactions" for the purposes of the manner of sale requirements. Under the revised definition, a broker must neither solicit nor arrange for the solicitation of customers' orders to buy the securities in anticipation of, or in connection with the transaction. In addition to activities deemed not to be a solicitation set forth under Rule 144(g)(2), the amendments include the posting of bid and ask quotations in alternative trading systems. Under the amendments, a broker may insert bid and ask quotations for the security in an alternative trading system (as defined in the Rule 300 of the SEC's Regulation ATS), *provided* that 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.

In addition to revising the manner of sale requirements for equity securities, the amendments eliminate them entirely for resales of debt securities held by affiliates.[3]

(iv) SALE VOLUME LIMITATIONS FOR DEBT SECURITIES

The amendments have also made changes to the quarterly sale volume limitations applicable to the resale of debt securities.

Prior to the amendments, under Rule 144(e), the amount of securities sold in a three-month period could not exceed the greater of: (i) one percent of the shares or other units of the class outstanding as shown by the most recent report or statement published by the issuer, or (ii) the average weekly volume of trading in such securities, as calculated pursuant to provisions in the rule. These limitations constrained the ability of debt holders to rely on Rule 144 for the resales of debt securities.

Under the amendments, Rule 144(e) now permits the resale of debt securities in an amount that does not exceed 10 percent of a tranche (or class when the securities are non-participatory preferred stock), together with all sales of securities of the same tranche sold for the account of the selling security holder within a three-month period. These amended volume limitations also apply to resales of non-participatory preferred stock or asset-backed

[3] The manner of sale requirements also will not apply to securities sold for the account of the estate of a deceased person or for the account of a beneficiary of such estate, *provided* that the estate or beneficiary is not an affiliate of the issuer.

securities, which are now defined as debt securities for the purposes of Rule 144.

(v) Increased Thresholds That Trigger Form 144 Filing Requirement for Affiliates

The SEC has also amended the continuing Form 144 filing requirements that are applicable to sales by affiliates. Prior to the amendments, Rule 144(h) required a selling security holder to file a notice on Form 144 if the proposed sales exceeded 500 shares or an aggregate sale price in excess of $10,000 within a three-month period. As amended, no Form 144 filing is required unless the proposed sale exceeds 5,000 shares or has an aggregate sales price in excess of $50,000 within a three-month period.

(vi) Codification of Several SEC Staff Interpretations on Rule 144

Under the Rule 144 amendments, the SEC has incorporated several Staff interpretations relating to Rule 144 into the text of the rule, including, among others, clarification as to the "tacking" of holding periods under certain situations such as conversions and exchanges, the treatment of resales of securities of "shell companies" and the treatment of resales of pledged securities.

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IF YOU HAVE ANY QUESTIONS OR COMMENTS ABOUT THIS NEWSLETTER, PLEASE FEEL FREE TO CONTACT GARY J. WOLFE (212-574-1223) OR ROBERT E. LUSTRIN (212-574-1420), OR EMAIL BY TYPING IN THE ATTORNEY'S LAST NAME FOLLOWED BY *@SEWKIS.COM*

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