

November 16, 2007

Corporate &amp; Securities Practice

## **SEC Adopts Amendments To Rule 144 And Rule 145, Among Other Actions**

The Securities and Exchange Commission adopted amendments to Rules 144 and 145, and adopted several other measures at its meeting on November 15, 2007. See <http://www.sec.gov/news/press/2007/2007-233.htm>.

Rule 144 establishes a safe harbor so that a seller of securities will not be deemed to be an "underwriter." As a result, sales of securities in compliance with Rule 144 are eligible for the exemption from registration set forth in Section 4(1) of the Securities Act of 1933 for transactions by any person other than the issuer, underwriter, or dealer. The amendments to Rule 144 adopted by the SEC:

- Shorten the holding period for restricted securities of reporting companies to six months;
- Permit non-affiliates of reporting companies to freely resell restricted securities after satisfying a six-month holding period, provided that, until the securities have been held for one year, current public information must be available to sell the securities;
- Permit non-affiliates of non-reporting companies to freely resell restricted securities after satisfying a 12-month holding period;
- Revise the manner of sale requirements for sales of equity securities by affiliates;
- Eliminate the manner of sale requirements and relax the volume limitations for sales of debt securities by affiliates;
- Raise the thresholds that trigger Form 144 filing requirements for affiliates' sales from 500 shares or \$10,000, to 5,000 shares or \$50,000;
- Simplify and streamline the Preliminary Note to, and other parts of, Rule 144; and
- Codify certain staff interpretations relating to Rule 144.

Rule 145 provides that exchanges of securities in connection with business combinations, such as reclassifications of securities, mergers, consolidations or transfers of assets, that are subject to a shareholder vote constitute sales of those securities. The amendments to Rule 145:

- Eliminate the presumptive underwriter provision except with respect to transactions involving blank check or shell companies; and
- Revise the resale provisions of Rule 145(d).

These amendments to Rules 144 and 145 will be effective 60 days after their publication in the Federal Register.

The SEC also adopted two other measures intended to modernize and improve capital raising, reporting, and disclosure measures for smaller companies. The SEC made reduced disclosure requirements available to additional smaller companies by amendments that:

- Create a new, expanded category of "smaller reporting companies" that have less than \$75 million in public equity float or, if a company does not have a calculable public equity float, have revenues

of less than \$50 million in the last fiscal year;

- Permit the expanded category of “smaller reporting companies” to use reduced disclosure requirements;
- Move certain reduced disclosure item requirements from Regulation S-B into Regulation S-K and Regulation S-X;
- Amend the reduced financial statement requirements for smaller reporting companies, requiring two years of balance sheet data instead of one year;
- Permit smaller reporting companies to elect to comply with reduced financial disclosure and non-financial disclosure on an item-by-item basis;
- Eliminate the SEC’s current “SB” forms, but allow a phase-out period; and
- Permit all foreign companies to qualify as “smaller reporting companies” if they choose to file on domestic company forms and provide financial statements prepared in accordance with US generally accepted accounting principles.

The effective date for these rules will be 30 days after their publication in the Federal Register.

In addition, the SEC adopted two amendments to Exchange Act Rule 12h-1, creating new exemptions from registration for compensatory employee stock options. These amendments:

- Provide an exemption for private non-reporting issuers from Exchange Act Section 12(g) registration for compensatory employee stock options issued under employee stock option plans; and
- Provide an exemption for issuers that are required to file reports under the Exchange Act pursuant to Exchange Act Section 13 or Section 15(d) from Section 12(g) registration for compensatory employee stock options.

These exemptions apply only to the registration of stock options under the Exchange Act — they do not exempt the class of securities underlying those options. They will be effective as soon as they are published in the Federal Register.

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