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# Rules 144 and 145 Updated

## Service

Securities & Corporate Governance

The Securities and Exchange Commission has recently adopted final rules liberalizing Rules 144 and 145. These rules provide an exemption for the sale of "restricted securities," which have not been registered with the Commission under the Securities Act of 1933 in connection with their proposed sale, and "control securities," which, even though they may be registered, are held by "affiliates" of the issuer—typically directors, senior officers and large holders. These amendments should facilitate sales of:

Restricted securities of reporting issuers, which may enjoy a lower liquidity discount because they may be resold sooner than under the current rules

Securities acquired by affiliates of a target company in an acquisition using the stock of the acquiring company

Rule 144 compliance is also somewhat eased for control securities. The new rules apply to sales of securities from Feb. 15, 2008 onward, regardless of when the securities were originally acquired.

The complex requirements of Rule 144 often baffle those who become subject to it. It was adopted by the SEC in 1972 because persons or institutions that would not normally be considered "underwriters" or engaged in a sale as part of an underwriting of securities nonetheless could be deemed underwriters under the language of the 1933 Act. If they were underwriters, they generally could not sell their securities without registering them with the SEC—at that time almost always an expensive, cumbersome process stretching over several weeks. Holders of "restricted securities" and "control securities" who complied with the elaborate safe harbor requirements of Rule 144 are not deemed to be "underwriters" and thus can sell their securities without SEC registration.

The principal amendments to Rule 144 are:

For securities of companies which have been reporting under the Securities Exchange Act of 1934 (10-Ks/10-Qs/8-Ks) for 90 days prior to the sale, the current one-year holding period requirement will be reduced to six months for restricted securities held by both affiliates and non-affiliates

Non-affiliates, which include persons who ceased to be affiliates more than three months prior to the sale, no longer need to comply with the other requirements of Rule 144—the volume limitations applicable to any three-month period, the manner of sale requirements and the Form 144 notice filing—so long as the company continues to meet the current public information requirements for an additional six months after the six-month holding period is satisfied

For restricted securities of non-reporting companies, the holding period remains one year, but after one year, non-affiliates will have the benefit of being released from these other requirements of the current Rule 144

For affiliates, the manner of sale requirements – securities must be sold in "brokers transactions" or directly with a "market maker" – will no longer apply to sales of debt securities and the volume limitations for debt securities will be increased to up to 10% of a given tranche within a three-month period

Technical changes liberalize the manner of sale requirements for equity securities

For affiliates, the exemptions from the Form 144 filing requirement for smaller transactions are increased. (Non-affiliates will be exempt from Form 144 filings.) Only transactions with a dollar value of $50,000 or more or 5,000 shares or more within a three-month period will need a Form 144 filing (previously $10,000 or 500 shares).

One recurring practical question for issuer companies under Rule 144 has been when to remove the restrictive legend that is often placed on the share certificate for restricted securities to prevent their sale without clearance from the issuer. While noting that the removal of legends typically raises contractual and state law questions and is ultimately at the issuer's discretion, the SEC indicates that it would have no objection to the removal of legends from restricted securities held by non-affiliates after the applicable requirements of Rule 144—primarily the holding period—have been satisfied.

There were also changes to Rule 145 covering exchanges of securities in connection with reclassifications, mergers or consolidations, or transfers of assets that are subject to a shareholder vote. These transactions are considered sales and typically subject to registration under the 1933 Act because the parties were deemed to be underwriters. As amended, the parties other than the issuer

company and its affiliates would no longer be deemed underwriters and, excepting shell companies, could, after 90 days, resell the shares without registration, subject to the requirements of Rule 144. After six months, only the current public information rule would continue to apply and after one year all the 144 requirements would cease to apply.

The SEC did not adopt two measures it had originally proposed, one positive and one negative from the standpoint of issuers and holders of securities subject to Rule 144:

1. The SEC abandoned its plans to toll the holding period for restricted securities of reporting companies while the security holder engaged in certain hedging transactions. This would have been extraordinarily difficult to calculate and police.

2. The SEC indicated that it might consolidate the Form 144 with the Form 4 requirements under Section 16 of the 1934 Act, but did not do so. The holders of control shares are frequently the same people and institutions who are subject to Form 4 reporting under Section 16 and the Form 4 is frequently filed within a few days of the Form 144. The SEC has promised to revisit this apparent redundancy at some unspecified future date.

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