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### SEC Adopts Amendments to Rules 144 and 145

On December 6, 2007, the U.S. Securities and Exchange Commission (“SEC”) amended Rules 144 and 145 under the Securities Act of 1933. These amendments took effect on February 15, 2008. A complete copy of the adopting release, SEC Release No. 33-8869, can be accessed at <http://www.sec.gov/rules/final/2007/33-8869.pdf>.

#### Rule 144 Amendments

Rule 144 provides a safe harbor for sales of securities by both affiliates and non-affiliates. First, it permits resales of “restricted securities”<sup>1</sup> by non-affiliates so long as its requirements are met. Second, it permits resales of both restricted securities and “control securities”<sup>2</sup> by affiliates of the issuer upon compliance with its requirements.

The amendments significantly lessen Rule 144’s restrictions, particularly for non-affiliates. Among other things, they (i) shorten the holding period for restricted securities of SEC reporting companies; (ii) ease the restrictions on resales by non-affiliates; (iii) liberalize the manner of sale requirements and volume limitations; and (iv) increase the Form 144 filing thresholds.<sup>3</sup>

#### Holding Period

Rule 144 previously required persons to hold restricted securities for at least one year prior to resale. The amendments shorten this holding

*If you have any questions regarding the matters discussed in this Securities Alert, please contact your regular Vorys attorney or a member of our Corporate and Finance Group at 614.464.6400.*

<sup>1</sup> “Restricted securities” are securities acquired directly or indirectly from the issuer or an affiliate of the issuer in a non-public offering, such as a private placement.

<sup>2</sup> “Control securities,” although not defined in Rule 144, is the term commonly used to refer to any securities held by an affiliate of the issuer, regardless of how the securities were acquired.

<sup>3</sup> The current public information about the issuer, manner of sale and Form 144 filing requirements and volume limitations continue to apply to all sales by affiliates, whether involving restricted securities, control securities or both. The holding period requirements, however, only apply to restricted securities.

period to six months for securities of SEC reporting companies. The holding period for restricted securities of non-reporting companies, however, continues to be one year.

### Resale Restrictions

Prior to the amendments, both affiliates and non-affiliates were required to comply with Rule 144's current public information about the issuer requirement, volume limitations, manner of sale requirements and Form 144 filing requirements. The amendments permit non-affiliates of SEC reporting companies to resell restricted securities after the applicable six-month holding period, subject only to the current public information about the issuer requirement. After one year, non-affiliates need not comply with any Rule 144 conditions. All resales of control securities and restricted securities by affiliates, however, continue to be subject to Rule 144's current public information about the issuer requirement, volume limitations, manner of sale requirements and Form 144 filing requirements, until the persons have ceased being affiliates for 90 days.

### Manner of Sale Requirements and Volume Limitations

The amendments eliminate manner of sale requirements and volume limitations for non-affiliates and relax these requirements as to affiliates. Prior to the amendments, affiliates were only permitted to resell restricted securities in "brokers' transactions" or in transactions directly with a "market maker." The amendments add "riskless principal transactions"<sup>4</sup> to this list of permitted transactions. Additionally, the amendments apply the manner of sale requirements only to equity (and not debt) securities.

Volume limitations on the resale of debt (as opposed to equity) securities by affiliates have also been liberalized. Prior to the amendments, affiliates were prohibited from reselling within any three-month period, more than the greater of (i) 1% of the outstanding securities and (ii) the average weekly trading volume in such securities during the prior month. The amendments add a third upward limit of 10% of the principal amount of the tranche attributable to the debt securities sold.

### Form 144 Filing Thresholds

Prior to the amendments, a Form 144 was required to be filed for all intended sales of 500 or more shares or shares with a \$10,000 aggregate sale price within any three-month period. The amendments limit the Form 144 filing requirements to sales by affiliates only (regardless whether control securities or restricted securities are being sold), and increase the filing thresholds to intended sales of 5,000 shares or shares with a \$50,000 aggregate sale price in any three-month period.

A chart comparing the provisions of Rule 144 and their application to affiliates and non-affiliates before and after the amendments is attached.

## Rule 145 Amendments

Rule 145 requires the registration of securities issued in connection with certain business combinations, unless an exemption is available. Before the amendments, Rule 145(c) treated all parties to such business combinations, other than the issuer and its affiliates, as "underwriters" that were subject to the registration requirements of the Securities Act of 1933 (the "presumptive underwriter rule"). The amendments eliminate the presumptive underwriter rule, except with respect to business combinations involving securities of a shell company. Additionally, the

<sup>4</sup> A "riskless principal transaction" is a principal transaction in which a broker or dealer purchases the security, upon receipt of a customer order to buy, or sells the security upon receipt of a customer order to sell, as principal in the market.

amendments revise the sale conditions of Rule 145(d) so that they mirror the new Rule 144 sale conditions.

### **Codification of SEC Staff Positions**

In addition to specifically amending Rules 144 and 145, the amendments codify the following previously adopted SEC staff positions:

- Securities acquired pursuant to Section 4(6) of the Securities Act of 1933<sup>5</sup> are considered “restricted securities.”
- Security holders may “tack” their Rule 144 holding period when an issuer reorganizes into a holding company and when a conversion or exchange of securities from the same issuer occurs.
- Upon a cashless exercise of options or warrants, the newly-acquired underlying securities are deemed to have been acquired when the corresponding options or warrants were purchased.
- If pledgees have not acted in concert, then a pledgee is not required to aggregate its sale of restricted securities with sales by another pledgee of the same securities for purposes of compliance with Rule 144’s volume limitations.
- Rule 144’s safe harbor from the definition of “underwriter” is available to resellers of securities issued by shell companies if (a) the issuer is no longer a shell company, (b) the issuer is subject to the reporting requirements under the Securities Exchange Act of 1934, (c) the issuer has filed all of its required periodic reports during the preceding 12 months, and (d) at least one year has passed since the issuer filed Form 10 type information with the SEC to reflect its non-shell company status.
- The Form 144 representations required from a security holder relying on Rule 10b5-1(c) under the Securities Exchange Act of 1934 are permitted to be made as of the date the security holder adopted a written trading plan or gave trading instructions.

### **Conclusion**

The amendments significantly reduce the technical requirements for the resale of restricted securities and lessen the restrictions on resales of control securities. The amendments will likely cause reductions in the cost of capital for issuers of restricted securities due to decreases in the discount to market price usually associated with the issuance of restricted securities. They will also lessen the need for issuers of restricted securities to grant registration rights and to file and maintain resale registration statements for the benefit of investors, and will likely increase the use of restricted securities as consideration in business combinations due to their increased liquidity.

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<sup>5</sup> Section 4(6) provides an exemption from registration for an offering that does not exceed \$5,000,000 that is made only to accredited investors, that does not involve any advertising or public solicitation by the issuer or anyone acting on the issuer’s behalf and for which a Form D has been filed.

## Comparison of Rule 144 Requirements: Pre- and Post-Amendments

<u>Requirement</u>	<u>Pre-Amendments</u>	<u>Post-Amendments</u>			
		<u>Non-Affiliates</u>		<u>Affiliates</u>	
		<u>Reporting Companies</u>	<u>Non-Reporting Companies</u>	<u>Reporting Companies</u>	<u>Non-Reporting Companies</u>
Holding Period	<p>Restricted securities may <i>not</i> be sold within the 1<sup>st</sup> year without registration</p> <p>After holding for one year, restricted securities may be sold by compliance with Rule 144's requirements</p> <p>After holding for two years, <i>non-affiliates</i> may freely sell restricted securities</p> <p>Holding period does not apply to sales of control securities which are not also restricted securities</p>	<p>Restricted securities may <i>not</i> be sold within the 1<sup>st</sup> six months without registration</p> <p>Restricted securities may be sold after six months (but prior to one year) by compliance with Rule 144's current public information about the issuer requirement only</p> <p>Restricted securities may be freely sold after one year</p> <p>N/A</p>	<p>Restricted securities may <i>not</i> be sold within the 1<sup>st</sup> year without registration</p> <p>Restricted securities may be freely sold after one year</p> <p>Restricted securities may be freely sold after one year</p> <p>N/A</p>	<p>Restricted securities may <i>not</i> be sold within the 1<sup>st</sup> six months without registration</p> <p>Restricted securities may be sold after six months by full compliance with Rule 144's requirements</p> <p>N/A</p> <p>Holding period does not apply to sales of control securities which are not also restricted securities</p>	<p>Restricted securities may <i>not</i> be sold within the 1<sup>st</sup> year without registration</p> <p>Restricted securities may be sold after one year by full compliance with Rule 144's requirements</p> <p>N/A</p> <p>Holding period does not apply to sales of control securities which are not also restricted securities</p>

*This Securities Alert is for general information purposes only and does not constitute a full legal analysis of the subject matter discussed herein. The information in this Securities Alert should not be relied upon as specific legal advice, which should be given only after a thorough and complete review of all relevant facts and circumstances in each case.*

<u>Requirement</u>	<u>Pre-Amendments</u>	<u>Post-Amendments</u>			
		<u>Non-Affiliates</u>		<u>Affiliates</u>	
		<b>Reporting Companies</b>	<b>Non-Reporting Companies</b>	<b>Reporting Companies</b>	<b>Non-Reporting Companies</b>
Current Public Information About Issuer	<p>Must comply with current public information requirement upon a sale of restricted securities after the one-year holding period has expired; however, after the two-year holding period has expired, <i>non-affiliates</i> need not comply</p> <p>Must comply with current public information requirement upon any sale of control securities</p>	<p>Must comply with current public information requirement only upon a sale of restricted securities after the six-month holding period has expired but before the one-year holding period has expired</p>	N/A	<p>Must comply with current public information requirement upon any sale of control securities</p>	<p>Must comply with current public information requirement upon any sale of control securities</p>

<u>Requirement</u>	<u>Pre-Amendments</u>	<u>Post-Amendments</u>			
		<u>Non-Affiliates</u>		<u>Affiliates</u>	
		<u>Reporting Companies</u>	<u>Non-Reporting Companies</u>	<u>Reporting Companies</u>	<u>Non-Reporting Companies</u>
Volume Limitation	<p>Must abide by volume limitations upon a sale of restricted securities after the expiration of the one-year holding period; however, after the two-year holding period has expired, <i>non-affiliates</i> need not comply</p> <p>Must abide by volume limitations upon any sale of control securities</p>	N/A		<p>During any three-month period, no more than the greater of (a) 1% of the issuer's securities outstanding, or (b) the average weekly reported volume of trading in such securities during the prior four weeks, may be sold</p> <p> Holders of <i>debt</i> securities also have a third upward limit under which 10% of the principal amount of the tranche attributable to the securities sold, may be sold</p>	<p>During any three-month period, no more than the greater of (a) 1% of the issuer's securities outstanding, or (b) the average weekly reported volume of trading in such securities during the prior four weeks, may be sold</p> <p> Holders of <i>debt</i> securities also have a third upward limit under which 10% of the principal amount of the tranche attributable to the securities sold, may be sold</p>

<u>Requirement</u>	<u>Pre-Amendments</u>	<u>Post-Amendments</u>			
		<u>Non-Affiliates</u>		<u>Affiliates</u>	
		<u>Reporting Companies</u>	<u>Non-Reporting Companies</u>	<u>Reporting Companies</u>	<u>Non-Reporting Companies</u>
Manner of Sale	<p>Must comply with Rule 144’s manner of sale requirements upon a sale of restricted securities following the expiration of the one-year holding period, in order to satisfy Rule 144; but after the expiration of the two-year holding period, <i>non-affiliates</i> need not comply</p> <p>Must comply with Rule 144’s manner of sale requirements upon any sale of control securities</p> <p>Rule 144 requires securities be sold in “brokers’ transactions” or in transactions directly with a “market maker”</p>	N/A		<p><i>Equity</i> securities must be sold in: (1) “brokers’ transactions”<sup>6</sup>; (2) transactions directly with a “market maker”; or (3) “riskless principal transactions”<sup>7</sup></p> <p>No manner of sale requirements for <i>debt</i> securities</p>	<p><i>Equity</i> securities must be sold in (1) “brokers’ transactions”; (2) transactions with a “market maker”; or (3) “riskless principal transactions”</p> <p>No manner of sale requirements for <i>debt</i> securities</p>

<sup>6</sup> The definition of “brokers’ transactions” now permits publication by the broker of bid or ask quotations for the security in an alternative trading system.

<sup>7</sup> A riskless principal transaction is a principal transaction where, after having received from a customer an order to buy, a broker or dealer purchases the security as principal in the market in order to satisfy the order to buy, or after having received from a customer an order to sell, sells the security as principal to the market in order to satisfy the order to sell.

<u>Requirement</u>	<u>Pre-Amendments</u>	<u>Post-Amendments</u>			
		<u>Non-Affiliates</u>		<u>Affiliates</u>	
		<b>Reporting Companies</b>	<b>Non-Reporting Companies</b>	<b>Reporting Companies</b>	<b>Non-Reporting Companies</b>
Filing of Form 144	<p>Must comply with the Form 144 filing requirement upon a sale of restricted securities after the one-year holding period has expired, in order to satisfy Rule 144; however, after the expiration of the two-year holding period, <i>non-affiliates</i> need not comply</p> <p>Must comply with the Form 144 filing requirements upon a sale of control securities</p> <p>Filing requirement is triggered if the amount of restricted securities or control securities sold in any three-month period exceeds 500 shares or units or has an aggregate sale price in excess of \$10,000</p>	N/A		<p>Must comply with the Form 144 filing requirement upon a sale of control securities</p> <p>Filing requirement is triggered if the amount of control securities sold in any three-month period exceeds 5,000 shares or units or has an aggregate sale price in excess of \$50,000</p>	<p>Must comply with the Form 144 filing requirement upon a sale of control securities</p> <p>Filing requirement is triggered if the amount of control securities sold in any three-month period exceeds 5,000 shares or units or has an aggregate sale price in excess of \$50,000</p>