

## SEC Liberalizes Resales of Restricted Securities By Amending Rules 144 and 145

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On December 6, 2007, the SEC issued final new rules shortening the holding periods and reducing other requirements of Rules 144 and 145 of the Securities Act of 1933, as amended (the "Securities Act"). These new rules, which amend the existing rules, become effective on February 15, 2008 (the "Effective Date") and apply to securities purchased both before and after the Effective Date. The SEC's stated purpose in amending the existing rules is to increase the liquidity of privately sold securities and to decrease the cost to companies of raising capital, in both cases without compromising investor protection.

### RULE 144 GENERALLY

By way of background, Rule 144 provides a "safe-harbor" exemption from registration under the Securities Act for the public resale of restricted securities if certain conditions are met. Restricted securities are those acquired in unregistered, private sales directly from an issuer or an affiliate of an issuer. In addition, all securities held by an affiliate of the issuer, even non-restricted securities purchased in the open market, are considered control securities and are subject to the same resale limitations as restricted securities with the exception of the holding period requirement. An affiliate is a person, such as a director, officer or large shareholder (10% or more), in a relationship of control with the issuer, having the power to direct the management and policies of the company in question, whether through the ownership of voting securities, by contract, or otherwise.

### HISTORY OF RULE 144

Rule 144 was adopted by the SEC in January 1972 and resulted in increased liquidity for

STEPHEN D.  
BROOK

is an Associate in  
the Firm's Corporate  
and Securities  
Practice Groups.



J. FRASER  
COLLIN

is an Associate in  
the Firm's Corporate  
and Securities  
Practice Groups.



restricted securities. Under the original version of the rule, all restricted securities had to be held for a minimum of two years, measured from the time the securities were purchased from the issuer or an affiliate, before any public resale of the restricted securities could be effected. After the initial holding period, restricted securities could only be sold pursuant to Rule 144 by complying with certain requirements including trading volume limitations. Since then, the SEC has amended Rule 144 several times, including the following: (i) in 1983, Rule 144(k) was added to allow anyone who is not an affiliate of the issuer to sell all restricted securities without volume limitations after a holding period of at least three years; (ii) in 1990, an amendment was made to allow the purchaser of restricted securities to "tack" the holding period of the

previous owner, i.e., add onto the previous holding period rather than start a new holding period; (iii) in 1997, the initial holding period was shortened from two years to one year and the holding period for non-affiliates pursuant to Rule 144(k) from three years to two years. Now, ten years later, the SEC is reducing certain restrictions under Rule 144 and again shortening the holding period requirements that must be met prior to resale of restricted securities under the rule.

### AMENDMENTS TO RULE 144

#### *Restricted Securities Resales by Non-Affiliates*

Pursuant to the latest amendments to Rule 144, non-affiliate holders of restricted securities of reporting companies (companies that file SEC reports under the Securities Exchange Act of 1934, as amended) will be permitted (i) to freely resell such restricted securities after meeting a holding period of six months, so long as the company keeps available adequate current public information per Rule 144(c); or (ii) to freely resell after holding the restricted securities for one year without regard to the current public information limitation. Non-affiliate holders of restricted securities of non-reporting companies will be permitted to freely resell such restricted securities after meeting a holding period of one year. Prior to these amendments, non-affiliates holding restricted securities for a period of at least one year were permitted to make public resales subject to certain restrictions including trading volume limitations. Non-affiliates were eligible for unlimited resales after holding restricted securities for a period of two years pursuant to Rule 144(k). Additionally, per the latest amendments, non-affiliate holders conducting a public

resale of restricted securities pursuant to Rule 144 will no longer be required to file Form 144 with the SEC or be subject to manner of sale requirements.

### **Restricted Securities Resales by Affiliates**

Pursuant to the latest amendments, affiliates of reporting companies will be permitted to make limited resales of restricted securities held for at least six months and affiliates of non-reporting companies will continue to be permitted to make limited resales of restricted securities held for at least one year. In addition to the applicable aforementioned holding periods, resales of restricted securities by affiliates will still need to comply with all other requirements of Rule 144, including trading volume limitations which limit the number of restricted securities that may be sold to the greater of one percent of the outstanding securities of the class being sold or the average weekly trading volume for the class during the four week period preceding the sale of the restricted securities. Affiliates are also required to file a Form 144 with the SEC if the affiliate intends to sell more than 5,000 shares or \$50,000 of securities within any three-month period. Prior to these latest amendments, the thresholds were 500 shares or \$10,000 within any three-month period.

### **AMENDMENTS TO RULE 145**

Rule 145 of the Securities Act requires the registration of securities publicly issued to certain persons in business combinations such as certain mergers, consolidations and particular transfers of assets. Prior to the amendments, subsection (c) of Rule 145, known as the "presumptive underwriter" provision, deemed parties (other than the issuer), or affiliates of parties, to the business combination transactions to be underwriters and required presumptive underwriters to register the resale of securities acquired in

one of the business combination transactions specified in subsection (a) of Rule 145 or sell the securities in a transaction exempt from registration. Subsection (d) of Rule 145 permitted persons presumed to be underwriters to sell their restricted securities pursuant to certain requirements of Rule 144.

The latest amendments to Rule 145 generally (i) eliminate the presumptive underwriter provision under Rule 145(c) for persons who are party to, or affiliates of parties to, a Rule 145(a) business combination transaction except with respect to transactions involving blank check or shell companies, and (ii) revise the resale provisions of Rule 145(d) to conform with certain of the latest amendments to Rule 144.

### **BENEFITS AND PRACTICAL IMPLICATIONS**

The benefits to issuers and investors from the changes to Rules 144 and 145 include the following:

- Investors may be willing to pay smaller discounts on the purchase from a public issuer of restricted securities in a private placement since the securities will be able to resold in a shorter timeframe and with fewer restrictions.
- Registration rights that are negotiated by investors for restricted securities will likely have shorter periods, as the restricted securities can be resold without registration earlier than before.
- Mergers and acquisitions may see more deals involving unregistered securities, as the securities received by the sellers can be liquidated earlier than before.

*This article was contributed by Stephen D. Brook and J. Fraser Collin, Associates in Burns & Levinson's Securities Law Group.*

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#### **THE SECURITIES LAW GROUP**

**Josef Volman - Co-Chair**  
617.345.3895 | [jvolman@burnslev.com](mailto:jvolman@burnslev.com)

**Andrew Merken - Co-Chair**  
617.345.3740 | [amerken@burnslev.com](mailto:amerken@burnslev.com)

If you have any questions regarding this Burns & Levinson Securities Law Update, please contact one of the individuals named above.

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