

# CORPORATE AND SECURITIES LAW

## *Alert*

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

## Securities and Exchange Commission Issues Final Rules Amending SEC Rules 144 and 145

December 14, 2007

On December 6, 2007, the Securities and Exchange Commission (SEC), seeking to increase liquidity of privately sold securities and decrease the cost of capital, issued final rules amending SEC Rules 144 and 145. The final rules, which codify several staff interpretive positions that relate to Rule 144, are designed to simplify the Preliminary Note to Rule 144, amend, and in some instances eliminate, the manner of sale requirements of Rule 144, amend the volume limitations for debt securities and increase the Form 144 filing thresholds. The SEC decided not to combine Form 4 and Form 144 at this time, but will continue to consider the issue and may take it up as a separate project. As it relates to Rule 145, the final rules eliminate Rule 145 restrictions on resales of securities acquired in most business combinations.

Highlights of the changes, which are effective on February 15, 2008, include:

- The shortening of the holding period under Rule 144 for restricted securities of public companies from one year to six months;
- The simplification and streamlining of Rule 144; and
- The codification of a number of staff interpretations relating to Rule 144.

### **Simplification of Rule 144**

Consistent with its focus on requiring plain English disclosure by reporting companies, the SEC has revised the text of Rule 144 and its preliminary note to be more easily interpreted by issuers and their advisors. These clarifications, which are not intended to alter the substantive operation of Rule 144, make clear that Rule 144 provides a safe harbor for the resale of restricted securities and control securities but that the rule is not the exclusive means for reselling these types of securities.

### **Amendments to the Holding Periods for Restricted Securities**

The most important aspect of revised Rule 144 is the shortening of the period of time a purchaser of restricted securities must hold the shares before he or she may resell them within the safe harbor afforded by

Rule 144 and the elimination of all of Rule 144's other requirements with respect to resales of restricted securities by non-affiliate shareholders after satisfaction of this shortened holding period. Presently, holders of restricted securities of reporting companies that are not affiliates of the reporting company must hold the securities for at least one year before they can rely on the protections of Rule 144, and then must comply with the manner of sale and volume limitation requirements of the rule and sell the shares only when adequate current public information is also available about the issuer. After two years, these non-affiliate shareholders may sell restricted securities without compliance with the manner of sale or volume limitation requirements of Rule 144 and without current public information being available about the issuer. Affiliates of reporting companies must always comply with Rule 144's requirements when selling shares, regardless of whether the shares are restricted and regardless of the period of time the shareholder has held the shares.

As amended, Rule 144 now only requires that adequate current public information about a reporting company be available for sales made by non-affiliates beginning six months after their acquisition of the shares. In short, the volume limitations and manner of sale requirements of Rule 144 no longer apply to resales of restricted securities of reporting companies by non-affiliate shareholders after the shares have been held for at least six months. After one year, non-affiliates of reporting companies may sell restricted securities under Rule 144 without limitation and without any requirement that adequate current public information about the issuer be available. For sales by affiliates of reporting companies, revised Rule 144 continues to require compliance with all of the rule's requirements for sales made by the affiliate, including the current public information, manner of sale and volume limitations, but shortens the period during which an affiliate may not resell the securities at all within the safe harbor provided by the rule to six months. This time period is extended to one year for affiliate sales of restricted securities of non-reporting issuers.

Set forth below is a chart summarizing the final conditions applicable under Rule 144 to the resale of restricted securities by affiliates and non-affiliates of both reporting and non-reporting issuers:

	<b>Affiliate or Person Selling on Behalf of an Affiliate</b>	<b>Non-Affiliate (and Has Not Been an Affiliate During the Prior Three Months)</b>
<b>Restricted Securities of Reporting Issuers</b>	<p><u>During six-month holding period:</u> no resales under Rule 144 permitted.</p> <p><u>After six-month holding period:</u> may resell in accordance with all Rule 144 requirements including:</p> <ul style="list-style-type: none"> <li>• Current public information,</li> <li>• Volume limitations,</li> <li>• Manner of sale requirements for equity securities, and</li> <li>• Filing of Form 144.</li> </ul>	<p><u>During six-month holding period:</u> no resales under Rule 144 permitted.</p> <p><u>After six-month holding period but before one year:</u> unlimited public resales under Rule 144 except that the current public information requirement still applies.</p> <p><u>After one-year holding period:</u> unlimited public resales under Rule 144; need not comply with any other Rule 144 requirements.</p>

<p><b>Restricted Securities of Non-Reporting Issuers</b></p>	<p><u>During one-year holding period:</u> no resales under Rule 144 permitted.</p> <p><u>After one-year holding period:</u> may resell in accordance with all Rule 144 requirements, including:</p> <ul style="list-style-type: none"> <li>• Current public information,</li> <li>• Volume limitations,</li> <li>• Manner of sale requirements for equity securities, and</li> <li>• Filing of Form 144.</li> </ul>	<p><u>During one-year holding period:</u> no resales under Rule 144 permitted.</p> <p><u>After one-year holding period:</u> unlimited public resales under Rule 144; need not comply with any other Rule 144 requirements.</p>
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**Tolling Provision**

The original proposal to amend Rule 144 contained a section proposing to toll the holding period during “any period in which the previous owner held a short position or put equivalent position with respect to a security.” Based on the public comments received, the SEC decided not to include a tolling provision in the text of the new rule. The SEC reasoned that such a tolling provision would impose significant costs on the part of security holders or brokers to monitor hedging positions to determine their compliance with the Rule 144 holding period requirement.

**Other Important Changes**

The revisions to Rule 144 also eliminate the manner of sale requirements for resales of debt securities, allowing for privately negotiated resales, and raise the volume limitations for debt securities to permit the resale of debt securities in an amount that does not exceed 10 percent of a tranche, together with all sales of securities of the same tranche. The revisions also increase the thresholds that trigger Form 144 filing requirements for affiliates from 500 shares or \$10,000 within a three-month period to 5,000 shares or \$50,000. Non-affiliate shareholders are no longer required to file Forms 144 under the revised rules.

**Codification of Several Staff Positions**

The revisions to Rule 144 also codify certain SEC staff interpretations relating to, among other matters, securities acquired in connection with holding company formations, securities acquired from the issuer upon cashless exercise of options or warrants and the interplay between Rule 10b5-1 trading plans and Form 144, in an effort to provide greater certainty regarding the treatment of restricted securities.

**Amendments to Rule 145**

Prior to the revisions, Rule 145 deemed persons who were parties to business combination transactions, other than the issuer, or affiliates of such parties to be underwriters and the rule also permitted the resale of securities acquired in a business combination transaction, subject to compliance with specified conditions. The revisions to Rule 145 eliminate the presumed underwriter status provisions of Rule 145 for most transactions and allow securities acquired in most business combination transactions subject to Rule 145 to be resold without resale restriction unless the seller is also an affiliate of the acquiring company, in which case the requirements of revised Rule 144 would continue to apply.

The text of the SEC's Final Release is posted on the SEC's Web site.

If you have any questions regarding this Corporate and Securities Law Alert, or would like any additional information, please contact any Bass, Berry & Sims PLC attorney in the Corporate and Securities Practice Area.

The information contained herein has been derived from the statutory sources and should not be construed or relied upon for legal advice. Readers are urged to consult legal counsel concerning particular situations and specific legal questions.

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