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### CORPORATE ADVISOR

#### SEC Adopts Amendments to Rules 144 and 145 and Codifies Certain SEC Staff Positions Under Rule 144

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##### Overview

On December 6, 2007, the SEC adopted significant amendments to Rules 144 and 145 under the Securities Act of 1933, as amended (the "Securities Act"), codified certain SEC staff positions under Rule 144, and made several conforming changes to certain of its rules and forms. These rule changes are part of the SEC's efforts to facilitate public and private capital raising and ease disclosure requirements, particularly for smaller companies but also for large public companies.

The amendments to Rule 144 include:

- shortening to six months the holding period for "restricted securities" of issuers subject to the reporting requirements of the Securities Exchange of 1934, as amended (the "Exchange Act");
- allowing restricted securities of non-reporting companies to be subject to a one year holding period before a public resale;
- substantially reducing restrictions on re-sales of restricted securities by non-affiliates, by eliminating the manner of sale, volume limitations, and Form 144 filing obligations, and eliminating the current public information requirements after one year;
- eliminating the "manner of sale" requirements with regard to sales of debt securities by affiliates;
- relaxing the volume limitations for re-sales of debt securities by affiliates;
- increasing the Form 144 filing threshold for affiliates to trades of either 5,000 shares or \$50,000 in a three month period.

The revised holding periods and other changes are applicable to securities acquired *before* or *after* the effective date of the rule amendments.

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The SEC has determined not to adopt a provision that would toll, or suspend, for up to six months, the Rule 144 holding period during any period that a security holder engages in hedging activities with respect to any equity securities of the same class as the restricted securities or any securities convertible into such class.

Also, the SEC also adopted amendments to Rule 145 eliminating the “presumptive underwriter” rule, except for transactions by shell companies, and revising the resale requirements under Rule 145. The amendments also make certain conforming changes to other SEC rules and forms, including Regulation S.

The amendments will be effective 60 days after publication in the Federal Register.

### Amendments to Rule 144

The Securities Act requires registration of all offers and sales of securities in interstate commerce or by use of the U.S. mails unless an exemption from registration is available. Section 4(1) of the Securities Act exempts transactions by any person other than an issuer, underwriter or dealer. The definition of “underwriter” is central to the operation of the Section 4(1) exemption. Section 2(a)(11) defines an “underwriter” as “any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking.”

Rule 144 provides a “safe harbor” from the definition of underwriter to assist security holders in determining when the Section 4(1) exemption is available with regard to the re-sale of “restricted securities” and “control securities.” Restricted securities include, among other things, securities acquired in a private placement, in a Rule 144A transaction, or in a transaction subject to Regulation S. The term control securities refers to securities held by an affiliate of the issuer, regardless of how acquired.

The principal changes to Rule 144 will:

- ***Shorten the Holding Period Requirements.*** The amendments reduce the Rule 144 holding period to *six* months for restricted securities of “*reporting* issuers.” The restricted securities of *non-reporting* issuers will continue to be subject to a one year holding period. A *reporting issuer* is an issuer that has been subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act for at least 90 days.
- ***Substantially Reduce the Conditions for Reliance Upon Rule 144.*** The amendments significantly reduce the conditions for reliance on Rule 144 by non-affiliates.

A *non-affiliate* of a *reporting issuer* will be able to freely publicly re-sell restricted securities after meeting the initial six month holding period requirement and will be subject only to the current public information requirement for a period of six months after the expiration of the initial six month holding period.

A *non-affiliate* of a *non-reporting issuer* will be subject to a one year holding period and may not re-sell restricted securities in reliance upon Rule 144 during such period.

After a one year holding period, non-affiliates may make unlimited re-sales of restricted securities of either a reporting or non-reporting issuer and without regard to the public

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information requirement. The manner of sale, volume limitations and Form 144 filing requirements for non-affiliates relying on the rule in connection with re-sales of restricted securities have been eliminated.

*Affiliates* may resell restricted securities after the applicable six month (reporting issuer) or twelve month (non-reporting issuer) holding period but will continue to be subject to current public information, volume limitation, manner of sale, and Form 144 filing requirements.

- ***Amend the "Manner of Sale" Requirements.*** The "manner of sale" requirements applicable to re-sales of securities by an affiliate have been amended to permit re-sales through "*riskless principal transactions*." Also, the definition of "*brokers' transactions*" has been amended to permit a broker to post bid and ask quotations in alternative trading systems (ATS) provided the broker has published bona fide bid and ask quotations for the security in the ATS on each of the preceding 12 business days.
- ***Eliminate the Manner of Sale Requirements for Debt Securities.*** For re-sales of debt securities by affiliates, the amendments eliminate the manner of sale requirements. This includes non-participatory preferred stock and asset backed securities as well as other nonconvertible debt securities.
- ***Increase the Volume Limitations for Debt Securities.*** The volume limitations for debt securities have been increased to permit re-sales of debt securities by affiliates that do not exceed 10% of a tranche (or class of non-participatory preferred stock) together with all sales of securities of the same tranche sold for the account of a selling security holder within a three month period.
- ***Increase the Threshold for Form 144 Filing by Affiliates.*** The dollar and share threshold requirements for the filing of a Form 144 by an *affiliate* with regard to sales of restricted securities during a three month period have been increased. The dollar threshold has been increased to \$50,000 and the share threshold has been increased to 5,000.

### Codification of Certain Staff Positions

The SEC has also codified the following staff positions relating to Rule 144:

- securities acquired in a transaction pursuant to an exemption from registration under Section 4(6) are considered "restricted securities;"
- a holder may tack the holding period during which he held restricted securities of a predecessor company before the predecessor company organized into a holding company structure, subject to certain conditions;
- securities acquired from an issuer solely in exchange for securities of the same issuer will be deemed to have been acquired at the same time as the securities surrendered for

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conversion or exchange, even if the securities surrendered were not convertible or exchangeable by their terms;

- securities acquired from an issuer upon a cashless exercise of options or warrants are deemed to have been acquired when the corresponding options or warrants were acquired, even if the options or warrants did not provide for cashless exercise by their terms. However, if the options or warrants were not purchased for cash or property (such as employee options), the newly acquired securities will be deemed acquired at the time the options or warrants are exercised;
- a pledgee of securities is not required to aggregate sales of restricted securities with other pledgees of the same securities from the same pledgor provided there is no concerted action by such pledgees and the pledgees are not the same "person;"
- Rule 144 is not available with respect to the resale of securities initially issued by a reporting or non-reporting shell company or that at any time previously was a reporting or non-reporting shell company (other than a business combination related shell company). However, if the issuer has ceased to be a shell company, is subject to the Exchange Act reporting obligations, has filed all Exchange Act reports during the preceding 12 months, and at least 12 months has elapsed from the date of the filing of Form 10 information, then such initially acquired securities may be resold in reliance upon Rule 144.

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