

RULE 144 – RECENT AMENDMENTS

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In late 2007, the SEC adopted amendments to Rules 144 and 145 (Release No. 33-8869). The amendments are intended to lower the cost of raising capital by decreasing the holding periods for securities acquired in private placements and otherwise substantially loosening the restrictions on the resale of such securities. The amendments are likely to have a significant impact on PIPEs and other types of financing which involve private placements. The amendments also codified a number of existing staff interpretations of Rule 144.

The amendments became effective February 15, 2008 and are applicable to securities acquired before or after that date. Set forth below is a description of Rule 144 and those recent amendments which are most likely to be relevant to the planning and negotiation of a typical private placement.

Rule 144 – Background

1. Section 4(1) of the Securities Act of 1933 (the “Act”) exempts from the registration provisions of Section 5 of the Act

 transactions by any person other than an issuer, underwriter
 or dealer...
2. Section 2(11) of the Act defines “underwriter,” in relevant part, 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...
3. The term “distribution” is not defined in the Act.
 - Look to the impact of a particular transaction on trading markets.
 Specifically, consider:
 - the magnitude of the offering
 - the nature of the selling efforts involved (e.g., methods of offering,
 compensation paid)
4. As stated in the Preliminary Note to Rule 144,

 The rule is designed to prohibit the creation of public markets in
 securities of issuers concerning which adequate current
 information is not available to the public. At the same time, where
 adequate current information concerning the issuer is available to
 the public, the rule permits the public sale in ordinary trading
 transactions of limited amounts of securities owned by persons

controlling, controlled by or under common control with the issuer and by persons who have acquired restricted securities of the issuer.

5. The term “restricted securities” includes, among other types of securities, securities acquired directly or indirectly from the issuer, or from an affiliate of the issuer, in a transaction or chain of transactions not involving any public offering – i.e., a private placement.

Resale Conditions – Old Rule

1. Current public information regarding issuer – Rule 144(c)
 - a. Reporting companies
 - Issuer must be subject to the reporting requirements of the Securities Exchange Act of 1934 (the “Exchange Act”) for at least 90 days immediately preceding the sale; and
 - Issuer must have filed all reports required to be filed under the Exchange Act during the 12 months preceding such sale (other than certain Current Reports on Form 8-K).
 - b. Non-reporting companies
 - Information required by Rule 15c2-11 under the Exchange Act
2. Holding period for restricted securities – Rule 144(d)
 - a. 1 year from date full purchase price has been paid for the securities
 - b. “Tacking” (i.e., cumulating) holding periods permitted under certain circumstances, including, for example, in connection with the conversion or exchange of securities.
3. Limitation on amount of securities to be sold – Rule 144(e)
 - Within a three month period, the greater of: (i) one percent of securities outstanding; and (ii) average weekly trading volume during the four calendar weeks preceding filing of notice on Form 144 with SEC.
4. Manner of sale – Rule 144(f)
 - Securities must be sold in “brokers’ transactions” (as defined in Rule 144 (g)) or directly to a market maker.

5. Notice of Proposed sale – Rule 144(h)
 - Must be transmitted for filing with SEC concurrently with the placing of an order with a broker or the execution directly with a market maker of the sale.

Resale Conditions Eliminated – Old Rule 144(k)

All resale conditions are eliminated for any person (i) who, at the time of sale, is not an affiliate of the issuer and was not an affiliate of the issuer during the preceding three months; and (ii) who has held the securities for at least two years.

Selected Amendments Relevant to Resales of Securities Acquired in a Private Placement

Key Changes: Elimination/relaxation of restrictions given to resales by non-affiliates of reporting companies.

Additional relaxation provided for resales of debt securities by affiliates.

1. Holding Period – reporting companies: *6 months*
 - a. Non-affiliates
 - No resale conditions other than current public information
 - After 12 months, current public information condition lapses

I.e., resales by non-affiliates are unrestricted after 12 months. (Compare with two years under “old” Rule 144(k).)
 - b. Affiliates – remain subject to other standard resale conditions, as amended (see 4 - 6, below)
2. Holding period – Non-reporting companies: no change (one year)
 - a. Non-affiliates – resales are otherwise unrestricted
 - b. Affiliates – remain subject to other standard resale conditions, as amended (see 4 - 6, below)
3. Determination of holding period – tacking permitted for:
 - a. Conversion or exchange of securities, even if the securities surrendered were not convertible or exchangeable by their terms (codification of prior interpretations)
 - b. Cashless exercise of options and warrants (codification of prior interpretations)

4. Manner of sale (applicable now only to resales by affiliates)
 - a. Debt securities - limitations have been eliminated for debt securities, which include:
 - non-convertible debt securities
 - non-participatory preferred stock
 - asset-backed securities
 - b. Equity securities – technical liberalizations
 - Permits riskless principal transactions
 - Expands definition of “brokers’ transactions”
5. Volume limitations relaxed for debt securities (applicable now only to resales by affiliates) – amount of securities sold during a three month period may be equal to the greater of (i) the volume permitted under “old” Rule 144(e) (as described above) and (ii) up to 10% of a tranche of debt securities, or up to 10% of a class of non-participating preferred stock
6. Notice filing thresholds for affiliates.
 - Increased from 500 shares or an aggregate sales price of \$10,000, to 5,000 shares or \$50,000.