

**SECURITIES AND EXCHANGE  
COMMISSION****17 CFR Parts 230 and 239**

[Release No. 33-8869; File No. S7-11-07]

RIN 3235-AH13

**Revisions to Rules 144 and 145****AGENCY:** Securities and Exchange Commission.**ACTION:** Final rule.

**SUMMARY:** Rule 144 under the Securities Act of 1933 creates a safe harbor for the sale of securities under the exemption set forth in Section 4(1) of the Securities Act. We are shortening the holding period requirement under Rule 144 for “restricted securities” of issuers that are subject to the reporting requirements of the Securities Exchange Act of 1934 to six months. Restricted securities of issuers that are not subject to the Exchange Act reporting requirements will continue to be subject to a one-year holding period prior to any public resale. The amendments also substantially reduce the restrictions applicable to the resale of securities by non-affiliates. In addition, the amendments simplify the Preliminary Note to Rule 144, amend the manner of sale requirements and eliminate them with respect to debt securities, amend the volume limitations for debt securities, increase the Form 144 filing thresholds, and codify several staff interpretive positions that relate to Rule 144. Finally, we are eliminating the presumptive underwriter provision in Securities Act Rule 145, except for transactions involving a shell company, and revising the resale requirements in Rule 145(d). We believe that the amendments will increase the liquidity of privately sold securities and decrease the cost of capital for all issuers without compromising investor protection.

**DATES:** *Effective Date:* February 15, 2008. The revised holding periods and other amendments that we are adopting are applicable to securities acquired before or after February 15, 2008.

*Comment Date:* Comments regarding the collection of information requirements within the meaning of the Paperwork Reduction Act of 1995 should be received on or before January 16, 2008.

**ADDRESSES:** Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission’s Internet comment form (<http://www.sec.gov/rules/final.shtml>);

- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File No. S7-11-07 on the subject line; or
- Use the Federal Rulemaking Portal (<http://www.regulations.gov>). Follow the instructions for submitting comments.

*Paper Comments*

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number S7-11-07. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission’s Internet Web site (<http://www.sec.gov/rules/final.shtml>). Comments are also available for public inspection and copying in the Commission’s Public Reference Room, 100 F Street, NE., Washington, DC 20549. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

**FOR FURTHER INFORMATION CONTACT:**

Katherine Hsu or Raymond A. Be, Special Counsels in the Office of Rulemaking, Division of Corporation Finance, at (202) 551-3430, 100 F Street, NE., Washington, DC 20549.

**SUPPLEMENTARY INFORMATION:** The Commission is adopting amendments to Rule 144,<sup>1</sup> Rule 145,<sup>2</sup> Rule 190,<sup>3</sup> Rule 701,<sup>4</sup> Rule 903,<sup>5</sup> and Form 144<sup>6</sup> under the Securities Act of 1933.<sup>7</sup>

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<sup>1</sup> 17 CFR 230.144.<sup>2</sup> 17 CFR 230.145.<sup>3</sup> 17 CFR 230.190.<sup>4</sup> 17 CFR 230.701.<sup>5</sup> 17 CFR 230.903.<sup>6</sup> 17 CFR 239.144.<sup>7</sup> 15 U.S.C. 77a et seq.

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**I. Background**

The Securities Act of 1933 (“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 the registration requirement is available.<sup>8</sup> Section 4(1) of the Securities Act provides such an exemption for transactions by any person other than an issuer, underwriter or dealer.<sup>9</sup>

The definition of the term “underwriter” is key to the operation of the Section 4(1) exemption. Section 2(a)(11) of the Securities Act defines an

<sup>8</sup> See 15 U.S.C. 77e.<sup>9</sup> 15 U.S.C. 77d(1).

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.”<sup>10</sup> The Securities Act does not, however, provide specific criteria for determining when a person purchases securities “with a view to \* \* \* the distribution” of those securities. In 1972, the Commission adopted Rule 144 to provide a safe harbor from this definition of “underwriter” to assist security holders in determining whether the Section 4(1) exemption is available for their resale of securities.<sup>11</sup>

Rule 144 regulates the resale of two categories of securities—restricted securities and control securities. Restricted securities are securities acquired pursuant to one of the transactions listed in Rule 144(a)(3).<sup>12</sup> Although it is not a term defined in Rule 144, “control securities” is used commonly to refer to securities held by an affiliate of the issuer,<sup>13</sup> regardless of how the affiliate acquired the securities.<sup>14</sup> Therefore, if an affiliate acquires securities in a transaction that is listed in Rule 144(a)(3), those securities are both restricted securities and control securities. A person selling restricted securities, or a person selling restricted or other securities on behalf of the account of an affiliate, who satisfies all of Rule 144’s applicable conditions in connection with the transaction, is deemed not to be an “underwriter,” as defined in Section 2(a)(11) of the Securities Act, and therefore may rely on the Section 4(1) exemption for the resale of the securities.

Since its adoption, we have reviewed and revised Rule 144 several times. We last made major changes in 1997 (“1997 amendments”).<sup>15</sup> At that time, we shortened the required holding periods

for restricted securities.<sup>16</sup> Before the 1997 amendments, security holders could resell restricted securities under Rule 144, subject to limitation, after two years, and persons who were not affiliates and had not been affiliates during the prior three months, could resell restricted securities without limitation after three years. The 1997 amendments changed these two-year and three-year periods to one-year and two-year periods, respectively.

On the same day that we adopted those changes, we also proposed and solicited comment on several possible additional changes to Rule 144, Rule 145 and Form 144, including reducing the holding period further (“1997 Proposing Release” and “1997 proposals”).<sup>17</sup> We received 38 comment letters on those proposed changes. While some commenters supported further shortening the holding periods, others suggested that we monitor the results of the 1997 amendments before making further changes. We did not take further action to adopt the 1997 proposals.

Rule 144 states that a selling security holder shall be deemed not to be engaged in a distribution of securities, and therefore not an underwriter, with respect to such securities, thus making available the Section 4(1) exemption from registration, if the resale satisfies specified conditions. The conditions include the following:

- There must be adequate current public information available about the issuer;<sup>18</sup>
- If the securities being sold are restricted securities, the security holder must have held the security for a specified holding period;<sup>19</sup>
- The resale must be within specified sales volume limitations;<sup>20</sup>

<sup>16</sup> We shortened the holding period requirements in paragraphs (d) and (k) of Rule 144.

<sup>17</sup> See the 1997 Proposing Release. In the 1997 Proposing Release, we proposed to (1) revise the Preliminary Note to Rule 144 to restate the intent and effect of the rule, (2) add a bright-line test to the Rule 144 definition of “affiliate,” (3) eliminate the Rule 144 manner of sale requirements, (4) increase the Form 144 filing thresholds, (5) include in the definition of “restricted securities” securities issued pursuant to the Securities Act Section 4(6) exemption, (6) clarify the holding period determination for securities acquired in certain exchanges with the issuer and in holding company formations, (7) streamline and simplify several Rule 144 provisions, and (8) eliminate the presumptive underwriter provisions of Rule 145. We also solicited comment on (1) further revisions to the Rule 144 holding periods, (2) elimination of the trading volume tests to determine the amount of securities that can be resold under Rule 144, and (3) several possible regulatory approaches with respect to certain hedging activities.

<sup>18</sup> 17 CFR 230.144(c).

<sup>19</sup> 17 CFR 230.144(d).

<sup>20</sup> 17 CFR 230.144(e).

- The resale must comply with the manner of sale requirements;<sup>21</sup> and
- The selling security holder must file Form 144 if the amount of securities being sold exceeds specified thresholds.<sup>22</sup>

Rule 144, as it existed before today’s amendments, permitted a non-affiliate to publicly resell restricted securities without being subject to the above limitations if the securities had been held for two years or more, provided that the security holder was not, and, for the three months prior to the sale, had not been, an affiliate of the issuer.<sup>23</sup>

On July 5, 2007, we again proposed to amend several aspects of Rule 144 and Rule 145, including by further shortening the holding periods (the “2007 Proposing Release”).<sup>24</sup> We proposed to shorten the holding period requirement in Rule 144(d) for restricted securities of issuers that are subject to the reporting requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934 (the “Exchange Act”)<sup>25</sup> to six months. Restricted securities of issuers that are not subject to Exchange Act reporting requirements would continue to be subject to a one-year holding period under Rule 144(d). We also proposed to relieve non-affiliates of reporting issuers from having to comply with all conditions in Rule 144, except the current public information requirement, after a six-month holding period. Non-affiliates of non-reporting issuers would be allowed to resell their securities freely after a one-year holding period. In addition, we proposed to:

- Simplify the Preliminary Note to Rule 144 and text of Rule 144;
- Toll the holding period during the time that security holders engage in certain hedging transactions;
- Eliminate the “manner of sale” requirements with respect to the resale of debt securities;
- Increase the thresholds triggering the requirement to file Form 144; and
- Codify several staff positions relating to Rule 144.

We also solicited comment on amending the Form 144 filing deadline to coincide with the deadline for filing a Form 4<sup>26</sup> under Section 16<sup>27</sup> of the Exchange Act and permitting persons who are subject to Section 16 to meet their Form 144 filing requirement by

<sup>21</sup> 17 CFR 230.144(f) and (g).

<sup>22</sup> 17 CFR 230.144(h).

<sup>23</sup> This provision was previously located in Rule 144(k).

<sup>24</sup> Release No. 33–8813 (June 22, 2007) [72 FR 36822] (Jul. 5, 2007).

<sup>25</sup> 15 U.S.C. 78a *et seq.*

<sup>26</sup> 17 CFR 249.104.

<sup>27</sup> 15 U.S.C. 78p.

<sup>10</sup> 15 U.S.C. 77b(a)(11). Section 2(a)(11) states that the term “issuer” shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer. Therefore, any person who purchased securities from an affiliate of an issuer is an underwriter under Section 2(a)(11) if that person purchased with a view to the distribution of the securities.

<sup>11</sup> Release No. 33–5223 (Jan. 11, 1972) [37 FR 591].

<sup>12</sup> 17 CFR 230.144(a)(3).

<sup>13</sup> An affiliate of the issuer is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such issuer. See 17 CFR 230.144(a)(1).

<sup>14</sup> See, e.g., Release No. 33–7391 (Feb. 20, 1997) [62 FR 9246].

<sup>15</sup> See Release No. 33–7390 (Feb. 20, 1997) [62 FR 9242] (“the 1997 Adopting Release”).

filing a Form 4.<sup>28</sup> Finally, we proposed to eliminate the presumptive underwriter provision in Securities Act Rule 145, except for transactions involving a shell company, and to harmonize the resale provisions in Rule 145 with the Rule 144 provisions applicable to resales of securities of shell companies.

We received 32 comment letters from 30 commenters on the proposals in the 2007 Proposing Release.<sup>29</sup> A majority of the commenters expressed support for the proposals in general.<sup>30</sup> Several of these commenters expressed support for the proposed amendments to shorten the holding period requirement in Rule 144 for both affiliates and non-affiliates of Exchange Act reporting issuers.<sup>31</sup> Two commenters opposed shortening the holding period, as proposed.<sup>32</sup>

Some commenters expressed opposition to the proposed reintroduction of a provision that would toll, or suspend, for up to six months, the 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

<sup>28</sup> Section 16 applies to every person who is the beneficial owner of more than 10% of any class of equity securities registered under Section 12 of the Exchange Act, and each officer and director (collectively, "reporting persons" or "insiders") of the issuer of such security. Section 16(a) of the Exchange Act generally requires reporting persons to report changes in their beneficial ownership of all equity securities of the issuer on Form 4 before the end of the second business day following the day on which the transaction that caused the change in beneficial ownership was executed.

<sup>29</sup> The comment letters on the 2007 Proposing Release are available on the Commission's public Web site at <http://www.sec.gov/comments/s7-11-07/s71107.shtml>.

<sup>30</sup> See, e.g., comment letters on the 2007 Proposing Release from Jesse Brill (dated Aug. 1, 2007) ("Brill 1"); Cleary Gottlieb Steen & Hamilton LLP ("Cleary Gottlieb"); Feldman Weinstein and Smith LLP ("Feldman"); Fried, Frank, Harris, Shriver, and Jacobsen LLP ("Fried Frank"); Barry Gleicher ("Gleicher"); Krieger & Prager, LLP ("Krieger"); U.S. Securities Lawyers in London ("London Forum"); Parsons/Burnett LLP ("Parsons"); Pink Sheets, LLC ("Pink Sheets"); Richardson Patel LLP ("Richardson Patel"); Roth Capital Partners ("Roth"); Society of Corporate Secretaries & Governance Professionals ("SCSGP"); Sichenzia Ross Friedman Ference LLP ("Sichenzia"); Sullivan & Cromwell LLP ("Sullivan"); Peter J. Weisman ("Weisman"); and Williams Securities Law ("Williams"); and a joint letter from the Securities Industry and Financial Markets Association, International Swaps and Derivatives Association, Inc. and Management Funds Association ("Financial Associations").

<sup>31</sup> See comment letters on the 2007 Proposing Release from the Committee on Federal Regulation of Securities of the American Bar Association ("ABA"); Feldman; Financial Associations; Fried Frank; London Forum; Richardson Patel; Roth; Sichenzia; SCSGP; Weisman; and Williams.

<sup>32</sup> See comment letters on the 2007 Proposing Release from the North American Securities Administrators Association, Inc. ("NASAA") and Marc I. Steinberg ("Steinberg").

convertible into that class (or, in the case of nonconvertible debt, with respect to any nonconvertible debt securities).<sup>33</sup> The commenters thought that the tolling provision could have a negative effect on capital raising transactions. These commenters provided several recommendations on how we should modify the tolling provision, if we decide to adopt it. We received general support for the other aspects of the proposed amendments, including the proposals relating to Form 144, the elimination of the manner of sale requirements for debt securities and the codification of several staff interpretations.

## II. Discussion of Final Amendments

### A. Simplification of the Preliminary Note and Text of Rule 144

In the 2007 Proposing Release, we noted that the current Preliminary Note is complex and may be confusing to some security holders. We proposed amendments to simplify and clarify the Preliminary Note to Rule 144 and to incorporate plain English principles. The proposed amendments to the Preliminary Note were not intended to alter the substantive operation of the rule. In addition, we proposed changes throughout the rule to make the rule less complex and easier to read.

We received a few comments on the proposed changes to simplify Rule 144 and the Preliminary Note. One commenter believed that the Preliminary Note to Rule 144 is no longer necessary, because the purpose and meaning of the rule are well-understood.<sup>34</sup> Some commenters recommended that we further explain how Rule 144 can be used for the resale of control securities.<sup>35</sup>

We are adopting the amendments to the Preliminary Note with some modification from the proposed version. The revised Preliminary Note retains an explanation of the relationship among the exemption in Section 4(1) of the Securities Act, the Section 2(a)(11) definition of "underwriter" and the Rule 144 safe harbor. Consistent with the proposal, the revised Preliminary Note also clarifies that any person who sells restricted securities, and any person who sells restricted securities or other securities on behalf of an affiliate, shall be deemed not to be engaged in a

<sup>33</sup> See comment letters on the 2007 Proposing Release from ABA; Cleary Gottlieb; Feldman; Financial Associations; Richardson Patel; Sichenzia; and Weisman.

<sup>34</sup> See comment letter on the 2007 Proposing Release from ABA.

<sup>35</sup> See comment letters on the 2007 Proposing Release from ABA; Bulldog Investors; and Sutherland Asbill & Brennan LLP ("Sutherland").

distribution of such securities and therefore shall be deemed not to be an underwriter with respect to such securities if the sale in question is made in accordance with all the applicable provisions of the rule. The revised Preliminary Note further states that, although Rule 144 provides a safe harbor for establishing the availability of the Section 4(1) exemption, it is not the exclusive means for reselling restricted and control securities. Therefore, Rule 144 does not eliminate or otherwise affect the availability of any other exemption for resales.<sup>36</sup> Consistent with a statement that was included in the original Rule 144 adopting release,<sup>37</sup> we are adding a statement to the Preliminary Note that the Rule 144 safe harbor is not available with respect to any transaction or series of transactions that, although in technical compliance with the rule, is part of a plan or scheme to evade the registration requirements of the Securities Act.<sup>38</sup> We also are adopting plain English changes throughout the rule text substantially as proposed.

### B. Amendments to Holding Periods for Restricted Securities

#### 1. Six-Month Rule 144(d) Holding Period Requirement for Exchange Act Reporting Companies

As stated above, in 1997, we reduced the Rule 144 holding periods for restricted securities for both affiliates and non-affiliates.<sup>39</sup> Before the 1997 amendments, security holders could sell limited amounts of restricted securities after holding those securities for two years if they satisfied all other conditions imposed by Rule 144.<sup>40</sup> Under Rule 144(k), non-affiliates could sell restricted securities without being subject to any of the conditions in Rule 144 after holding their securities for three years. The 1997 amendments to

<sup>36</sup> We are moving the statements indicating that Rule 144 is a non-exclusive safe harbor from paragraph (j) of the rule, as it existed prior to the amendments, to the Preliminary Note.

<sup>37</sup> Release No. 33-5223. In the original release adopting Rule 144, we stated:

In view of the objectives and policies underlying the Act, the rule shall not be available to any individual or entity with respect to any transaction which, although in technical compliance with the provisions of the rule, is part of a plan by such individual or entity to distribute or redistribute securities to the public. In such case, registration is required.

<sup>38</sup> Similar language can also be found in other rules such as in the Preliminary Note to Securities Act Rule 144A [17 CFR 230.144A].

<sup>39</sup> See the 1997 Adopting Release.

<sup>40</sup> These other conditions included the availability of current public information, the volume of sale limitations, the manner of sale requirements, and the filing of Form 144. See 17 CFR 230.144(c), (e), (f) and (h).

Rule 144 reduced the two-year Rule 144(d) holding period to one year and amended the three-year Rule 144(k) holding period to two years.

In the 1997 Proposing Release, we solicited comment on whether the Rule 144(d) holding period should be further reduced for both affiliates and non-affiliates, and whether restrictions applicable to sales by non-affiliates also should be reduced. We received numerous comments on this issue. Twelve commenters recommended that we further reduce the holding period to six months.<sup>41</sup> Two other commenters thought that we should maintain the holding periods that we had just recently adopted.<sup>42</sup> Eight commenters recommended that we gain more experience with the new holding periods before proposing further amendments to those holding periods.<sup>43</sup>

In the 2007 Proposing Release, we again proposed to shorten the Rule 144(d) holding period for restricted securities held by affiliates and non-affiliates.<sup>44</sup> The proposal would have permitted both affiliates and non-affiliates to publicly sell restricted securities of Exchange Act reporting issuers<sup>45</sup> after holding the securities for six months, subject to any other applicable condition of Rule 144, if they had not engaged in hedging transactions with respect to the securities. Because of

our concern that the market does not have sufficient information and safeguards with respect to non-reporting issuers, we proposed to retain the one-year holding period for restricted securities of issuers that are not subject to Exchange Act Section 13(a) or Section 15(d) reporting obligations for both affiliates and non-affiliates.

Several commenters supported the proposal to shorten the holding period to six months for securities of reporting issuers.<sup>46</sup> These commenters noted that the shortened holding period would increase liquidity for issuers, make capital investment more attractive, and decrease costs of capital for smaller companies without sacrificing investor protection.<sup>47</sup> In this regard, one commenter noted that today's markets now function at an accelerated pace, and technology, particularly the Internet, has caused the markets to become more efficient.<sup>48</sup> Two commenters advocated an even shorter holding period requirement than the proposed six-month period, with one commenter advocating a four-month holding period and the other a three-month holding period.<sup>49</sup> Two commenters opposed shortening the holding period requirement under Rule 144, as proposed.<sup>50</sup>

The purpose of Rule 144 is to provide objective criteria for determining that the person selling securities to the public has not acquired the securities from the issuer for distribution. A holding period is one criterion established to demonstrate that the selling security holder did not acquire the securities to be sold under Rule 144 with distributive intent. We do not want the holding period to be longer than necessary or impose any unnecessary costs or restrictions on capital formation. After observing the operation of Rule 144 since the 1997 amendments, we believe that a six-month holding period for securities of reporting issuers provides a reasonable indication that an

investor has assumed the economic risk of investment in the securities to be resold under Rule 144. Therefore, we are adopting a six-month holding period for reporting companies, as proposed.<sup>51</sup> Most commenters agreed that shortening the holding period to six months for restricted securities of reporting issuers will increase the liquidity of privately sold securities and decrease the cost of capital for reporting issuers, while still being consistent with investor protection.<sup>52</sup> By reducing the holding period for restricted securities, these amendments are intended to help companies to raise capital more easily and less expensively. For example, by making private offerings more attractive, the amendments may allow some companies to avoid certain types of costly financing structures involving the issuance of extremely dilutive convertible securities. Many commenters supported the proposal to maintain the existing one-year holding period for restricted securities of non-reporting issuers.<sup>53</sup>

Under the amendments that we are adopting, the six-month holding period requirement will apply to the securities of an issuer that has been subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act for a period of at least 90 days before the Rule 144 sale.<sup>54</sup> Restricted securities of a "non-reporting issuer" will continue to be subject to a one-year holding period requirement.<sup>55</sup> A non-reporting issuer is one that is not, or has not been for a period of at least 90 days before the Rule 144 sale, subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act.<sup>56</sup>

We believe that different holding periods for reporting and non-reporting issuers are appropriate given that reporting issuers have an obligation to file periodic reports with updated financial information (including audited financial information in annual filings) that are publicly available on EDGAR, the Commission's electronic filing system. Although non-reporting issuers

<sup>41</sup> See comment letters on the 1997 Proposing Release from American Society of Corporate Secretaries ("ASCS"); Association for Investment Management & Research ("AIMR"); Association of the City Bar of New York ("NY City Bar"); Baltimore Gas & Electric ("BG&E"); Investment Company Institute ("ICI"); Charles Lilienthal ("Lilienthal"); Loeb & Loeb LLP; New York State Bar Association ("NY Bar"); Schwartz Investments, LLC ("Schwartz Investments"); Sullivan; Testa, Hurwitz & Thibault, LLP ("Testa Hurwitz"); and Willkie, Farr & Gallagher LLP ("Willkie Farr"). The comment letters on the 1997 Proposing Release are available on the Commission's Web site at <http://www.sec.gov/rules/proposed/s7797.shtml> or in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549. Interested persons should refer to File No. S7-07-97.

<sup>42</sup> See comment letters on the 1997 Proposing Release from Argent Securities, Inc. ("Argent") and The Corporate Counsel ("Corporate Counsel").

<sup>43</sup> See comment letters on the 1997 Proposing Release from ABA; joint letter from Goldman Sachs & Co., JP Morgan Securities, Inc., Morgan Stanley & Co., Inc., and Salomon Brothers Inc. ("Four Brokers"); Lehman Brothers Inc. ("Lehman Brothers"); Merrill Lynch & Co., Inc. ("Merrill Lynch"); Morgan Stanley & Co., Inc. ("Morgan Stanley"); Regional Investment Bankers Association ("Regional Bankers"); Securities Industry Association ("SIA"); and Smith Barney Inc. ("Smith Barney").

<sup>44</sup> See the 2007 Proposing Release at Section II.B.2.a.

<sup>45</sup> Under the 2007 proposals, the six-month holding period would apply to securities of an issuer that is, and has been for at least 90 days before the sale, subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act.

<sup>46</sup> See comment letters on the 2007 Proposing Release from ABA; Feldman; Financial Associations; Fried Frank; London Forum; Richardson Patel; Roth; Sichenzia; SCSSGP; Weisman; and Williams.

<sup>47</sup> See comment letters on the 2007 Proposing Release from Financial Associations; Pink Sheets; Richardson Patel; and Roth.

<sup>48</sup> See comment letter on the 2007 Proposing Release from ABA. See also letter to John W. White, Director, SEC Division of Corporation Finance, from Keith F. Higgins, Chair, Committee on Federal Regulation of Securities, ABA Section of Business Law (Mar. 22, 2007) ("the March 2007 ABA Letter"), available at <http://www.sec.gov/comments/s7-11-07/s71107.shtml>.

<sup>49</sup> See comment letters on the 2007 Proposing Release from Feldman and Weisman.

<sup>50</sup> See comment letters on the 2007 Proposing Release from NASAA and Steinberg.

<sup>51</sup> See amendments to Rule 144(d). The amendments do not change the Rule 144(d) requirement that, if the acquirer takes the securities by purchase, the holding period will not commence until the full purchase price is paid.

<sup>52</sup> See Section VI. of this release.

<sup>53</sup> See comment letters on the 2007 Proposing Release from ABA; Brill 1; Financial Associations; Gleicher; Weisman; and Williams.

<sup>54</sup> See new Rule 144(d)(1)(i). We also are making conforming amendments to paragraphs (e)(3)(ii), (e)(3)(iii) and (e)(3)(iv) of Rule 144.

<sup>55</sup> However, non-affiliates of non-reporting companies will no longer be subject to any other resale restrictions after meeting the one-year holding period. See Section II.B.3 below.

<sup>56</sup> See new Rule 144(d)(1)(ii).

must make some information publicly available before resales can be made under Rule 144, this information typically is much more limited in scope than information included in Exchange Act reports, is not required to include audited financial information, and is not publicly available via EDGAR.<sup>57</sup> For these reasons, we believe that continuing to require security holders of non-reporting issuers to hold their securities for one year is not unduly burdensome and is consistent with investor protection.

## 2. Significant Reduction of Conditions Applicable to Non-Affiliates

Before adoption of these amendments, both non-affiliates and affiliates were subject to all other applicable conditions of Rule 144, in addition to the Rule 144(d) holding period requirement, including the condition that current information about the issuer of the securities be publicly available, the limitations on the amount of securities that may be sold in any three-month period, the manner of sale requirements and the Form 144 notice requirement. However, pursuant to paragraph (k) of Rule 144 as it existed prior to the amendments that we are adopting, a non-affiliate of the issuer at the time of the Rule 144 sale who had not been an affiliate during the three months prior to the sale, could sell the securities after holding them for two years without complying with these other conditions.

In the 2007 Proposing Release, we proposed to permit non-affiliates to resell their restricted securities freely after meeting the applicable holding period requirement (i.e., six months with respect to a reporting issuer and one year with respect to a non-reporting issuer), except that non-affiliates of reporting issuers still would be subject to the current public information requirement in Rule 144(c) for an additional six months after the end of the initial six-month holding period.

In general, commenters supported the proposal to reduce substantially the requirements for the resale of restricted securities by non-affiliates under Rule 144.<sup>58</sup> Noting the importance of the current public information condition, two commenters expressed support for

the proposed retention of that requirement for the resales of restricted securities by non-affiliates occurring between six months and one year after acquisition of the securities.<sup>59</sup> Some commenters expressed support for removal of the manner of sale requirements and the Form 144 notice requirement,<sup>60</sup> while a few objected to removal of those requirements.<sup>61</sup> The commenters objecting to the removal of those requirements expressed concern about the transparency of Rule 144 transactions and the potential increase in violations of the holding period requirement if the manner of sale requirements and the Form 144 notice requirement were eliminated.<sup>62</sup> The two commenters that opposed shortening the Rule 144(d) holding period also opposed the proposals to permit non-affiliates to resell without being subject to any other condition (except the public information requirement, with respect to resales of securities of reporting companies) after they meet the holding period.<sup>63</sup>

We are adopting the amendments for the sale of restricted securities by non-affiliates after the holding period, as proposed.<sup>64</sup> Under the amendments, after the applicable holding period requirement is met, the resale of restricted securities by a non-affiliate under Rule 144 will no longer be subject to any other conditions of Rule 144 except that, with regard to the resale of securities of a reporting issuer, the current public information requirement in Rule 144(c) will apply for an additional six months after the six-month holding period requirement is met.<sup>65</sup> Therefore, a non-affiliate will no

longer be subject to the Rule 144 conditions relating to volume limitations, manner of sale requirements, and filing Form 144.<sup>66</sup>

We believe that the complexity of resale restrictions may inhibit sales by, and imposes costs on, non-affiliates. Because Rule 144 is relied upon by many individuals to resell their restricted securities, we believe that it is particularly helpful to streamline and reduce the complexity of the rule as much as possible while retaining its integrity. We continue to believe that retaining the current public information requirement with regard to resales of restricted securities of reporting issuers for up to one year after the acquisition of the securities is important to help provide the market with adequate information regarding the issuer of the securities. In addition, we generally believe that most abuses in sales of unregistered securities involve affiliates of issuers<sup>67</sup> and securities of shell companies. As discussed below, we are codifying the staff's current interpretive position that Rule 144 cannot be relied upon for the resale of the securities of reporting and non-reporting shell companies.<sup>68</sup>

The final conditions applicable to the resale under Rule 144 of restricted securities held by affiliates and non-affiliates of the issuer can be summarized as follows:

Gottlieb; Financial Associations; and Weisman. In the past, the staff in the Division of Corporation Finance has expressed the view that "it is not inappropriate for issuers to remove restrictive legends from securities that may be resold in reliance on Rule 144(k)." See, e.g., *Toth Aluminum Corporation* (Oct. 31, 1988). Under the amendments that we are adopting, we do not object if issuers remove restrictive legends from securities held by non-affiliates after all of the applicable conditions in Rule 144 are satisfied. However, the removal of a legend is a matter solely in the discretion of the issuer of the securities. Disputes about the removal of legends are governed by state law or contractual agreements, rather than federal law.

<sup>66</sup> Although the Rule 144(e) volume limitations will no longer apply to resales of restricted securities by non-affiliates as a result of the amendments, an affiliate pledgor, donor, or trust settlor will be required to aggregate the amount of securities sold for the account of a pledgee, donee or trust, as applicable, even when there is no concerted action, in accordance with Rule 144(e)(3)(i), (iii), and (iv) in order to determine the amount of securities that is permitted to be sold under Rule 144.

<sup>67</sup> Pink Sheets also noted in its letter that most of the abuses in transactions involving unregistered securities involve sales and purchases by affiliates of the issuers.

<sup>68</sup> See Section II.E.6 of this release.

<sup>59</sup> See comment letters on the 2007 Proposing Release from ABA and Weisman.

<sup>60</sup> See, e.g., comment letters on the 2007 Proposing Release from ABA; BAIS; Cleary Gottlieb; Fried Frank; and SCSGP.

<sup>61</sup> See comment letters on the 2007 Proposing Release from Argus Vickers Stock Research Corp. ("Argus"); Brill 1; and The Washington Service on the Form 144 requirement ("WS 2").

<sup>62</sup> See comment letters on the 2007 Proposing Release from Brill 1 and WS 2.

<sup>63</sup> See comment letters on the 2007 Proposing Release from NASAA and Steinberg.

<sup>64</sup> Under the amendments, paragraph (k) of Rule 144 has been removed. The conditions that non-affiliates are required to meet for the sale of their securities under Rule 144 are now contained in paragraph (b)(1) of the rule.

<sup>65</sup> Some commenters requested us to state that the Commission would not object if the restricted securities legend were removed from securities held by a non-affiliate, after all the applicable Rule 144 conditions to resale have been met. See comment letters on the 2007 Proposing Release from Cleary

<sup>57</sup> See 17 CFR 240.15c2-11.

<sup>58</sup> See, e.g., comment letters on the 2007 Proposing Release from Brill 1; Cleary Gottlieb; Pink Sheets; and Weisman.

	Affiliate or person selling on behalf of an affiliate	Non-affiliate (and has not been an affiliate during the prior three months)
Restricted Securities of Reporting Issuers.	<p><i>During six-month holding period</i>—no resales under Rule 144 permitted</p> <p><i>After six-month holding period</i>—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><i>During six-month holding period</i>—no resales under Rule 144 permitted.</p> <p><i>After six-month holding period but before one year</i>—unlimited public resales under Rule 144 except that the current public information requirement still applies.</p> <p><i>After one-year holding period</i>—unlimited public resales under Rule 144; need not comply with any other Rule 144 requirements.</p>
Restricted Securities of Non-Reporting Issuers.	<p><i>During one-year holding period</i>—no resales under Rule 144 permitted</p> <p><i>After one-year holding period</i>—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><i>During one-year holding period</i>—no resales under Rule 144 permitted.</p> <p><i>After one-year holding period</i>—unlimited public resales under Rule 144; need not comply with any other Rule 144 requirements.</p>

### 3. Tolling Provision

In 1990, we eliminated a Rule 144 provision that tolled, or suspended, the holding period of a security holder maintaining a short position in, or any put or other option to dispose of, securities equivalent to the restricted securities owned by the security holder.<sup>69</sup> We eliminated this provision in conjunction with an amendment to broaden a security holder's ability to tack the holding periods of prior owners to the security holder's own holding period.<sup>70</sup>

We previously have expressed concern regarding the effect of hedging activities designed to shift the economic risk of investment away from the security holder with respect to restricted securities.<sup>71</sup> In the 1997 Proposing Release, we solicited comment on several alternatives designed to address these concerns.<sup>72</sup> Seven commenters recommended that we adopt measures

<sup>69</sup> See Release No. 33-6862 (Apr. 23, 1990) [55 FR 17933].

<sup>70</sup> "Tacking" the holding period is the ability of the security holder to include, under certain circumstances, the period that securities were held by a previous owner as part of his or her own holding period for the purposes of meeting the holding period requirement in Rule 144(d). Further discussion about tacking appears in Section II.E.2 of this release.

<sup>71</sup> For a discussion on hedging arrangements in prior releases, see Section IV.B of the 1997 Proposing Release and Section II.A of Release No. 33-7187 (June 27, 1995) [60 FR 35645].

<sup>72</sup> See the 1997 Proposing Release. In that release, we proposed five different alternatives: (1) make the Rule 144 safe harbor unavailable to persons who hedge during the restricted period; (2) independently of Rule 144, promulgate a rule that would define a sale for purposes of Section 5 to include specified hedging transactions; (3) adopt a shorter holding period during which hedging could not occur without losing the safe harbor; (4) reintroduce a tolling provision in Rule 144 similar to the provision that was included prior to 1990; or (5) maintain the status quo with no specific prohibition against hedging.

to eliminate or restrict hedging activities during the holding period.<sup>73</sup> Six commenters recommended maintaining the status quo.<sup>74</sup> Six other commenters suggested that we adopt a safe harbor for certain hedging activities that would be deemed permissible under Rule 144.<sup>75</sup>

In the 2007 Proposing Release, we acknowledged a concern about the effect of hedging activities in connection with the adoption of a six-month holding period for securities of reporting issuers. We noted that, when we eliminated the tolling provision in 1990, the Rule 144 holding periods were longer.<sup>76</sup> We also expressed the view that the proposal to shorten the holding period to six months could make the entry into such hedging arrangements significantly easier and less costly because these arrangements would cover a much shorter period.<sup>77</sup> We therefore proposed to reintroduce a Rule 144 tolling provision that would have suspended the holding period for restricted securities of Exchange Act reporting issuers while a security holder engaged in certain hedging transactions.<sup>78</sup>

<sup>73</sup> See comment letters on the 1997 Proposing Release from ABA; AIMR; Argent; ASCS; Constantine Katsoris; Corporate Counsel; and Schwartz Investments.

<sup>74</sup> See comment letters on the 1997 Proposing Release from Bear, Stearns & Co., Inc.; BG&E; Intel Corporation ("Intel"); PaineWebber Incorporated; Wilkie Farr; and XXI Securities.

<sup>75</sup> See comment letters on the 1997 Proposing Release from Four Brokers; NY Bar; SIA; Merrill Lynch; Citibank; and Lehman Brothers.

<sup>76</sup> At that time, Rule 144 provided for a two-year holding period before a security holder could sell limited amounts of restricted securities, and a three-year period before a non-affiliate security holder could sell an unlimited amount of the securities.

<sup>77</sup> See the 2007 Proposing Release at Section II.B.2.b.

<sup>78</sup> We proposed to exclude from the holding period any period in which the security holder had a short position or had entered into a "put equivalent position," as defined by Exchange Act

However, we proposed that any suspension due to hedging would not have caused, under any circumstances, the holding period to extend beyond one year.

Because the proposed tolling provision also would have worked in conjunction with the Rule 144 provisions that permit tacking of holding periods, a selling security holder would have been required to determine whether a previous owner of the securities had engaged in hedging activities with respect to the securities, if the selling security holder wished to tack the previous owner's holding period to the holding period of the selling security holder. The proposed provision would have tolled the holding period during any period in which the previous owner held a short position or put equivalent position with respect to the securities, however, there would have been no tolling of the previous owner's holding period if the security holder for whose account the securities were to be sold reasonably believed that no such short or put equivalent position was held by the previous owner.

In connection with the proposed tolling provision, we also proposed other related changes to Rule 144. First, we proposed to require that information be provided in Form 144 regarding any short or put equivalent position held with respect to the securities prior to the resale of the securities. The second proposal related to the manner of sale requirements in paragraphs (f) and (g) of Rule 144.<sup>79</sup>

Rule 16a-1(h) [17 CFR 240.16a-1(h)], with respect to the same class of securities (or, in the case of nonconvertible debt, with respect to any nonconvertible debt securities of the same issuer).

<sup>79</sup> We proposed to amend Note (ii) to Rule 144(g)(3) [17 CFR 230.144(g)(3)] to supplement the

Several commenters objected to the proposed reintroduction of the tolling provision and suggested modifications to the proposed provision, if the Commission chose to adopt it.<sup>80</sup> Commenters objecting to the proposed tolling provision provided the following reasons, among others, why the Commission should not adopt the proposed tolling provision:

- Hedging transactions involve costs and risks for the security holder and do not entirely transfer risk of the economic investment of the securities;<sup>81</sup>

- Any concern that the Commission has about hedging activities immediately after the acquisition is outweighed by the belief that hedging activities can enhance private placements as a means of capital formation and should be allowed to continue because they do not raise substantial concerns about unregistered distributions;<sup>82</sup>

- In the current environment, a security holder may hold long and short positions across multiple trading desks and complex financial institutions and positions may change daily or even intra-day. The task of tracing and processing such positions would necessitate the development of costly custom software and hardware systems. Consequently, security holders might ultimately choose to hold the securities for the default one-year period rather than implement these costly systems, thereby frustrating the intent of the Commission in adopting the six-month holding period;<sup>83</sup>

- There is a natural ceiling on the amount of hedging activity in restricted securities because the supply of unrestricted securities is limited;<sup>84</sup>

- The Commission has adequate enforcement tools to address abuses in

reasonable inquiry requirement by requiring a broker to inquire into the existence and character of any short position or put equivalent position with regard to the securities held by the person for whose account the securities are to be sold, if the securities have been held for less than one year, whether such person has made inquiries into the existence and character of any short position or put equivalent position held by the previous owner of the securities, and the results of such person's inquiries.

<sup>80</sup> See, e.g., comment letters on the 2007 Proposing Release from ABA; Cleary Gottlieb; Feldman; Financial Associations; Richardson Patel; Sichenzia; and Weisman.

<sup>81</sup> See, e.g., comment letters on the 2007 Proposing Release from Feldman; Financial Associations; and Richardson Patel.

<sup>82</sup> See comment letter on the 2007 Proposing Release from ABA.

<sup>83</sup> See, e.g., comment letter on the 2007 Proposing Release from Financial Associations.

<sup>84</sup> See comment letter on the 2007 Proposing Release from ABA.

hedging with respect to restricted securities;<sup>85</sup> and

- The Commission's reasoning for eliminating the tolling provision in 1990 was that a single holding period running from the date of purchase from the issuer, or an affiliate of the issuer, is sufficient to prevent unregistered distributions to the public.<sup>86</sup> This reasoning still applies, even if the holding period is reduced to six months for securities of reporting issuers.<sup>87</sup>

Some commenters reasoned that if the Commission detects an increase in abuse after implementation of the revised holding period, as proposed, the Commission could modify its treatment of hedging activities.<sup>88</sup> This would be consistent with the approaches taken by the Commission when it first adopted Rule 144, and in 1997 when commenters recommended that the Commission gain more experience with the shortened holding periods before making additional revisions.<sup>89</sup>

After considering the comments, we are not adopting the proposed tolling provision and related amendments. We note, in particular, the comments asserting that, in the current environment, the tolling provision would unduly complicate Rule 144 and could require security holders or brokers to incur significant costs to monitor hedging positions for purposes of determining whether they have met the holding period requirement. This would frustrate our primary objectives to streamline Rule 144 and reduce the costs of capital for issuers. We will revisit the issue if we observe abuse relating to the hedging activities of holders of restricted securities.<sup>90</sup>

<sup>85</sup> See, e.g., comment letters on the 2007 Proposing Release from ABA and Financial Associations.

<sup>86</sup> See Release No. 33-6862.

<sup>87</sup> See comment letter on the 2007 Proposing Release from Financial Associations.

<sup>88</sup> See, e.g., comment letters on the 2007 Proposing Release from Cleary Gottlieb; Financial Associations; and Sichenzia.

<sup>89</sup> See Release No. 33-5223 and Section I of this release.

<sup>90</sup> The Commission's staff has previously stated that, with respect to short sales in reliance on the safe harbor of Rule 144 where the borrower closes out using the restricted securities, all the conditions of Rule 144 must be met at the time of the short sale. See Questions 80 through 82 of Release No. 33-6099 (Aug. 2, 1979) [44 FR 46752, 46765]. In the Commission's view, the term "sale" under the Securities Act includes contract of sale. See Release No. 33-8591 (July 19, 2005) [70 FR 44722, 44765] and Release No. 34-56206 (August 6, 2007) [72 FR 45094]. The Commission has previously indicated that, in a short sale, the sale of securities occurs at the time the short position is established, rather than when shares are delivered to close out that short position, for purposes of Section 5 of the Securities Act. See, e.g., Questions 3 and 5 of Release No. 33-8107 (June 21, 2002) [67 FR 43234]

### C. Amendments to the Manner of Sale Requirements Applicable to Resales by Affiliates

Before today's amendments, the manner of sale requirements in Rule 144(f) required securities to be sold in "brokers' transactions"<sup>91</sup> or in transactions directly with a "market maker," as that term is defined in Section 3(a)(38) of the Exchange Act.<sup>92</sup> Additionally, the rule prohibits a selling security holder from: (1) Soliciting or arranging for the solicitation of orders to buy the securities in anticipation of, or in connection with, the Rule 144 transaction; or (2) making any payment in connection with the offer or sale of the securities to any person other than the broker who executes the order to sell the securities.

In the 1997 Proposing Release, we proposed to eliminate the manner of sale requirements for the sale of both equity and debt securities alike, reasoning that the manner of sale requirements are not necessary to satisfy the purposes of Rule 144 and limit the liquidity of the security.<sup>93</sup> Some commenters opposed this proposal, asserting that brokers help ensure that selling security holders are complying with the applicable Rule 144 conditions to resale.<sup>94</sup> As discussed below, although we proposed to eliminate the manner of sale requirements only for debt securities and not equity securities in the 2007 Proposing Release, we requested comment on whether it would be appropriate to eliminate the manner of sale requirements for the sale of equity securities as well.

The comments were mixed on this point. One commenter strongly discouraged the elimination of the manner of sale requirements for equity securities,<sup>95</sup> while another supported such a change.<sup>96</sup> One commenter did not object to retaining the manner of sale requirements for resales of equity securities of affiliates, on the grounds that affiliates generally find the assistance of a broker useful in navigating compliance with Rule 144 and thus brokers serve a useful function

and Release No. 34-56206 n. 46 (Aug. 6, 2007) [72 FR 45094, 45096].

<sup>91</sup> Rule 144(g) defines the term for purposes of Rule 144.

<sup>92</sup> 15 U.S.C. 78c(a)(38).

<sup>93</sup> See Section III.C of the 1997 Proposing Release.

<sup>94</sup> See comment letters on the 1997 Proposing Release from Corporate Counsel; Matthew Crain; Katsoris; Merrill Lynch; Regional Bankers; SIA; and Smith Barney.

<sup>95</sup> See comment letter on the 2007 Proposing Release from Barron.

<sup>96</sup> See comment letter on the 2007 Proposing Release from Sullivan.

that is not unduly burdensome.<sup>97</sup> Instead of completely eliminating the manner of sale requirements, some commenters requested that we consider expanding the methods to sell the securities permitted by the manner of sale requirements.<sup>98</sup> For example, two commenters discussed amending the requirement to permit sales through alternative trading systems such as electronic venues where the broker's identity is anonymous prior to trade execution.<sup>99</sup>

In response to comments, we are adopting amendments to the manner of sale requirements that apply to resales of equity securities of affiliates.<sup>100</sup> We last made substantive amendments to the manner of sale requirements in 1978.<sup>101</sup> Since then, the growth of technological and other developments directed at meeting the investment needs of the public and reducing the cost of capital for companies have led us to refine the rules governing the trading of securities.<sup>102</sup> We believe that it is appropriate now to adopt two amendments to the manner of sale requirements so that the restrictions better reflect current trading practices and venues.

First, we are adopting a change to Rule 144(f) to permit the resale of securities through riskless principal transactions in which trades are executed at the same price, exclusive of any explicitly disclosed markup or markdown, commission equivalent, or other fee, and the rules of a self-regulatory organization permit the transaction to be reported as riskless.<sup>103</sup> We believe that these riskless principal

transactions are equivalent to agency trades.<sup>104</sup> As with agency trades, in order to qualify as a permissible manner of sale under the revised rule, the broker or dealer conducting the riskless principal transaction must meet all the requirements of a brokers' transaction, as defined by Rule 144(g), except the requirement that the broker does no more than execute the order or orders to sell the securities as agent for the person for whose account the securities are sold. The broker or dealer must neither solicit nor arrange for the solicitation of customers' orders to buy the securities in anticipation of or, in connection with, the transaction, must receive no more than the usual and customary markup or markdown, commission equivalent, or other fee, and must conduct a reasonable inquiry regarding the underwriter status of the person for whose account the securities are to be sold.

Second, we are amending Rule 144(g) which defines "brokers' transactions" for purposes of the manner of sale requirements. Under the definition of brokers' transactions, a broker must neither solicit nor arrange for the solicitation of customers' orders to buy the securities in anticipation of, or in connection with, the transaction. However, certain activities specified in three subparagraphs of Rule 144(g)(2) are deemed not to be a solicitation.<sup>105</sup> We are adding another subparagraph covering the posting of bid and ask quotations in alternative trading systems that will also be deemed not to be a solicitation. This new provision permits a broker to insert bid and ask quotations for the security in an alternative trading system, as defined in Rule 300 of Regulation ATS,<sup>106</sup> provided that the broker has published bona fide bid and ask quotations for the security in the alternative trading system on each of the last 12 business days.<sup>107</sup>

<sup>104</sup> See also, e.g., *SEC Interpretation: Commission Guidance on the Scope of Section 28(e) of the Exchange Act*, Interpretive Release No. 34-45194 (Dec. 27, 2001) [67 FR 6]. This treatment is also consistent with NASD Rules 4632(d)(3)(B), 4642(d)(3)(B), and 6420(d)(3)(B).

<sup>105</sup> See Release No. 34-5452 (Feb. 1, 1974; amended Feb. 21, 1974). These subparagraphs, as amended, are contained in paragraphs (g)(3)(i), (g)(3)(ii), and (g)(3)(iii) of Rule 144. Under the amendments, the previous paragraph (g)(2) has been redesignated as paragraph (g)(3), and the previous paragraph (g)(3) has been redesignated as paragraph (g)(4).

<sup>106</sup> 17 CFR 242.300.

<sup>107</sup> See new Rule 144(g)(3)(iv).

#### *D. Changes to Rule 144 Conditions Related to Resales of Debt Securities by Affiliates*

##### 1. Comments Received on Proposed Amendments Relating to Debt Securities

In the 2007 Proposing Release, we proposed to eliminate the manner of sale requirements in Rule 144 with regard to sales of debt securities by affiliates.<sup>108</sup> We also requested comment on whether there were any other conditions in Rule 144, such as the volume limitations, to which debt securities should not be subject. In the 2007 Proposing Release, we included preferred stock and asset-backed securities in the "debt securities" category for purposes of the proposed elimination of the manner of sale requirements.

Four commenters expressly supported the proposal to eliminate the manner of sale requirements for resales of debt securities,<sup>109</sup> and we did not receive any comments objecting to the proposal. We also did not receive any comments objecting to the proposed inclusion of preferred stock and asset-backed securities in the definition of debt securities. We received a few comments that we should expand the definition of debt securities for the purposes of proposed changes to the manner of sale requirements.<sup>110</sup>

##### 2. No Manner of Sale Requirements Regarding Resales of Debt Securities

We are adopting the amendments to eliminate the manner of sale requirements for resales of debt securities held by affiliates, as proposed.<sup>111</sup> We agree that, as financial intermediaries, brokers serve an important function as gatekeepers for promoting compliance with Rule 144,<sup>112</sup> and we are concerned that eliminating the manner of sale requirements for

<sup>108</sup> As noted in Section II.B.3 above, under the amendments that we are adopting in this release, the manner of sale requirements do not apply to the resale of securities of a non-affiliate under Rule 144. The manner of sale requirements also do not apply to securities sold for the account of the estate of a deceased person or for the account of a beneficiary of such estate, provided that the estate or beneficiary is not an affiliate of the issuer.

<sup>109</sup> See comment letters on the 2007 Proposing Release from ABA; Cleary Gottlieb; Financial Associations; and Sullivan.

<sup>110</sup> See comment letter on the 2007 Proposing Release from ABA stating that the definition of debt should exclude any requirement that the preferred stock have a liquidation preference in excess of par.

<sup>111</sup> See 17 CFR 230.144(f). As discussed above, we also are eliminating the manner of sale requirements for resales of equity and debt securities by non-affiliates.

<sup>112</sup> Brokers also must comply with the criteria set forth in Rule 144(g) in order to claim the "brokers' transactions" exemption under Section 4(4) of the Securities Act.

<sup>97</sup> See comment letter on the 2007 Proposing Release from ABA.

<sup>98</sup> See, e.g., comment letters on the 2007 Proposing Release from ABA; Cleary Gottlieb; and Sullivan.

<sup>99</sup> See comment letters on the 2007 Proposing Release from ABA and Sullivan.

<sup>100</sup> Only affiliates are required to comply with the manner of sale requirements under the amendments that we are adopting.

<sup>101</sup> See Release No. 33-5979 (Sept. 19, 1978) [43 FR 43709] (Sept. 27, 1978) (the Commission amended Rule 144(f) to permit sales under the rule to be made directly to a market maker in lieu of selling through a broker).

<sup>102</sup> For example, in the second quarter of 2007, alternative trading systems handled approximately \$1.3 trillion in volume of matched orders. (These amounts do not include orders that flow through a system, but are ultimately executed elsewhere). We obtained this data from information provided in Form ATS-R Quarterly Reports.

<sup>103</sup> See new Rule 144(f)(1)(iii). A "riskless principal transaction" is defined as 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 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 to satisfy the order to sell. See new Note to Rule 144(f)(1).

equity securities would lead to abuse. However, we do not believe that the fixed income securities market raises the same concerns about abuse,<sup>113</sup> and are persuaded that the manner of sale requirements may place an unnecessary burden on the resale of fixed income securities.<sup>114</sup> Combined with the changes that we are making to the Rule 144(e) volume limitations, these amendments will permit holders of debt securities to rely on the Rule 144 to resell their debt securities in a way and amount that was not possible previously.

As proposed, our definition of debt securities in Rule 144 includes non-participatory preferred stock (which has debt-like characteristics)<sup>115</sup> and asset-backed securities (where the predominant purchasers are institutional investors including financial institutions, pension funds, insurance companies, mutual funds and money managers)<sup>116</sup> in addition to other types of nonconvertible debt securities. This definition of debt securities is consistent with the treatment of such securities under Regulation S.<sup>117</sup>

### 3. Raising Volume Limitations for Debt Securities

We also are adopting amendments to raise the Rule 144(e) volume limitations for debt securities. Before the amendments that we are adopting, under Rule 144(e), the amount of securities sold in a three-month period could not exceed the greater of: (1) One percent of the shares or other units of the class outstanding as shown by the most recent report or statement published by the issuer, or (2) the

average weekly volume of trading in such securities, as calculated pursuant to provisions in the rule.<sup>118</sup> In response to our request for comment regarding whether we should eliminate or revise any other conditions in Rule 144 with regard to debt securities, three commenters noted that the Rule 144(e) volume limitations effectively precluded resales of debt securities by affiliates.<sup>119</sup>

Debt securities generally are issued in tranches.<sup>120</sup> We agree that, prior to our amendments, the volume limitations in Rule 144 constrained the ability of debt holders to rely on Rule 144 for the resales of their securities. For the same reasons that we are eliminating the manner of sale requirements for debt securities, we believe that it is appropriate to adopt an alternative volume limitation that is specifically applicable to the resale of debt securities. We are amending Rule 144(e) to permit the resale of debt securities in an amount that does not exceed ten percent of a tranche (or class when the securities are non-participatory preferred stock), together with all sales of securities of the same tranche sold for the account of the selling security holder within a three-month period.<sup>121</sup> We believe that this new ten percent limitation provision will permit a more reasonable amount of trading in debt securities than the one percent limitation has permitted.<sup>122</sup> These revised volume limitations also apply to resales of non-participatory preferred stock or asset-backed securities, which are defined as debt securities for purposes of Rule 144.

#### *E. Increase of the Thresholds That Trigger the Form 144 Filing Requirement for Affiliates*

Before today's amendments, Rule 144(h) required a selling security holder to file a notice on Form 144 if the security holder's intended sale exceeded either 500 shares or \$10,000 within a three-month period.<sup>123</sup> These filing thresholds had not been modified since 1972.<sup>124</sup> In the 1997 Proposing Release,

we proposed to increase the filing thresholds to 1,000 shares or \$40,000. Thirteen commenters supported raising the filing threshold and no commenters opposed the idea.<sup>125</sup> Some commenters suggested that we eliminate Form 144 altogether.<sup>126</sup> One commenter suggested raising the threshold to \$100,000.<sup>127</sup> Another commenter suggested raising it to \$250,000.<sup>128</sup>

In the 2007 Proposing Release, we proposed to increase the Form 144 filing thresholds to cover sales of 1,000 shares or \$50,000 within a three-month period.<sup>129</sup> Some commenters specifically expressed support for raising the Form 144 filing thresholds.<sup>130</sup> One of these commenters recommended filing thresholds of 10,000 shares or \$100,000, if the Commission chose to retain a Form 144 filing requirement for affiliates.<sup>131</sup>

We are adopting the increased Form 144 filing thresholds with some modification. As proposed, we are raising the dollar threshold to \$50,000 to adjust for inflation since 1972.<sup>132</sup> After considering the comments, we are raising the share threshold to 5,000 shares, rather than the proposed 1,000 shares. We believe that the 5,000 share threshold is an appropriate alternate threshold for trades in amounts that may not reach the \$50,000 dollar threshold, but that merit notice to the market.

In the 2007 Proposing Release, we also solicited comment on whether we should coordinate the Form 144 filing requirements with Form 4 filing

months and made conforming changes to the Form 144 filing requirement. Release No. 33-5995 (Nov. 8, 1978) [43 FR 54229].

<sup>125</sup> See comment letters on the 1997 Proposing Release from ABA; ASCS; AT&T Corp. ("AT&T"); BG&E; Corporate Counsel; Merrill Lynch; Morgan Stanley; NY Bar; NY City Bar; Regional Bankers; SIA; Smith Barney; and Sullivan.

<sup>126</sup> See comment letters on the 1997 Proposing Release from ABA; Benesch, Friedlander, Coplan & Aronoff, LLP; NY Bar; NY City Bar; and Sullivan.

<sup>127</sup> See comment letter on the 1997 Proposing Release from ABA.

<sup>128</sup> See comment letter on the 1997 Proposing Release from NY Bar.

<sup>129</sup> Only affiliates of the issuer are required to file a notice of proposed sale on Form 144 when relying on Rule 144 under the amendments that we are adopting.

<sup>130</sup> See, e.g., comment letters on the 2007 Proposing Release from ABA; Financial Associations; and SCSGP.

<sup>131</sup> See comment letter on the 2007 Proposing Release from ABA. ABA supported elimination of Form 144 but recommended these filing thresholds, if the Commission chose to retain it.

<sup>132</sup> The adjustment would be approximately \$42,000 if based on the Personal Consumption Expenditures Chain-Type Price Index, as published by the Department of Commerce. In addition, if based on the Consumer Price Index, the adjustment would be approximately \$50,000. To achieve a round number, we proposed to raise the filing threshold to \$50,000.

<sup>113</sup> We distinguish between debt and equity in the same way we distinguished debt and equity markets when we last amended Regulation S. There, we did not believe that the procedures and restrictions applicable to offerings of equity securities under Regulation S should be applicable to offerings of nonconvertible debt securities, reasoning that the nature of the trading markets for debt securities appears not to have facilitated similar abusive practices as the markets for equity securities. See *Offshore Offers and Sales*, Release No. 33-7505 (Feb. 17, 1998) [63 FR 9631].

<sup>114</sup> The March 2007 ABA Letter noted that debt securities generally are traded in dealer transactions in which the dealer seeks buyers for securities to fill sell orders instead of through the means prescribed in Rule 144(f).

<sup>115</sup> The definition of debt securities appears in amended Rule 144(a). "Non-participatory preferred stock" is defined as non-convertible capital stock, the holders of which are entitled to a preference in payment of dividends and in distribution of assets on liquidation, dissolution, or winding up of the issuer, but are not entitled to participate in residual earnings or assets of the issuer.

<sup>116</sup> See Release No. 33-8518 (Dec. 22, 2004) [70 FR 1506].

<sup>117</sup> See 17 CFR 230.901 through 230.905 and Release No. 33-7505.

<sup>118</sup> See 17 CFR 230.144(e)(1)(i), (ii), and (iii).

<sup>119</sup> See comment letters on the 2007 Proposing Release from ABA; Cleary Gottlieb; and Sullivan.

<sup>120</sup> The term "tranche" is also used in the definition of "distribution compliance period" in Rule 902(f) of Regulation S. 17 CFR 230.902(f).

<sup>121</sup> See newly revised Rule 144(e)(2).

<sup>122</sup> Generally, because of the absence of an active trading market in debt securities, debt holders do not rely on the average daily trading volume test to sell their securities under Rule 144.

<sup>123</sup> 17 CFR 230.144(h).

<sup>124</sup> We note, however, that in 1978, the Commission shortened the relevant time period in Rule 144(e) for calculating the amount of securities to be sold under Rule 144 from six months to three

requirements. Many commenters supported a combination of the two forms.<sup>133</sup> Although we are not adopting those changes today, we expect to issue a separate release in the future to provide affiliates that are subject to both the Form 4 and Form 144 filing requirements with greater flexibility in satisfying their requirements.

#### F. Codification of Several Staff Positions

In the 2007 Proposing Release, we proposed to codify several interpretive positions issued by the staff of the Division of Corporation Finance. We proposed to codify the first three staff positions listed below in both the 1997 Proposing Release and the 2007 Proposing Release, but we proposed to codify the last four staff positions listed below only in the 2007 Proposing Release.

Some commenters expressed general support for the proposed codifications of staff interpretations relating to Rule 144.<sup>134</sup> One commenter specifically expressed the view that the action should help to resolve any lingering confusion regarding the calculation of holding periods in the circumstances addressed by the interpretations.<sup>135</sup> We are adopting all of the codifications substantially as proposed. The codifications should make these interpretations more transparent and readily available to the public.

#### 1. Securities Acquired Under Section 4(6) of the Securities Act Are Considered "Restricted Securities"

In 1997, we first proposed to codify the Division of Corporation Finance's interpretive position that securities acquired from the issuer pursuant to an exemption from registration under Section 4(6) of the Securities Act<sup>136</sup> are considered "restricted securities" under Rule 144(a)(3).<sup>137</sup> We did not receive

<sup>133</sup> See, e.g., comment letters on the 2007 Proposing Release from ABA; BAIS; Brill 1; Fried Frank; Pink Sheets; Sichenzia; SCSSGP; and Sullivan. The comment letters from ABA, BAIS, SCSSGP and Sullivan advocated that the Commission should eliminate the Form 144 filing requirement; however, to the extent that we determine to retain any items required by Form 144, they provided suggestions regarding the proposal to combine Form 144 with Form 4.

<sup>134</sup> See comment letters on the 2007 Proposing Release from ABA; Cleary Gottlieb; Financial Associations; Fried Frank; and Richardson Patel.

<sup>135</sup> See comment letter on the 2007 Proposing Release from Financial Associations.

<sup>136</sup> 15 U.S.C. 77d(6). Section 4(6) was included in the Securities Act pursuant to the Small Business Investment Incentive Act of 1980 [Pub. L. No. 96-477 (Oct. 21, 1980)].

<sup>137</sup> 17 CFR 230.144(a)(3). See the Division of Corporation Finance's Compliance and Disclosure Interpretations on Rule 144 (Updated April 2, 2007), at Section 104 (Rule 144(a)(3)), Question No. 104.03.

any comments on this proposal at the time. In the 2007 Proposing Release, we again proposed to codify this position. We did not receive any comments.

Section 4(6) provides for 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.<sup>138</sup> Because the resale status of securities acquired in Section 4(6) exempt transactions should be the same as securities received in other non-public offerings that are included in the definition of restricted securities, we are of the view that securities acquired under Section 4(6) should be defined as restricted securities for purposes of Rule 144. Therefore, we are adopting an amendment to add securities acquired under Section 4(6) of the Securities Act to the definition of restricted securities, as proposed.<sup>139</sup>

#### 2. Tacking of Holding Periods When a Company Reorganizes Into a Holding Company Structure

In 1997, we also proposed to codify the Division of Corporation Finance's interpretive position that holders may tack the Rule 144 holding period in connection with transactions made solely to form a holding company.<sup>140</sup> When "tacking," holders may count the period during which they held the restricted securities of the predecessor company before the predecessor company reorganized into a holding company structure when calculating the holding period of the restricted securities of the holding company received in the reorganization. We did not receive any comments on this proposal.

We again proposed to codify this interpretive position in the 2007 Proposing Release. Two commenters recommended codification of the staff interpretive position covering tacking, in certain circumstances, in connection with the reincorporation of the issuer in a different state.<sup>141</sup> We did not receive any comments opposing this proposal.

We are adopting this amendment to Rule 144(d), as proposed.<sup>142</sup> This provision will permit tacking of the

<sup>138</sup> See 15 U.S.C. 77d(6).

<sup>139</sup> See amendments to Rule 144(a)(3).

<sup>140</sup> See the Division of Corporation Finance's letter to Morgan, Olmstead, Kennedy & Gardner Capital Corporation (Jan. 8, 1988).

<sup>141</sup> See comment letters on the 2007 Proposing Release from Sichenzia and Sullivan.

<sup>142</sup> See new Rule 144(d)(3)(ix).

holding period if the following three conditions are satisfied:

- The newly formed holding company's securities were issued solely in exchange for the securities of the predecessor company as part of a reorganization of the predecessor company into a holding company structure;
- Security holders received securities of the same class evidencing the same proportional interest in the holding company as they held in the predecessor company, and the rights and interests of the holders of such securities are substantially the same as those they possessed as holders of the predecessor company's securities; and
- Immediately following the transaction, the holding company had no significant assets other than securities of the predecessor and its existing subsidiaries and had substantially the same assets and liabilities on a consolidated basis as the predecessor had before the transaction. In such transactions, tacking is appropriate because the securities being exchanged are substantially equivalent, and there is no significant change in the economic risk of the investment in the restricted securities. The amendment that we are adopting does not change the staff interpretive position that permits tacking in connection with the reincorporation of the issuer in a different state in certain situations.

#### 3. Tacking of Holding Periods for Conversions and Exchanges of Securities

The 1997 Proposing Release proposed codifying the Division of Corporation Finance's position that, if the securities to be sold were acquired from the issuer solely in exchange for other securities of the same issuer, the newly acquired securities shall be deemed to have been acquired at the same time as the securities surrendered for conversion or exchange, even if the securities surrendered were not convertible or exchangeable by their terms.<sup>143</sup> As noted in the 1997 release, Rule 144 does not state whether the surrendered securities must have been convertible by their terms in order for tacking to be permitted, which led to some confusion on how to calculate the Rule 144 holding period. We did not receive any comments on this proposal.

We again proposed this amendment to Rule 144(d)(3)(ii) in the 2007 Proposing Release. In addition, we proposed a note to this provision that clarifies the Division's position that if:

<sup>143</sup> See the Division of Corporation Finance's letter to Planning Research Corp. (Dec. 8, 1980).

- The original securities do not permit cashless conversion or exchange by their terms;

- The parties amend the original securities to allow for cashless conversion or exchange; and

- The security holder provides consideration, other than solely securities of the issuer, for that amendment,

then the newly acquired securities will be deemed to have been acquired on the date that the original securities were so amended.<sup>144</sup>

One commenter expressed support for this proposed amendment.<sup>145</sup> Another commenter provided a suggestion for a technical change to the proposed note, that the phrase “so long as the conversion or exchange itself meets the conditions of this section,” be deleted.<sup>146</sup> We are adopting the changes to Rule 144(d), substantially as proposed.<sup>147</sup> In response to comment, we are further clarifying the note to Rule 144(d)(3)(ii) to clarify that the newly acquired securities shall be deemed to have been acquired at the same time as the amendment to the surrendered securities, so long as, in the conversion or exchange, the securities to be sold were acquired from the issuer solely in exchange for other securities of the same issuer.

#### 4. Cashless Exercise of Options and Warrants

Several commenters responding to the 1997 Proposing Release suggested that we codify the Division of Corporation Finance’s position that, 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 acquired, even if the options or warrants originally did not provide for cashless exercise by their terms.<sup>148</sup>

In the 2007 Proposing Release, we proposed to revise Rule 144 to codify that position. We also proposed to add two notes to this new paragraph. As proposed, the first note would codify the Division’s position that if:

- The original options or warrants do not permit cashless exercise by their terms; and

- The holder provides consideration, other than solely securities of the issuer,

<sup>144</sup> See the Division of Corporation Finance’s letter to Morgan Stanley & Co., Inc. (June 30, 1993).

<sup>145</sup> See comment letter on the 2007 Proposing Release from Feldman.

<sup>146</sup> See comment letter on the 2007 Proposing Release from Sullivan.

<sup>147</sup> See amendments to Rule 144(d)(3)(ii).

<sup>148</sup> See the Division of Corporation Finance’s Compliance and Disclosure Interpretations on Rule 144 (Updated April 2, 2007), at Section 212 (Rule 144(d)(3)), Interpretation No. 212.01.

to amend the options or warrants to allow for cashless exercise,

then the amended options or warrants would be deemed to have been acquired on the date that the original options or warrants were so amended.<sup>149</sup> This treatment is analogous to our treatment of conversions and exchanges.

The second note would codify the Division’s position that the grant of certain options or warrants that are not purchased for cash or property does not create an investment risk in a manner that would justify tacking the holding period for the options or warrants to the holding period for the securities received upon exercise of the options or warrants.<sup>150</sup> This is the case for options granted under an employee benefit plan. The note would clarify that, in such instances, the holder would not be allowed to tack the holding period of the option or warrant and would be deemed to have acquired the underlying securities on the date the option or warrant was exercised, if the conditions of Rule 144(d)(1) and Rule 144(d)(2) are met at the time of exercise.

Three commenters supported the codification of the staff interpretation relating to the cashless exercise of options and warrants.<sup>151</sup> Some commenters believed that the proposed rule should be expanded,<sup>152</sup> such as to include warrants and options that have only a *de minimis* exercise price.<sup>153</sup> One commenter suggested that we delete the phrase “so long as the conditions of Rule 144(d)(1) and Rule 144(d)(2) are met at the time of exercise,” in the second proposed note.<sup>154</sup>

We are adopting the amendments, substantially as proposed.<sup>155</sup> In response to comment, we have further clarified the second note to Rule 144 to make it clear that the newly acquired securities shall be deemed to have been acquired at the same time as the amendment to the options or warrants so long as the exercise itself was cashless.<sup>156</sup>

<sup>149</sup> See the Division of Corporation Finance’s letter to Morgan Stanley & Co., Inc. (June 30, 1993).

<sup>150</sup> See the Division of Corporation Finance’s letters to Morgan Stanley & Co., Inc. (June 30, 1993) and Malden Trust Corporation (Feb. 21, 1989).

<sup>151</sup> See comment letters on the 2007 Proposing Release from Cleary Gottlieb; Feldman; and Richardson Patel.

<sup>152</sup> See comment letters on the 2007 Proposing Release from Cleary Gottlieb; Financial Associations; Richardson Patel; and Weisman.

<sup>153</sup> See comment letters on the 2007 Proposing Release from Cleary Gottlieb and Financial Associations.

<sup>154</sup> See comment letter on the 2007 Proposing Release from Sullivan.

<sup>155</sup> See new Rule 144(d)(3)(x) and related notes.

<sup>156</sup> See Note 2 to Rule 144(d)(3)(x).

#### 5. Aggregation of Pledged Securities

In response to suggestions from commenters on the 1997 proposals, we proposed in the 2007 Proposing Release to add a note that would address how a pledgee of securities should calculate the Rule 144(e) volume limitation condition.<sup>157</sup> The note would codify the Division of Corporation Finance’s position that, so long as the pledgees are not the same “person” under Rule 144(a)(2), a pledgee of securities may sell the pledged securities without having to aggregate the sale with sales by other pledgees of the same securities from the same pledgor, as long as there is no concerted action by those pledgees.<sup>158</sup> As an example, assume that a security holder (the pledgor) pledges the securities he owns in Company A to two banks, Bank X and Bank Y (the pledgees). If the pledgor defaults:

- Upon default, Bank X does not have to aggregate its sales of Company A securities with Bank Y’s sales of Company A securities unless Bank X and Bank Y are acting in concert, but
- Bank X individually still must aggregate its sales with the pledgor’s sales, and

- Bank Y individually still must aggregate its sales with the pledgor’s sales.

Provided that the loans and pledges are bona fide transactions and there is no concerted action among pledgees and no other aggregation provisions under Rule 144(e) apply, we do not believe that extra burdens on pledgees to track and coordinate resales by other pledgees are warranted.

We received no comments on this proposal, and we are adopting the amendment to Rule 144(e), as proposed.<sup>159</sup>

#### 6. Treatment of Securities Issued by “Reporting and Non-Reporting Shell Companies”

A blank check company is a company that:

- Is in the development stage;
- Has no specific business plan or purpose, or has indicated that its business plan is to merge with or acquire an unidentified third party; and
- Issues penny stock.<sup>160</sup>

<sup>157</sup> Under the amendments that we are adopting, the volume limitations in Rule 144(e) would apply only to affiliates.

<sup>158</sup> See the Division of Corporation Finance’s Compliance and Disclosure Interpretations on Rule 144 (Updated April 2, 2007), at Section 216 (Rule 144(e)(3)), Interpretation No. 216.01. See also the Division of Corporation Finance’s letter to Standard Chartered Bank (June 22, 1987).

<sup>159</sup> See amendments to Rule 144(e)(3)(ii).

<sup>160</sup> 17 CFR 230.419. The term “penny stock” is defined in Exchange Act Rule 3a51–1 [17 CFR 240.3a51–1].

Such companies historically have provided opportunity for abuse of the federal securities laws, particularly by serving as vehicles to avoid the registration requirements of the securities laws.<sup>161</sup> Rule 419 under the Securities Act<sup>162</sup> was adopted in 1992 to control the extent to which such companies are able to access funds from a public offering.

In 2005, we amended Securities Act Rule 405<sup>163</sup> to define a “shell company” to mean a registrant, other than an asset-backed issuer, that has:

- (1) No or nominal operations; and
- (2) Either:
  - No or nominal assets;
  - Assets consisting solely of cash and cash equivalents; or
  - Assets consisting of any amount of cash and cash equivalents and nominal other assets.<sup>164</sup>

On January 21, 2000, the Division of Corporation Finance concluded in a letter to NASD Regulation, Inc. that Rule 144 is not available for the resale of securities initially issued by companies that are, or previously were, blank check companies.<sup>165</sup> In an effort to curtail misuse of Rule 144 by security holders through transactions in the securities of blank check companies, we proposed to codify this position with some modifications. First, we proposed to modify the staff interpretation to address securities of all companies, other than asset-backed issuers, that meet the definition of a shell company, including blank check companies. The category of companies to whom the staff interpretation was proposed to apply is broader than the Rule 405 definition of a “shell company,” however, as it would apply to any “issuer” meeting that standard, whereas the Rule 405 definition refers only to “registrants.”

<sup>161</sup> See Release No. 33-6932 (Apr. 28, 1992) [57 FR 18037].

<sup>162</sup> 17 CFR 230.419.

<sup>163</sup> 17 CFR 230.405.

<sup>164</sup> See Release No. 33-8587 (Jul. 15, 2005) [70 FR 42234].

<sup>165</sup> See the Division of Corporation Finance’s letter to Ken Worm, NASD Regulation, Inc. (Jan. 21, 2000). In that letter, the Division stated that “transactions in blank check company securities by their promoters or affiliates . . . are not the kind of ordinary trading transactions between individual investors of securities already issued that Section 4(1) [of the Securities Act] was designed to exempt.” The Division stated its view that “both before and after the business combination or transaction with an operating entity or other person, the promoters or affiliates of blank check companies, as well as their transferees, are ‘underwriters’ of the securities issued. . . . Rule 144 would not be available for resale transactions in this situation, regardless of technical compliance with that rule, because these resale transactions appear to be designed to distribute or redistribute securities to the public without compliance with the registration requirements of the Securities Act.”

For purposes of the discussion in this release only, we call these companies, “reporting and non-reporting shell companies.” Under the proposed rule, a person who wishes to resell securities of a company that is, or was, a reporting or a non-reporting shell company, other than a business combination related shell company,<sup>166</sup> would not be able to rely on Rule 144 to sell the securities.

Several commenters provided comments on the proposal to codify this staff interpretation with some modification. Some commenters expressed support for the proposed codification,<sup>167</sup> with one commenter noting that most micro-cap frauds result from the purchase and sale of securities issued by shell companies.<sup>168</sup> Two commenters expressed concern that expanding the staff interpretation to shell companies would prohibit reliance on Rule 144 by security holders of businesses attempting to implement real business plans that technically meet the definition of a shell company, but are not blank check companies.<sup>169</sup> One commenter recommended that the Commission only preclude reliance on Rule 144 for the resale of securities if they were issued at the time the issuer was a shell company.<sup>170</sup>

We are adopting, as proposed, the amendment to prohibit reliance on Rule 144 for the resale of securities of a company that is a reporting or a non-reporting shell company.<sup>171</sup> Under the amended rules, Rule 144 will not be available for the resale of securities initially issued by either a reporting or non-reporting shell company (other than a business combination related shell company) or an issuer that has been at any time previously a reporting or non-reporting shell company, unless the issuer is a former shell company that meets all of the conditions discussed below.<sup>172</sup>

<sup>166</sup> A “business combination related shell company” is defined in Securities Act Rule 405 as a shell company that is (1) formed by an entity that is not a shell company solely for the purpose of changing the corporate domicile of that entity solely within the United States; or (2) formed by an entity that is not a shell company solely for the purpose of completing a business combination transaction (as defined in § 230.165(f)) among one or more entities other than the shell company, none of which is a shell company.

<sup>167</sup> See, e.g., comment letters on the 2007 Proposing Release from Feldman; Financial Associations; Parsons; Pink Sheets; and Williams.

<sup>168</sup> See comment letter on the 2007 Proposing Release from Pink Sheets.

<sup>169</sup> See comment letters on the 2007 Proposing Release from Sichenzia and Williams.

<sup>170</sup> See comment letter on the 2007 Proposing Release from Sichenzia.

<sup>171</sup> See new Rule 144(i).

<sup>172</sup> Rule 144(i) does not prohibit the resale of securities under Rule 144 that were not initially issued by a reporting or non-reporting shell

In another part of our proposal regarding the resale of securities of reporting and non-reporting shell companies, we proposed to modify the staff interpretation to make Rule 144 available for resales of securities of companies that were formerly shell companies under provisions that are similar to other provisions that permit the use of a Securities Act Form S-8<sup>173</sup> registration statement by reporting companies that were former shell companies.<sup>174</sup> Under the proposal, despite the general prohibition against reliance on Rule 144 with respect to securities acquired by shell companies or former shell companies, a security holder would have been able to resell securities subject to Rule 144 conditions if the issuer:

- Had ceased to be a shell company;
- Is subject to Exchange Act reporting obligations;
- Has filed all required Exchange Act reports during the preceding twelve months; and

- At least 90 days have elapsed from the time the issuer files “Form 10 information” reflecting the fact that it had ceased to be a shell company before any securities were sold under Rule 144. “Form 10 information” is equivalent to information that a company would be required to file if it were registering a class of securities on Form 10 or Form 20-F under the Exchange Act.<sup>175</sup> This information is ordinarily included in a Form 8-K if the former shell company has been filing Exchange Act reports.<sup>176</sup> As proposed, the Rule 144(d) holding period for restricted securities sold under this provision would have

company or an issuer that has been at any time previously such a company, even when the issuer is a reporting or non-reporting shell company at the time of sale. Contrary to commenters’ concerns, Rule 144(i)(1)(i) is not intended to capture a “startup company,” or, in other words, a company with a limited operating history, in the definition of a reporting or non-reporting shell company, as we believe that such a company does not meet the condition of having “no or nominal operations.”

<sup>173</sup> 17 CFR 239.16b.

<sup>174</sup> See Release No. 33-8587. These provisions are consistent with the Form S-8 provisions for shell companies, except that Form S-8 requires a former shell company to wait 60 days, rather than 90 days, before it is able to use the form to register securities.

<sup>175</sup> 17 CFR 249.210 and 17 CFR 249.220f. In another Commission release, we are rescinding Form 10-SB [17 CFR 249.210b]. See SEC Press Release No. 2007-233 (Nov. 15, 2007), available at <http://www.sec.gov/news/press/2007/2007-233.htm>.

<sup>176</sup> 17 CFR 249.308. Items 2.01(f) and 5.01(a)(8) of Form 8-K require a company in a transaction where the company ceases being a shell company to file a current report on Form 8-K containing the information (or identifying the previous filing in which the information is included) that would be required in a registration statement on Form 10 or Form 10-SB to register a class of securities under Section 12 of the Exchange Act.

commenced at the time that the Form 10 information was filed.

We are adopting this part of the amendments, with some modification.<sup>177</sup> We have modified the proposal to require at least one year to elapse after Form 10 information is filed with Commission before a security holder can resell any securities of an issuer that was formerly a shell company subject to Rule 144 conditions. We believe that the one-year period is necessary for investor protection given the comments relating to the abuse and micro-cap fraud occurring in connection with the securities of shell companies. Both restricted securities and unrestricted securities will be subject to the same one-year waiting period. Thus, under the amendments that we are adopting, Rule 144 is available for the resale of restricted or unrestricted securities that were initially issued by a reporting or non-reporting shell company or an issuer that has been at any time previously a reporting or non-reporting shell company, only if the following conditions are met:

- The issuer of the securities that was formerly a reporting or non-reporting shell company has ceased to be a shell company;
- The issuer of the securities is subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act;
- The issuer of the securities has filed all reports and material required to be filed under Section 13 or 15(d) of the Exchange Act, as applicable, during the preceding 12 months (or for such shorter period that the issuer was required to file such reports and materials), other than Form 8-K reports (§ 249.308 of this chapter); and
- At least one year has elapsed from the time that the issuer filed current Form 10 type information with the Commission reflecting its status as an entity that is not a shell company.

One commenter requested clarification on when a Form 10 is deemed filed, if the staff is undertaking a review of the filing, and recommended that the Form 10 should be deemed filed when the information is filed initially with the Commission.<sup>178</sup> To promote consistency and to provide a date that security holders can rely upon, the Form 10 information will be deemed filed when the initial filing is made with the Commission, rather than when the staff of the Division of Corporation Finance has completed its review of the filing or an amendment is made in response to

staff comments, for purposes of the amendments.<sup>179</sup>

Some commenters recommended that we permit security holders of non-reporting companies that have merged with a private operating company and therefore have ceased to be shell companies to be able to rely on Rule 144.<sup>180</sup> We are not adopting a provision to permit this, because we believe that Form 10 type information and Exchange Act reporting requirements are important in protecting against potential abuse.

#### 7. Representations Required From Security Holders Relying on Exchange Act Rule 10b5-1(c)

Rule 10b5-1<sup>181</sup> under the Exchange Act defines when a purchase or sale constitutes trading “on the basis of” material nonpublic information in insider trading cases brought under Exchange Act Section 10(b)<sup>182</sup> and Rule 10b-5.<sup>183</sup> Specifically, a purchase or sale of a security of an issuer is “on the basis of” material nonpublic information about that security or issuer if the person making the purchase or sale was aware of the material nonpublic information when the person made the purchase or sale. However, Rule 10b5-1(c) provides an affirmative defense that a person’s purchase or sale was not “on the basis of” material nonpublic information. For this defense to be available, the person must demonstrate that:

- Before becoming aware of the material nonpublic information, he or she had entered into a binding contract to purchase or sell the securities, provided instructions to another person to execute the trade for the instructing person’s account, or adopted a written plan for trading the securities;
- The contract, instructions or written trading plan satisfy the conditions of Rule 10b5-1(c); and
- The purchase or sale that occurred was pursuant to the contract, instruction, or plan.

Form 144 requires a selling security holder to represent, as of the date that

the form is signed, that he or she “does not know any material adverse information in regard to the current and prospective operations of the issuer of the securities to be sold which has not been publicly disclosed.” The Division of Corporation Finance has indicated that a selling security holder who satisfies Rule 10b5-1(c) may modify the Form 144 representation to indicate that he or she had no knowledge of material adverse information about the issuer as of the date on which the holder adopted the written trading plan or gave the trading instructions. In this case, the security holder must specify that date and indicate that the representation speaks as of that date.<sup>184</sup>

In order to reconcile the Form 144 representation with Rule 10b5-1, we proposed to codify this interpretive position. Under the proposed amendments, Form 144 filers would be able to make the required representation as of the date that they adopted written trading plans or gave trading instructions that satisfied Rule 10b5-1(c). We did not receive any comments specifically on this proposal. We are adopting this amendment, as proposed.<sup>185</sup>

#### G. Amendments to Rule 145

Securities Act Rule 145<sup>186</sup> provides that exchanges of securities in connection with reclassifications of securities, mergers or consolidations or transfers of assets that are subject to shareholder vote constitute sales of those securities. Unless an exemption from the registration requirement is available, Rule 145(a) requires the registration of these sales. Rule 145(c) deems persons who were parties to such a transaction, other than the issuer, or affiliates of such parties to be underwriters. Rule 145(d) permits the resale, subject to specified conditions, of securities received in such transactions by persons deemed underwriters. In the 1997 Proposing Release, we proposed to eliminate the presumed underwriter and resale provisions in Rule 145(c) and (d). Many commenters supported the 1997 proposal.<sup>187</sup>

In the 2007 Proposing Release, we proposed amendments to Rule 145(c) and (d) that would:

<sup>184</sup> See the Division of Corporation Finance’s Manual of Publicly Available Telephone Interpretations, Fourth Supplement (May 30, 2001), at Rule 10b5-1; Form 144, Interpretation No. 2.

<sup>185</sup> See amendments to Form 144.

<sup>186</sup> 17 CFR 230.145.

<sup>187</sup> See comment letters on the 1997 Proposing Release from ABA; ASCS; AT&T; BG&E; Brobeck, Phleger & Harrison, LLP (“Brobeck”); Corporate Counsel; Intel; NY Bar; NY City Bar; SIA; Smith Barney; Sullivan; and Testa Hurwitz.

<sup>177</sup> See new Rule 144(i)(2).

<sup>178</sup> See comment letter on the 2007 Proposing Release from Sichenzia.

<sup>179</sup> See new Rule 144(i)(3).

<sup>180</sup> See, e.g., comment letters on the 2007 Proposing Release from Charles Nelson; Tom Russell; and Williams.

<sup>181</sup> 17 CFR 240.10b5-1.

<sup>182</sup> 15 U.S.C. 78j(b).

<sup>183</sup> 17 CFR 240.10b-5. As stated in Rule 10b5-1(a), the “manipulative and deceptive devices” prohibited by Section 10(b) and Rule 10b-5 include, among other things, the purchase or sale of a security of any issuer, on the basis of material nonpublic information about that security or issuer, in breach of a duty of trust or confidence that is owed directly, indirectly, or derivatively, to the issuer of that security or the shareholders of that issuer, or to any other person who is the source of the material nonpublic information.

- Eliminate the presumed underwriter provision in Rule 145(c), except with regard to Rule 145(a) transactions that involve a shell company (other than a business combination related shell company);<sup>188</sup> and

- Harmonize the requirements in Rule 145(d) with the proposed provisions in Rule 144 that would apply to securities of shell companies.

Under the proposed rule, where a party to a Rule 145(a) transaction, other than the issuer, is a shell company (other than a business combination related shell company), the party and its affiliates could resell securities acquired in connection with the transaction only in accordance with Rule 145(d).

Five commenters expressly supported the proposed changes to Rule 145.<sup>189</sup> Two commenters requested that we reassess the impact of the proposed Rule 145 amendments on the staff's position that stock received in a reorganization that is exempt from registration pursuant to Section 3(a)(10) of the Securities Act<sup>190</sup> could be publicly resold pursuant to Rule 145(d)(2).<sup>191</sup>

After considering the comments, we believe that it is appropriate to adopt the amendments to Rule 145, as proposed. The presumptive underwriter provision in Rule 145 is no longer necessary in most circumstances. However, based on our experience with transactions involving shell companies that have resulted in abusive sales of securities, we believe that there continues to be a need to apply the presumptive underwriter provision to reporting and non-reporting shell companies and their affiliates and promoters. We are amending Rule 145 to eliminate the presumptive underwriter provision except when a party to the Rule 145(a) transaction is a shell company.<sup>192</sup>

<sup>188</sup> The terms "shell company" and "business combination related shell company" are defined in Securities Act Rule 405. See also Release No. 33-8587 (Jul. 15, 2005) [70 FR 42233].

<sup>189</sup> See comment letters on the 2007 Proposing Release from ABA; Cleary Gottlieb; Fried Frank; Financial Associations; and SCSGP.

<sup>190</sup> 15 U.S.C. 77c(a)(10).

<sup>191</sup> See comment letters on the 2007 Proposing Release from Barron and Fried Frank.

<sup>192</sup> With respect to a transaction that is exempt from registration pursuant to Section 3(a)(10) of the Securities Act that falls within Rule 145(a), if any party to the transaction is a shell company, then any party to the transaction, other than the issuer, and its affiliates will be permitted to resell their securities in accordance with the restrictions of Rule 145(d). Also, the staff intends to issue a revised Staff Legal Bulletin No. 3 concurrently with the effective date of the amendments that we are adopting that will address the treatment of parties to a transaction and their affiliates that have acquired securities in a transaction exempt from

Rule 145(c) now provides that any party, other than the issuer, to a Rule 145(a) transaction involving a shell company (but not a business combination related shell company), including any affiliate of such party, who publicly offers or sells securities of the issuer acquired in connection with the transaction, will continue to be deemed an underwriter.<sup>193</sup>

Under the amendments to Rule 145 that we are adopting, if the issuer has met the requirements of new paragraph (i)(2) of Rule 144,<sup>194</sup> the persons and parties deemed underwriters will be able to resell their securities subject to paragraphs (c), (e), (f), and (g) of Rule 144 after at least 90 days have elapsed since the securities were acquired in the transaction. After six months have elapsed since the securities were acquired in the Rule 145(a) transaction, the persons and parties will be permitted to resell their securities, subject only to the Rule 144(c) current public information condition, provided that the sellers are not affiliates of the issuer at the time of sale and have not been affiliates during the three months before the sale. After one year has elapsed since the securities were acquired in the transaction, the persons and parties will be permitted to resell their securities without any limitations under Rule 145(d), provided that they are non-affiliates at the time of sale and have not been affiliates during the three months before the sale.

In addition, we are adopting, as proposed, a note to paragraphs (c) and (d) of Rule 145 that paragraph (d) is not available with respect to any transaction or series of transactions that, although in technical compliance with the rule, is part of a plan or scheme to evade the registration requirements of the Securities Act.<sup>195</sup> We have included a similar statement in the Preliminary Note to Rule 144. We also are adopting, as proposed, the clarification to the language in Rule 145(d) regarding the securities that were acquired in a transaction specified in Rule 145(a).<sup>196</sup>

registration pursuant to Section 3(a)(10) of the Securities Act.

<sup>193</sup> We are also adding the definition of "affiliate" to paragraph (e) and transferring the definition of "party" from paragraph (c) to paragraph (e).

<sup>194</sup> The requirement in the newly added Rule 144(i)(2) that Form 10 information be filed reflecting a company's status as no longer a shell company is fulfilled with respect to a Rule 145(a) transaction through the filing of the registration statement.

<sup>195</sup> See new Note to Rule 145(c) and (d).

<sup>196</sup> See amendments to Rule 145(d) relating to "securities acquired in a transaction specified in paragraph (a) that was registered under the Act."

## H. Conforming and Other Amendments

### 1. Regulation S Distribution Compliance Period for Category Three Issuers

The purpose of the distribution compliance period in Regulation S<sup>197</sup> is to ensure that during the offering period and in the subsequent aftermarket trading that takes place offshore, the persons complying with the Rule 903<sup>198</sup> safe harbor (issuers, distributors and their affiliates) are not engaged in an unregistered, non-exempt distribution of securities into the United States capital markets.<sup>199</sup> In the 2007 Proposing Release, we requested comment on whether to amend Regulation S to conform the one-year distribution compliance period in Rule 903(b)(3)(iii) for Category 3 issuers (U.S. reporting issuers) to the proposed six-month Rule 144(d) holding period, or to retain the one-year distribution compliance period.

Several commenters recommended revising the Regulation S distribution compliance period in Rule 903(b)(3)(iii) to coincide with the six-month holding period under a revised Rule 144.<sup>200</sup> Commenters reasoned, among other things, that such a revision is logical and would promote consistency among the rules.<sup>201</sup> We did not receive any comment letters objecting to such an amendment to Regulation S.

When Regulation S was amended in 1998, the distribution compliance period was revised to coincide with the Rule 144(d) holding period.<sup>202</sup> In making this revision, we noted that a distribution compliance period that is longer than the Rule 144 holding period is unnecessary and could be confusing to apply. For the same reason, we are amending Regulation S to conform the distribution compliance period in Rule 903(b)(3)(iii) for Category 3 reporting issuers to the amendments to the Rule 144 holding period.<sup>203</sup> As a result, U.S. reporting issuers will be subject to a distribution compliance period of six months under Regulation S.

<sup>197</sup> 17 CFR 230.901 through 230.905 and Preliminary Notes.

<sup>198</sup> See 17 CFR 230.903.

<sup>199</sup> See Release No. 33-7505.

<sup>200</sup> See comment letters on the 2007 Proposing Release from ABA; Cleary Gottlieb; Financial Associations; Fried Frank; Herbert Smith CIS LLP ("Herbert Smith"); London Forum; Parsons; and Sullivan.

<sup>201</sup> See, e.g., comment letters on the 2007 Proposing Release from Cleary Gottlieb; Financial Associations; and London Forum.

<sup>202</sup> See Release No. 33-7505.

<sup>203</sup> See amendments to Rule 903(b)(3) of the Securities Act.

## 2. Underlying Securities in Asset-Backed Securities Transactions

In 2004, we adopted Securities Act Rule 190 to clarify when registration of the sale of underlying securities in asset-backed securities transactions is required.<sup>204</sup> One of the basic premises underlying asset-backed securities offerings is that an investor is buying participation in the underlying assets. Therefore, if the assets being securitized are themselves securities under the Securities Act (commonly referred to as a “resecuritization”), the offering of the underlying securities must itself be registered or exempt from registration under the Securities Act. Rule 190 provides the framework for determining if registration of the sale of these underlying assets is required at the time of the registered asset-backed securities offering.

One of the requirements of Rule 190 is that the depositor must be free to publicly resell the securities without registration under the Securities Act.<sup>205</sup> Before the amendments that we are adopting, this provision noted as an example that if the underlying securities are Rule 144 restricted securities, under the conditions of the previous Rule 144(k), at least two years must have elapsed from the date the underlying securities were acquired from the issuer, or an affiliate of the issuer, and the date they are pooled and resecuritized pursuant to Rule 190.

The changes to Rule 144 with no concurrent revision to Rule 190 would have allowed privately placed debt or other asset-backed securities to be publicly resecuritized in as little as six months after their original issuance without registration of the underlying securities.<sup>206</sup> Given that Rule 190 addresses the public distribution of privately placed securities via resecuritization transactions, we proposed to revise Rule 190 to retain the current two-year period for resecuritizations that do not require registration of the underlying securities.<sup>207</sup>

A particular issuance of asset-backed securities often involves one or more publicly offered classes (e.g., classes rated investment grade) as well as one or more privately placed classes (e.g., non-investment grade subordinated

classes). In most instances, the subordinated classes act as structural credit enhancement for the publicly offered senior classes by receiving payments after, and therefore absorbing losses before, the senior classes. These unregistered asset-backed securities are typically rated below investment grade, or are unrated, and as such could not be offered on Form S-3. They typically are not fungible with registered securities from the same offering and are held by very few investors. Further, the trust or issuing entity usually ceases reporting under the Exchange Act with respect to the publicly offered classes after its initial Form 10-K is filed. We understand that the privately placed subordinated securities in these transactions are often the types of securities that are pooled and resecuritized into new asset-backed securities.<sup>208</sup>

One commenter provided comments on the proposal to retain the two-year period for resecuritizations that do not require registration of the underlying securities.<sup>209</sup> The commenter submitted that the proposed two-year holding period for resecuritizations should be shortened to no more than six months (or twelve months, if tolling were to be reinstated). With respect to non-asset-backed securities (e.g., corporate debt), the commenter stated that we should permit securitization without registration during the revised period, as these securities face fewer complications and are not the focus of our concerns.

Due to the particular circumstances of asset-backed securities and our experience with a two-year period under both Regulation AB and the prior staff positions that were codified by those rules, we are not making any changes to shorten the current two-year holding period for restricted securities that are to be resecuritized in publicly registered offerings. In light of the changes that we are making to Rule 144, we are amending Rule 190 to provide that if the underlying securities are restricted securities, Rule 144 is available for the sale of the securities in the resecuritization, if at least two years have elapsed since the later of the date the securities were acquired from the issuer of the underlying securities or

from an affiliate of the issuer of the underlying securities.<sup>210</sup> Of course, the underlying securities could still be resecuritized if they do not meet this requirement; their sale would need to be concurrently registered with the offering of the asset-backed securities on a form for which the offering of the class of underlying securities would be eligible. In addition, nothing in Rule 190, as amended, will lengthen the six-month holding period of the underlying securities under Rule 144 for resales other than in connection with publicly registered resecuritizations.

## 3. Securities Act Rule 701(g)(3)

Securities Act Rule 701(g)(3)<sup>211</sup> outlines the resale limitations for securities issued under Rule 701. The limitations for resales by non-affiliates includes references to paragraphs (e) and (h) of Rule 144, which under the amendments that we are adopting no longer apply to resales by non-affiliates. We received one comment on the conforming change, and the commenter concurred with the proposed amendment to Securities Act Rule 701(g)(3).<sup>212</sup> Accordingly, we believe that it is appropriate to conform the resale restrictions of securities acquired pursuant to employee benefit plans under Rule 701 of the Securities Act. We are adopting the amendment to remove references to Rule 144(e) and (h) from Rule 701.<sup>213</sup>

## III. Paperwork Reduction Act

### A. Background

Our amendments contain “collection of information” requirements within the meaning of the Paperwork Reduction Act of 1995 (“PRA”).<sup>214</sup> We submitted the amendments to Form 144 to the Office of Management and Budget (OMB) for review in accordance with the PRA.<sup>215</sup> OMB has approved the revision. The title for the information collection is “Notice of Proposed Sale of Securities Pursuant to Rule 144 under the Securities Act of 1933” (OMB Control No. 3235-0101). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a current valid control number.

The primary purpose of this collection of information is the disclosure of a proposed sale of

<sup>204</sup> 17 CFR 230.190 and Release No. 33-8518.

<sup>205</sup> 17 CFR 230.190(a)(3).

<sup>206</sup> Although the asset-backed securities we are discussing may be privately placed, the issuing trust will have also registered the sale of other asset-backed securities and may have a reporting obligation under Section 15(d) of the Exchange Act for some time.

<sup>207</sup> This change would not in any way impact the disclosure requirements for resecuritizations.

<sup>208</sup> See Saskia Scholtes, *Left in the Dark on Debt Obligations*, FT.com (Mar. 27, 2007) (describing privately placed collateralized debt obligations (CDOs) vehicles used to repackage portfolios of other debt and noting that “the biggest category of deals, at 44%, consisted of CDOs backed by asset-backed securities such as those backed by subprime mortgages”).

<sup>209</sup> See comment letter on the 2007 Proposing Release from Financial Associations.

<sup>210</sup> See amendments to Rule 190(a) of the Securities Act.

<sup>211</sup> 17 CFR 230.701(g)(3).

<sup>212</sup> See comment letter on the 2007 Proposing Release from ABA.

<sup>213</sup> See amendments to Rule 701(g)(3) of the Securities Act.

<sup>214</sup> 44 U.S.C. 3501 *et seq.*

<sup>215</sup> See 44 U.S.C. 3507 and 5 CFR 1320.11.

securities by security holders deemed not to be engaged in the distribution of the securities and therefore not underwriters. Form 144 may be filed in paper or electronically using the EDGAR filing system. Form 144 filings are publicly available. Persons reselling securities in reliance on Rule 144 are the respondents to the information required by Form 144. The information collection requirements imposed by Form 144 are mandatory.

#### B. Summary of Amendments

In the 2007 Proposing Release, we proposed an amendment to the Form 144 filing requirement to eliminate the need for non-affiliates of the issuer to file Form 144 in order to sell their securities under Rule 144. In addition, the proposal would have raised the filing threshold for Form 144 to 1,000 shares or \$50,000 worth of securities during a three-month period. Currently, the Form 144 filing threshold is 500 shares or \$10,000. The proposed amendments also included two other minor changes to Form 144.<sup>216</sup>

The 2007 Proposing Release included a PRA analysis. We received one comment letter addressing this analysis. The commenter noted that our estimate of burden hours necessary to complete a notice on Form 4 is 0.5 hours, while we estimate that it takes 2.0 burden hours to complete Form 144.<sup>217</sup> This commenter believed our estimates for the two forms should be comparable. Because this commenter estimated that it takes only three minutes on average to key and proof Form 144 data items, the commenter believed that 0.5 hours is probably a more accurate estimate of the burden hours needed to complete the Form 144.

In addition, in response to comment, we are raising the thresholds that trigger a Form 144 filing requirement to 5,000 shares or \$50,000 of securities within a three-month period, from the proposed thresholds of 1,000 shares or \$50,000. Therefore, we are adjusting our paperwork burden estimates for Form 144.

<sup>216</sup> We proposed to amend Form 144 to include information regarding security holders' hedging activities and to allow security holders to represent that they do not know of material adverse information about the company as of the date they adopt a plan under Exchange Act Rule 10b5-1. We are adopting the amendment to Form 144 regarding the representation that the security holder does not know of material adverse information about the company as of the date that he or she adopts a plan under Exchange Act Rule 10b5-1.

<sup>217</sup> See comment letter on the 2007 Proposing Release from Washington Service on PRA estimates ("WS 1").

#### C. Revised Burden Estimates

Due to comment and the changes that we are adopting, we are publishing revised burden estimates for Form 144. Currently, we estimate that 60,500 notices on Form 144 are filed annually for a total burden of 121,000 hours.<sup>218</sup> As noted in the proposing release, the amendments that eliminate the need for non-affiliates to file Form 144 notices will decrease the annual Form 144 filings by approximately 45%. As a result, we estimate that the number of annual Form 144 filings will be reduced from 60,500 filings to 33,373 filings.<sup>219</sup>

In addition, we estimate that increasing the Form 144 filing thresholds from 500 shares or \$10,000 to 5,000 shares or \$50,000 will further reduce the number of Form 144 filings that we receive annually by approximately 30% (10,012 fewer filings).<sup>220</sup> After considering the comment letter that we received on the current PRA estimate for Form 144, we estimate that each notice on Form 144 imposes a burden for PRA purposes of one hour. Therefore, under these revised estimates, the amendments that we are adopting will reduce the burden on selling security holders who sell the securities under Rule 144 by a total of approximately 37,139 burden hours.

#### D. Solicitation of Comments

Pursuant to 44 U.S.C. 3506(c)(2)(A), we request comments to (1) evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information would have practical utility; (2) evaluate the accuracy of our estimate of the burden of the proposed collection of information; (3) determine whether there are ways to enhance the quality, utility and clarity of the information to be collected; and (4) evaluate whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Persons submitting comments on the collection of information requirements should direct the comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory

<sup>218</sup> This reflects current OMB estimates.

<sup>219</sup> The Office of Economic Analysis obtained data from the Thomson Financial Wharton Research Database. The estimate is based on information contained in notices on Form 144 filed in 2005.

<sup>220</sup> This estimate is based on information contained in notices on Form 144 filed in 2005.

Affairs, Washington, DC 20503, and should send a copy to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-9303, with reference to File No. S7-11-07. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7-11-07, and be submitted to the Securities and Exchange Commission, Public Reference Room, 100 F Street, NE., Washington, DC 20549-0609. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

#### IV. Cost-Benefit Analysis

##### A. Background

Rule 144 under the Securities Act of 1933 creates a safe harbor for the sale of securities under the exemption set forth in Section 4(1) of the Securities Act. Specifically, a selling security holder is deemed not to be an underwriter under Section 2(a)(11), and therefore may take advantage of the Section 4(1) exemption and need not register its sale of securities, if the sale complies with the provisions of the rule. Securities Act Rule 145 requires Securities Act registration of certain types of business combination transactions, unless an exemption from the registration requirement is available. Rule 145 contains a safe harbor provision similar to Rule 144 for presumed underwriters who receive securities in such a business combination transaction. Form 144 is required to be filed by persons intending to sell securities in reliance on Rule 144 if the amount of securities to be sold in any three-month period exceeds specified thresholds. The primary purpose of the form is to publicly disclose the proposed sale of securities by persons deemed not to be engaged in the distribution of the securities.

##### B. Description of Amendments

We are adopting, substantially as proposed, amendments to Rule 144, Rule 145, and Form 144 that will accomplish the following:

- Simplify the Preliminary Note to Rule 144 and the text of Rule 144, using plain English principles;
- Shorten the Rule 144(d) holding period for restricted securities of Exchange Act reporting issuers to six months for both affiliates and non-affiliates;

- Significantly reduce requirements applicable to non-affiliates of reporting and non-reporting issuers so that:

- Non-affiliates of reporting issuers will be subject only to the current public information requirement after meeting the six-month holding period for restricted securities of these issuers and up until one year since the date they acquired the restricted securities from the issuer or affiliate of the issuer; and

- Non-affiliates of non-reporting issuers will be able to resell restricted securities of these issuers after satisfying a one-year holding period without having to comply with any other condition of Rule 144;

- For affiliate sales:

- Revise the “manner of sale” limitations,

- Eliminate the “manner of sale” limitations with respect to debt securities,

- Raise the volume limitations for debt securities, and

- Increase the thresholds that trigger a Form 144 filing requirement;

- Codify staff interpretive positions, as they relate to Rule 144, concerning the following issues:

- Inclusion of securities acquired in a transaction under Section 4(6) of the Securities Act in the definition of “restricted securities,”

- The effect that creation of a holding company structure has on a security holder’s holding period,

- Holding periods for conversions and exchanges of securities,

- Holding periods for cashless exercise of options and warrants,

- Aggregation of a pledgee’s resales with resales by other pledgees of the same security for the purpose of determining the amount of securities to be sold,

- The extent to which securities issued by reporting and non-reporting shell companies are eligible for resale under Rule 144, and

- Representations required from security holders relying on Exchange Act Rule 10b5-1(c); and

- Eliminate the presumptive underwriter provision in Securities Act Rule 145, except for transactions involving a shell company, and revise the resale provisions for presumed underwriters in that rule.

### C. Benefits

We believe that the amendments will reduce the cost of complying with Rules 144 and 145. We examined the Forms 144 that were filed with the

Commission since 1997.<sup>221</sup> In 2006, the volume of transactions filed under Rule 144 exceeded \$71 billion, and more than 50% of U.S. public companies, large and small alike, every year have had at least one transaction reported on Form 144. Reducing the burden associated with these transactions can reduce the cost of capital to these companies.

One item on Form 144 requires security holders to provide information on the nature of the acquisition transaction. Some Form 144 filers acquire their securities from the issuer as a private investment, while others receive the securities as part of their employee awards, or as a form of payment for services to the issuer. Reducing the burden associated with selling these securities not only can reduce the cost of raising capital, but also may increase the value of these securities in non-cash transactions and thereby may reduce the cost of services and employment.

For the most part, transactions that have been reported on Form 144 have been small. In 2006, about 90% of the transactions had a market value of less than \$2 million and 99% of these transactions had a market value of less than \$20 million. More than half of the investors report total annual transactions of a market value of less than \$240,000 with any specific issuer. Thus, reducing the costs associated with filing Form 144 and raising the thresholds that trigger a Form 144 filing requirement are likely to affect a large number of investors.

We expect that the increase in the value of these securities will come from several sources under the amendments we are adopting. The first is the increase in the liquidity of the securities. Investors, suppliers, or employees who are restricted from selling securities and who cannot hedge their positions are generally exposed to more risk than those who are not subject to such limitations, and generally require higher compensation (or a larger discount with respect to the securities) for this risk.<sup>222</sup>

<sup>221</sup> These filings were obtained through Thomson Financial’s Wharton Research Database which includes Forms 144 filed from 1996 through 2007.

<sup>222</sup> There is also evidence that the non-trading period is associated with the premium that investors charge for lack of liquidity. See, for example, Silber, W.L., *Discounts on restricted stock: The impact of illiquidity on stock prices*, Financial Analysts Journal, 47, 60–64 (1991). Several studies have attempted to separate the discount associated with the non-transferability of the shares from other factors that affect the discount. See, e.g., Wruck, K.H., *Equity Ownership Concentration and Firm Value, Evidence from Private Equity Financings*, Journal of Financial Economics, 23, 3–28 (1989); Hertzfel, M., and R.L. Smith, *Market Discounts and Shareholder Gains for Placing Equity Privately*,

We also should expect that the longer the non-trading period, the higher the premium that investors will charge for their lack of liquidity.<sup>223</sup> Thus, reducing the time limit for selling these securities in the market is likely to reduce the discount that investors will charge for these securities, or the amount of securities that the issuer will need to provide for services. The actual reduction in this cost of capital will depend on the extent to which the six-month limit has a binding impact on security holders’ decisions to resell their securities, and the extent to which investors, employees, or service providers can protect themselves against such exposure.

Commenters expressed support for the belief that the proposals would increase liquidity for issuers and make capital investment more attractive without sacrificing investor protection.<sup>224</sup> Some commenters also stated that the proposals would decrease the cost of capital for smaller companies.<sup>225</sup> One commenter noted that if the proposals are adopted, companies will have greater financing options, which will save them time and resources.<sup>226</sup> One commenter noted that the reduction of the holding period requirement will reduce costs involved in any private investment in public equity financings, since investors will be incurring less risk in holding restricted securities.<sup>227</sup>

Also, resale transactional costs for non-affiliate selling security holders should decrease as a result of the

Journal of Finance, 459–485 (1993); Bajaj, M., Denis, D., Ferris, S.P., and A. Sarin, *Firm Value and Marketability Discounts*, Journal of Corporate Law, 27, 89–115 (2001); Finnerty, J.D., *The Impact of Transfer Restrictions on Stock Prices* (Fordham U. Working Paper, 2002). The average discounts attributed to lack of transferability across these studies is estimated between 7% and 20%. Among the other factors that could affect the discount are the amount of resources that private investors need to expend to assess the quality of the issuing firm or to monitor the firm, the ability of the investors to diversify the risk associated with the investment, whether the investors are cash constrained, and the financial situation of the firm.

<sup>223</sup> We are not aware of any empirical work that examines the effect of shortening the holding period in Rule 144 on the discount. Longstaff calculates an upper bound for percentage discounts for lack of marketability. According to his model, drops in a restriction from two years to one year and from one year to 180 days are each associated with a 30% drop in the discount. Longstaff, F.A., *How Much Can Marketability Affect Security Values?*, Journal of Finance, 50, 1767–1774 (1995).

<sup>224</sup> See, e.g., comment letters on the 2007 Proposing Release from Financial Associations; Richardson Patel; and Roth.

<sup>225</sup> See, e.g., comment letters on the 2007 Proposing Release from Pink Sheets and Sichenzia.

<sup>226</sup> See comment letter on the 2007 Proposing Release from Parsons.

<sup>227</sup> See comment letter on the 2007 Proposing Release from Weisman.

removal of all conditions other than the holding period condition and the current public information condition applicable to non-affiliates of reporting issuers. Reducing restrictions on resales by non-affiliates should streamline the rule and reduce the complexity of the rule. This and other simplifications of Rule 144 and its Preliminary Note should make it easier to understand and follow, reducing the time that investors must spend analyzing whether or not they can rely on the rule as a safe harbor from the requirement to register the resale of their securities. The differences in holding period conditions between resales of securities of reporting issuers and resales of securities of non-reporting issuers, however, adds some complexity to the rule that may diminish the effect of simplifying other aspects of the rule.

Under the amendments, non-affiliates no longer are required to file Form 144 or comply with the manner of sale requirements and volume limitations, after the Rule 144(d) holding period requirement is met. Therefore, they will save the cost of preparing and filing Form 144, as well as the transactional costs related to complying with the manner of sale requirements and volume of sale limitations. As noted above, we estimate that the amendments reducing the restrictions applicable to non-affiliates will decrease the annual Form 144 filings by approximately 45%.

In addition, the increase in the Form 144 filing thresholds should further reduce the number of transactions for which Form 144 needs to be filed for proposed sales of securities held by affiliates of the issuer. This will eliminate the cost of preparing and filing the form for transactions that fall below the new thresholds.

The elimination of the manner of sale requirements, combined with the relaxation of volume limitations, applicable to resales of debt securities will reduce costs for debt security holders. It is difficult to estimate the amount of reduction. Among the Forms 144 filed with the Commission in 2005, we found at least 200 filings covering a sale of debt securities, although we believe the actual number of debt securities resales relying on Rule 144 may be higher than this.<sup>228</sup> The elimination of the manner of sale requirements for resales of debt securities may also reduce brokers' fees

and, therefore, result in a reduction of revenue for brokers.

In the 2007 Proposing Release, we requested comment on whether to eliminate the manner of sale requirements also for resales of equity securities. After considering the comments, we are retaining and amending the manner of sale requirements for resales of equity securities by affiliates. We believe that the amendments we are adopting will benefit investors and companies by modernizing Rule 144 so that it better reflects current trading practices and venues for sales of securities.<sup>229</sup>

The codification of existing staff interpretive positions should not create added cost to companies or investors because, substantively, there is no expected change in practice as a result of the codification.<sup>230</sup> However, these codifications should provide substantial benefit to the investing community by clarifying and better publicizing the staff's positions. Greater clarity and transparency of our rules should reduce security holders' transactional costs by eliminating uncertainty and reducing the need for legal analysis. We received one comment letter in support of this reasoning, noting that codification of the staff's interpretive positions should help to resolve any lingering confusion and assist in making Rule 144 more readily understandable to market participants.<sup>231</sup> Another commenter noted that the codification of staff interpretations should reduce legal research costs for those who are considering the question for the first time.<sup>232</sup>

The amendments to Rule 145 remove what we believe are unnecessary restraints on the resale of securities by parties, or their affiliates, to a merger, recapitalization, or other transaction listed in Rule 145(a). The amendments

<sup>229</sup> For example, under the amendments, the posting of bid and ask prices in alternative trading systems will not be considered a solicitation proscribed by Rule 144(g), provided that the broker has published bona fide bid and ask quotations for the security in the alternative trading system on each of the last twelve days. As noted above, trading in alternative trading systems has become increasingly common such that, in the second quarter of 2007, alternative trading systems handled approximately \$1.3 trillion in volume of matched orders. We obtained this data from information provided in Form ATS-R Quarterly Reports.

<sup>230</sup> We are, however, modifying the staff interpretation relating to the treatment of reporting and non-reporting shell companies to allow resales of securities of former shell companies one year after Form 10 information is filed reflecting the issuer of the securities has ceased to be a shell company.

<sup>231</sup> See comment letter on the 2007 Proposing Release from Financial Associations.

<sup>232</sup> See comment letter on the 2007 Proposing Release from ABA.

to Rule 145 will reduce costs incurred by companies, parties to the transaction, and their affiliates to comply with the resale and other restrictions of the rule. Retaining the presumptive underwriter provision for transactions involving shell companies is intended to preserve for investors protection against manipulative practices or abusive sales by parties to the transaction and their affiliates after the completion of the Rule 145 transaction.

#### *D. Costs*

Relative to other options, the choice to register equity securities is attractive to issuers, because issuers can assure investors that there will be a liquid aftermarket for their equity securities. However, in the 2007 Proposing Release, we noted that reducing the requirements under Rule 144 might also cause a substitution effect, where companies might choose to rely more on private transactions than on public transactions to raise capital. Also, reducing the requirements under Rule 144 could also lead to the movement of certain investors from public transactions to private transactions.

We also acknowledge that there is the risk that the market will not be informed about the nature of these transactions, given that these transactions are not required to be registered and given the changes to the Form 144 filing requirements. The market may also be less informed, given that restricted securities of reporting companies could be resold by non-affiliates earlier without satisfying the condition that current information on the issuer of the securities be publicly available, and restricted securities of non-reporting companies could be resold by non-affiliates without current information on the issuer ever being publicly available. This, in return, could lead to a less efficient price formation. Direct negotiated deals with companies could also lead to informational advantage of some investors. The effect of the amendments on these movements and their effect on investor wealth or on issuers' cost of capital are thus subject to many factors.

Under the amendments we are adopting, with respect to securities of reporting issuers, after the six-month holding period is satisfied, non-affiliates of the issuer will be subject, for an additional six months, only to the condition requiring the availability of adequate current information on the issuer. After one year, non-affiliates of both reporting and non-reporting issuers will be permitted to sell their restricted securities freely without being subject to any other Rule 144 condition. We

<sup>228</sup> We base the estimate on number of filings that indicated that the securities were debt securities in the section of Form 144 that requests information on the nature of the acquisition transaction.

received comments in support of the proposed amendments regarding non-affiliates, as well as a few comments objecting to some of the changes. Some commenters objected to the aspect of the proposed amendments that would allow non-affiliates to resell their restricted securities after the holding period without being required to comply with the manner of sale requirements,<sup>233</sup> or the Form 144 filing requirement,<sup>234</sup> for an additional year. Another commenter was concerned that, for sales of securities of a non-reporting company, relieving non-affiliates from compliance with Rule 144's existing conditions, including the current public information condition, would lead to abuse.<sup>235</sup> We did not receive comments quantifying the effect of the proposed amendments on investor wealth or on cost of capital.

While we acknowledge that these are potential costs of the amendments that we are adopting, we continue to believe that they are justified by the potential benefits of the amendments and may not be significant in the aggregate. As stated in the 2007 Proposing Release, there is some evidence that, on average, the announcement of resales under Rule 144 by security holders has no adverse effect on stock prices, suggesting that the market does not attribute an informational advantage to these security holders at the time of selling.<sup>236</sup> Second, the rule, as amended, continues to impose several conditions to selling restricted securities by affiliated investors to alleviate these concerns.

One commenter expressed concern about the extent of the reduction of the restrictions for non-affiliates and contended that the changes will shift the market value of a company's securities away from the security holders who have held the securities for a longer time period and "into the pockets of the security holders" who are able to sell their securities without limitation after holding them for six months.<sup>237</sup> However, we believe that the possible impact that such a change could have is likely temporary and not significant. Also, to the extent that privately negotiated deals give private investors lucrative terms at the expense of public investors, public investors

may avoid such companies, and these companies may eventually be worse off.

#### V. Promotion of Efficiency, Competition and Capital Formation

Securities Act Section 2(b)<sup>238</sup> requires us, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in the public interest, to consider in addition to the protection of investors whether the action will promote efficiency, competition, and capital formation.

The amendments are intended to reduce regulatory requirements for the resale of securities and simplify the process of reselling such securities. Before today's amendments, a security holder who wished to rely on the Rule 144 safe harbor for the resale of restricted securities had to wait until at least one year after the securities were last sold by the issuer or an affiliate before any securities could be sold under Rule 144. The amendments to Rule 144 will reduce this holding period requirement to six months for the resale of restricted securities of Exchange Act reporting companies. Restricted securities of non-reporting companies will continue to be subject to a one-year holding period requirement.

After considering the comments on the 2007 Proposing Release, we continue to believe that the shorter holding period requirement for restricted securities of reporting companies will increase the liquidity of securities sold in private transactions.<sup>239</sup> This could result in increased efficiency in securities offerings to the extent that companies are able to sell securities in private offerings at prices closer to prices that they may obtain in public markets, without the need to register those securities, and otherwise obtain better terms in private offerings. We also believe that this will promote capital formation, particularly for smaller companies, because the amendments will increase the liquidity of securities sold in private transactions. The amendments should increase a company's ability to raise capital in private securities transactions, which may improve the competitiveness of those companies, particularly smaller businesses that do not have ready access to public markets.

The other amendments to Rule 144 generally also should increase efficiency and assist in capital formation. We believe that the elimination of most of the Rule 144 conditions applicable to

non-affiliates may further increase the liquidity of privately sold securities. We anticipate that the elimination of the manner of sale requirements for debt securities and the amendments to the volume limitations will provide debt security holders with greater flexibility in the resale of their securities, thereby increasing efficiency.

As noted above, several commenters supported the proposed amendments because they promote capital formation, noting that they enhance the ability to raise capital for issuers, and, in particular, smaller issuers.<sup>240</sup> One commenter, however, noted that the codification of the staff interpretation relating to reporting and non-reporting shell companies will adversely affect small business capital formation.<sup>241</sup> We are, however, modifying the staff interpretation to permit resales of securities of former reporting and non-reporting shell companies under certain circumstances. Also, we believe that the impact on small business capital formation due to the amendments will be limited, given that we believe there will not be a substantial change in existing practices, and the interest of investor protection is paramount where we believe there may be significant potential for abuse.

Several commenters noted in their letters that the Form 144 filing requirement imposes a burden on selling security holders.<sup>242</sup> Raising the Form 144 filing thresholds should also improve efficiency by reducing security holders' paperwork burden.

Under the amendments to Rule 145, individuals and smaller entities owning securities in companies that engage in transactions specified in Rule 145(a) will no longer be subject to the presumptive underwriter provision, except in the case of transactions involving a shell company. These amendments should improve the competitiveness of many smaller entities in permitting them to resell securities without the restrictions that were imposed by the rule before the amendments that we are adopting.

#### VI. Final Regulatory Flexibility Analysis

We have prepared this Final Regulatory Flexibility Analysis in

<sup>240</sup> See, e.g., comment letters on the 2007 Proposing Release from Financial Associations; Pink Sheets; Richardson Patel; Roth; and Sichenzia.

<sup>241</sup> See comment letter on the 2007 Proposing Release from Williams.

<sup>242</sup> See, e.g., comment letters on the 2007 Proposing Release from Fried Frank and SCSPG. Some commenters even supported eliminating the Form 144 filing requirement for both affiliates and non-affiliates. See comment letters from ABA; BAI; SCSPG; and Sullivan.

<sup>233</sup> See comment letter on the 2007 Proposing Release from Brill 1.

<sup>234</sup> See comment letters on the 2007 Proposing Release from Brill 1 and WS 2.

<sup>235</sup> See comment letter on the 2007 Proposing Release from Brill 1.

<sup>236</sup> Osborne, Alfred E., *Rule 144 Volume Limitations and the Sale of Restricted Securities in the Over-The-Counter Market*, *Journal of Finance*, 37, 505-523 (1982).

<sup>237</sup> See comment letters on the 2007 Proposing Release from NASAA.

<sup>238</sup> 15 U.S.C. 77b(b).

<sup>239</sup> See section IV.C of this section.

accordance with Section 603 of the Regulatory Flexibility Act.<sup>243</sup> This analysis relates to the amendments to Rules 144 and 145 and Form 144 under the Securities Act. An Initial Regulatory Flexibility Analysis (IRFA) was prepared in accordance with the Regulatory Flexibility Act in conjunction with the 2007 Proposing Release. The 2007 Proposing Release included, and solicited comment on, the IRFA.

#### A. Reasons for, and Objectives of, the Amendments

On July 5, 2007, we proposed amendments to Rules 144 and 145 of the Securities Act.<sup>244</sup> Rule 144 provides a safe harbor for the sale of securities under the exemption set forth in Section 4(1) of the Securities Act. If a selling security holder satisfies the Rule 144 conditions, that selling security holder may resell his or her securities publicly without registration and without being deemed an underwriter.

Rule 145 governs the offer and sale of certain securities received in connection with reclassifications, mergers, consolidations and asset transfers. It imposes restrictions similar to Rule 144 on a party to such transactions and to persons who are affiliates of that party at the time the transaction is submitted for vote or consent, with regard to securities acquired in that transaction.

Under the amendments we are adopting, Form 144 is required to be filed by affiliates of the issuer intending to sell securities in reliance on Rule 144 if the amount of securities to be sold in any three-month period exceeds 5,000 shares or other units or the aggregate sales price exceeds \$50,000. The primary purpose of the form is to publicly disclose the proposed sale of securities by persons who, under Rule 144, are deemed not to be engaged in the distribution of the securities.

We are amending Rule 144 to make it easier to understand and apply. We are streamlining both the Preliminary Note to Rule 144 and the Rule 144 text. In addition to codifying several staff interpretive positions, the amendments will reduce the Rule 144 holding period requirement and substantially reduce other Rule 144 conditions for the resales of securities by non-affiliates.

The reduction of the Rule 144 holding period requirement for restricted securities of reporting companies for affiliates and non-affiliates should increase the liquidity of privately issued securities, enabling companies to raise private capital more efficiently.

Although the codification of several staff interpretive positions is not intended to substantively change the rules, this should simplify analysis under Rule 144 by compiling these interpretations in one readily accessible location. The objectives of the amendments are to simplify Rule 144, to reduce its burdens on investors where consistent with investor protection, and to facilitate capital formation.

The amendments that increase the share and dollar thresholds that trigger a Form 144 filing take into account the effects of inflation since 1972. The amendments to the Form 144 filing requirements will eliminate much of the paperwork burden for selling security holders.

#### B. Significant Issues Raised by Comments

Some commenters stated that the proposals would facilitate capital raising for smaller companies without compromising investor protection.<sup>245</sup> One commenter noted that the elimination of the restrictions applicable to non-affiliates would save countless dollars and wasted resources.<sup>246</sup> On the other hand, one commenter that opposed the shortened holding periods stated that under the amendments, companies, especially small companies, will avoid registration on the federal and state level.<sup>247</sup> We acknowledge that, while this may be a potential cost of shortening the holding period, a six-month holding period is a reasonable indication that the security holder has assumed sufficient economic risk in the securities. Further, the potential cost caused by the amendments is justified by the potential benefits relating to capital formation that we believe will result from the amendments.

Some commenters had concerns about the codification of the staff interpretation that prohibits security holders of shell companies or former shell companies from relying on Rule 144 for the resale of their securities. Three commenters expressed concern that under the proposed amendments, security holders of non-reporting shell companies would not be able to rely on Rule 144.<sup>248</sup> Two commenters were

concerned that this could reduce funding for and penalize smaller companies.<sup>249</sup> We believe that the amendments relating to the use of Rule 144 for the resale of securities of shell companies are necessary to protect against abuses relating to the distribution of securities of shell companies.

#### C. Small Entities Subject to the Rule

The rules will affect both small entities that issue securities and small entities that hold such securities. An issuer, other than an investment company, is considered a "small business" for purposes of the Regulatory Flexibility Act if that issuer:

- Has assets of \$5 million or less on the last day of its most recent fiscal year, and
- Is engaged or proposing to engage in a small business financing.<sup>250</sup>

An issuer is considered to be engaged in a small business financing if it is conducting or proposes to conduct an offering of securities that does not exceed the dollar limitation prescribed by Section 3(b)<sup>251</sup> of the Securities Act. This dollar amount is currently \$5 million. When used with reference to an issuer or person, other than an investment company, Exchange Act Rule 0-10<sup>252</sup> defines small entity to mean an issuer or person that, on the last day of its most recent fiscal year, had total assets of \$5 million or less.

We are aware of approximately 1,100 Exchange Act reporting companies that currently satisfy the definition of "small business" and may be affected by the amendments as issuers of the securities sold under Rule 144.<sup>253</sup> The amendments also may affect companies that are small businesses, but that are not subject to Exchange Act reporting requirements. As noted above, we currently estimate that approximately 60,500 notices on Form 144 are filed annually.<sup>254</sup> We do not collect information in Form 144 about the size of an issuer, but we believe that some non-reporting issuers may be "small."

The amendments that relate to the Rule 144 manner of sale requirements may also affect brokers that qualify as

regarding how to improve the adequacy of information on non-reporting companies.

<sup>249</sup> See comment letters on the 2007 Proposing Release from Nelson and Russell.

<sup>250</sup> 17 CFR 230.157.

<sup>251</sup> 15 U.S.C. 77c(b).

<sup>252</sup> 17 CFR 240.0-10.

<sup>253</sup> The estimated number of reporting small entities is based on 2007 data including the SEC EDGAR database and Thomson Financial's Worldscope database. This represents an update from the number of reporting small entities estimated in prior rulemakings.

<sup>254</sup> This reflects current OMB estimates.

<sup>245</sup> See, e.g., comment letters on the 2007 Proposing Release from Pink Sheets; Roth; and Sichenzia.

<sup>246</sup> See comment letter on the 2007 Proposing Release from Brill 1.

<sup>247</sup> See comment letter on the 2007 Proposing Release from NASAA.

<sup>248</sup> See comment letters on the 2007 Proposing Release from Nelson; Russell; and Williams. The comment letter on the 2007 Proposing Release from Pink Sheets submitted various recommendations

<sup>243</sup> 5 U.S.C. 603.

<sup>244</sup> See Release No. 33-8813.

small entities. We estimate that 910 broker-dealers registered with the Commission are small entities for the purposes of the Regulatory Flexibility Act.<sup>255</sup>

In the 2007 Proposing Release, we solicited comment on the estimate of the number of small entities that may be affected by the proposed amendments. We did not receive any comments providing an estimate of the number of small entities that will be affected by the amendments.

#### *D. Reporting, Recordkeeping and Other Compliance Requirements*

We expect several of the amendments to reduce the number of Forms 144 filed with us by selling security holders. We are adopting amendments that will eliminate the need for non-affiliates relying on the Rule 144 safe harbor to comply with most of the conditions of Rule 144, after the holding period is met. We are also increasing the share number and dollar amount thresholds that trigger a Form 144 filing requirement.

As a result of the amendments, non-affiliates no longer will be required to file a Form 144, after the requisite holding period is met, in order to sell their securities under Rule 144, regardless of the amount of securities to be sold. As noted earlier, we estimate that 45% of Forms 144 that we currently receive relate to restricted securities held by non-affiliates. Therefore, this particular amendment should result in a corresponding reduction in the number of Forms 144 filed annually.

The increase in the filing thresholds for Form 144 should decrease the number of Forms 144 filed by affiliates. Based on studies conducted by our Office of Economic Analysis, we expect the number of Form 144 filings to decrease further by approximately 30%, as a result of the increase in the filing thresholds to 5,000 shares or \$50,000 in sales price in a three-month period.

Clerical skills are necessary to complete Form 144.

Also, because the amendments significantly reduce the conditions in Rule 144 to which non-affiliates are subject in the resale of their securities, non-affiliates will no longer be required to keep track of compliance with those conditions to which non-affiliates will

no longer be subject. Non-affiliates selling securities of either reporting issuers or non-reporting issuers under Rule 144 will no longer be required to comply with the manner of sale requirements and volume limitations. Non-affiliates selling securities of non-reporting issuers under Rule 144 will no longer be required to comply with the current public information requirement.

The amendments eliminating the manner of sale requirements for debt securities also will obviate the need for security holders to determine whether such condition has been met in the resale of their debt securities. As a result of both the amendments relating to the manner of sale requirements and the volume limitations with regard to debt securities, however, more security holders will be able to sell their securities under the Rule 144 safe harbor.

The amendments to Rule 145 will eliminate the need for parties to a Rule 145(a) transaction or their affiliates to determine whether they have complied with the Rule 145 resale provisions for presumed underwriters, except when the transaction involves a shell company.

#### *E. Agency Action To Minimize Effect on Small Entities*

We considered different compliance standards for the small entities that will be affected by the amendments. In the 1997 Proposing Release, we solicited comment regarding the possibility of different standards for small entities. However, we believe that such differences would be inconsistent with the purposes of the rules.

Because the amendments will benefit all companies and holders of restricted securities, differing compliance timetables or standards for small entities are not appropriate. In addition, the shortened holding period will likely have a favorable impact on small entities by increasing a company's ability to raise capital in private securities transactions, which may improve the competitiveness of those companies, particularly smaller businesses that do not have ready access to public markets. The amendments that clarify and streamline Rule 144 should benefit all companies, including small entities. The amendments relating to the manner of sale requirements and volume limitations for debt securities should benefit issuers of debt securities, preferred stock, and asset-backed securities. We continue to believe that further changes, such as the use of performance standards or other exemptions with regard to small entities, would overly complicate the

rule, which is contrary to our stated purpose. The prohibition against security holders of reporting and non-reporting shell companies from relying on Rule 144 protects against abuses relating to the resale of privately issued securities.

The amendments to Rule 145 will eliminate the presumptive underwriter provision and resale restrictions on parties to a transaction specified in Rule 145(a) and their affiliates, including small entities and their affiliates, except when the transaction involves a shell company. We believe that retaining the presumptive underwriter provision when the transaction involves a shell company is necessary, given the potential for abuse relating to such transactions.

#### **VII. Statutory Basis and Text of Amendments**

We are adopting the amendments pursuant to Sections 2(a)(11), 4(1), 4(3), 4(4), 7, 10, 19(a) and 28 of the Securities Act, as amended.

##### **List of Subjects**

###### *17 CFR Part 230*

Advertising, Reporting and recordkeeping requirements, Securities.

###### *17 CFR Part 239*

Reporting and recordkeeping requirements, Securities.

■ For the reasons set out above, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

#### **PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933**

■ 1. Revise the authority citation for Part 230 to read, in part, as follows:

**Authority:** 15 U.S.C. 77b, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z-3, 77sss, 78c, 78d, 78j, 78l, 78m, 78n, 78o, 78t, 78w, 78ll(d), 78mm, 80a-8, 80a-24, 80a-28, 80a-29, 80a-30, and 80a-37, unless otherwise noted.

\* \* \* \* \*

■ 2. Amend § 230.144 by:

- a. Revising the preliminary note;
- b. Revising paragraphs (a)(3)(vi) and (a)(3)(vii), and adding paragraphs (a)(3)(viii) and (a)(4);
- c. Revising paragraphs (b), (c), (d)(1), (d)(3)(i), (d)(3)(ii), (d)(3)(vii) and (d)(3)(viii);
- d. Adding paragraphs (d)(3)(ix) through paragraphs (d)(3)(x);
- e. Revising the introductory text to paragraphs (e) and (e)(1);
- f. Revising paragraphs (e)(2) and (e)(3);
- g. Revising paragraph (f);
- h. Revising paragraph (g)(1);

<sup>255</sup> For purposes of the Regulatory Flexibility Act, a broker or dealer is a small entity if it (i) had total capital of less than \$500,000 on the date in its prior fiscal year as of which its audited financial statements were prepared or, if not required to file audited financial statements, on the last business day of its prior fiscal year, and (ii) is not affiliated with any person that is not a small entity and is not affiliated with any person that is not a small entity. 17 CFR 240.0-1.

- i. Redesignating existing paragraph (g)(2) as paragraph (g)(3) and revising newly redesignated paragraph (g)(3);
- j. Redesignating existing paragraph (g)(3) and related notes as paragraph (g)(4) and related notes;
- k. Adding new paragraph (g)(2);
- l. Revising paragraphs (h) and (i); and
- m. Removing paragraphs (j) and (k).

The revisions and additions read as follows:

**§ 230.144 Persons deemed not to be engaged in a distribution and therefore not underwriters.**

**Preliminary Note:** Certain basic principles are essential to an understanding of the registration requirements in the Securities Act of 1933 (the Act or the Securities Act) and the purposes underlying Rule 144:

1. If any person sells a non-exempt security to any other person, the sale must be registered unless an exemption can be found for the transaction.

2. Section 4(1) of the Securities Act provides one such exemption for a transaction "by a person other than an issuer, underwriter, or dealer." Therefore, an understanding of the term "underwriter" is important in determining whether or not the Section 4(1) exemption from registration is available for the sale of the securities.

The term "underwriter" is broadly defined in Section 2(a)(11) of the Securities Act to mean 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, or participates or has a participation in the direct or indirect underwriting of any such undertaking. The interpretation of this definition traditionally has focused on the words "with a view to" in the phrase "purchased from an issuer with a view to \* \* \* distribution." An investment banking firm which arranges with an issuer for the public sale of its securities is clearly an "underwriter" under that section. However, individual investors who are not professionals in the securities business also may be "underwriters" if they act as links in a chain of transactions through which securities move from an issuer to the public.

Since it is difficult to ascertain the mental state of the purchaser at the time of an acquisition of securities, prior to and since the adoption of Rule 144, subsequent acts and circumstances have been considered to determine whether the purchaser took the securities "with a view to distribution" at the time of the acquisition. Emphasis has been placed on factors such as the length of time the person held the securities and whether there has been an unforeseeable change in circumstances of the holder. Experience has shown, however, that reliance upon such factors alone has led to uncertainty in the application of the registration provisions of the Act.

The Commission adopted Rule 144 to establish specific criteria for determining whether a person is not engaged in a distribution. Rule 144 creates a safe harbor

from the Section 2(a)(11) definition of "underwriter." A person satisfying the applicable conditions of the Rule 144 safe harbor is deemed not to be engaged in a distribution of the securities and therefore not an underwriter of the securities for purposes of Section 2(a)(11). Therefore, such a person is deemed not to be an underwriter when determining whether a sale is eligible for the Section 4(1) exemption for "transactions by any person other than an issuer, underwriter, or dealer." If a sale of securities complies with all of the applicable conditions of Rule 144:

1. Any affiliate or other person who sells restricted securities will be deemed not to be engaged in a distribution and therefore not an underwriter for that transaction;

2. Any person who sells restricted or other securities on behalf of an affiliate of the issuer will be deemed not to be engaged in a distribution and therefore not an underwriter for that transaction; and

3. The purchaser in such transaction will receive securities that are not restricted securities.

Rule 144 is not an exclusive safe harbor. A person who does not meet all of the applicable conditions of Rule 144 still may claim any other available exemption under the Act for the sale of the securities. The Rule 144 safe harbor is not available to any person with respect to any transaction or series of transactions that, although in technical compliance with Rule 144, is part of a plan or scheme to evade the registration requirements of the Act.

(a) \* \* \*

(3) \* \* \*

(vi) Securities acquired in a transaction made under § 230.801 to the same extent and proportion that the securities held by the security holder of the class with respect to which the rights offering was made were, as of the record date for the rights offering, "restricted securities" within the meaning of this paragraph (a)(3);

(vii) Securities acquired in a transaction made under § 230.802 to the same extent and proportion that the securities that were tendered or exchanged in the exchange offer or business combination were "restricted securities" within the meaning of this paragraph (a)(3); and

(viii) Securities acquired from the issuer in a transaction subject to an exemption under section 4(6) (15 U.S.C. 77d(6)) of the Act.

(4) The term *debt securities* means:

(i) Any security other than an equity security as defined in § 230.405;

(ii) Non-participatory preferred stock, which is defined as non-convertible capital stock, the holders of which are entitled to a preference in payment of dividends and in distribution of assets on liquidation, dissolution, or winding up of the issuer, but are not entitled to participate in residual earnings or assets of the issuer; and

(iii) Asset-backed securities, as defined in § 229.1101 of this chapter.

(b) *Conditions to be met.* Subject to paragraph (i) of this section, the following conditions must be met:

(1) *Non-Affiliates.* (i) If the issuer of the securities is, and has been for a period of at least 90 days immediately before the sale, subject to the reporting requirements of section 13 or 15(d) of the Securities Exchange Act of 1934 (the Exchange Act), any person who is not an affiliate of the issuer at the time of the sale, and has not been an affiliate during the preceding three months, who sells restricted securities of the issuer for his or her own account shall be deemed not to be an underwriter of those securities within the meaning of section 2(a)(11) of the Act if all of the conditions of paragraphs (c)(1) and (d) of this section are met. The requirements of paragraph (c)(1) of this section shall not apply to restricted securities sold for the account of a person who is not an affiliate of the issuer at the time of the sale and has not been an affiliate during the preceding three months, provided a period of one year has elapsed since the later of the date the securities were acquired from the issuer or from an affiliate of the issuer.

(ii) If the issuer of the securities is not, or has not been for a period of at least 90 days immediately before the sale, subject to the reporting requirements of section 13 or 15(d) of the Exchange Act, any person who is not an affiliate of the issuer at the time of the sale, and has not been an affiliate during the preceding three months, who sells restricted securities of the issuer for his or her own account shall be deemed not to be an underwriter of those securities within the meaning of section 2(a)(11) of the Act if the condition of paragraph (d) of this section is met.

(2) *Affiliates or persons selling on behalf of affiliates.* Any affiliate of the issuer, or any person who was an affiliate at any time during the 90 days immediately before the sale, who sells restricted securities, or any person who sells restricted or any other securities for the account of an affiliate of the issuer of such securities, or any person who sells restricted or any other securities for the account of a person who was an affiliate at any time during the 90 days immediately before the sale, shall be deemed not to be an underwriter of those securities within the meaning of section 2(a)(11) of the Act if all of the conditions of this section are met.

(c) *Current public information.* Adequate current public information with respect to the issuer of the

securities must be available. Such information will be deemed to be available only if the applicable condition set forth in this paragraph is met:

(1) *Reporting Issuers.* The issuer is, and has been for a period of at least 90 days immediately before the sale, subject to the reporting requirements of section 13 or 15(d) of the Exchange Act and has filed all required reports under section 13 or 15(d) of the Exchange Act, as applicable, during the 12 months preceding such sale (or for such shorter period that the issuer was required to file such reports), other than Form 8-K reports (§ 249.308 of this chapter); or

(2) *Non-reporting Issuers.* If the issuer is not subject to the reporting requirements of section 13 or 15(d) of the Exchange Act, there is publicly available the information concerning the issuer specified in paragraphs (a)(5)(i) to (xiv), inclusive, and paragraph (a)(5)(xvi) of § 240.15c2-11 of this chapter, or, if the issuer is an insurance company, the information specified in section 12(g)(2)(G)(i) of the Exchange Act (15 U.S.C. 78l(g)(2)(G)(i)).

**Note to § 230.144(c).** With respect to paragraph (c)(1), the person can rely upon:

1. A statement in whichever is the most recent report, quarterly or annual, required to be filed and filed by the issuer that such issuer has filed all reports required under section 13 or 15(d) of the Exchange Act, as applicable, during the preceding 12 months (or for such shorter period that the issuer was required to file such reports), other than Form 8-K reports (§ 249.308 of this chapter), and has been subject to such filing requirements for the past 90 days; or

2. A written statement from the issuer that it has complied with such reporting requirements.

3. Neither type of statement may be relied upon, however, if the person knows or has reason to believe that the issuer has not complied with such requirements.

(d) \* \* \*

(1) *General rule.* (i) If the issuer of the securities is, and has been for a period of at least 90 days immediately before the sale, subject to the reporting requirements of section 13 or 15(d) of the Exchange Act, a minimum of six months must elapse between the later of the date of the acquisition of the securities from the issuer, or from an affiliate of the issuer, and any resale of such securities in reliance on this section for the account of either the acquiror or any subsequent holder of those securities.

(ii) If the issuer of the securities is not, or has not been for a period of at least 90 days immediately before the sale, subject to the reporting requirements of section 13 or 15(d) of the Exchange Act, a minimum of one year must elapse

between the later of the date of the acquisition of the securities from the issuer, or from an affiliate of the issuer, and any resale of such securities in reliance on this section for the account of either the acquiror or any subsequent holder of those securities.

(iii) If the acquiror takes the securities by purchase, the holding period shall not begin until the full purchase price or other consideration is paid or given by the person acquiring the securities from the issuer or from an affiliate of the issuer.

\* \* \* \* \*

(3) \* \* \*

(i) *Stock dividends, splits and recapitalizations.* Securities acquired from the issuer as a dividend or pursuant to a stock split, reverse split or recapitalization shall be deemed to have been acquired at the same time as the securities on which the dividend or, if more than one, the initial dividend was paid, the securities involved in the split or reverse split, or the securities surrendered in connection with the recapitalization.

(ii) *Conversions and exchanges.* If the securities sold were acquired from the issuer solely in exchange for other securities of the same issuer, the newly acquired securities shall be deemed to have been acquired at the same time as the securities surrendered for conversion or exchange, even if the securities surrendered were not convertible or exchangeable by their terms.

**Note to § 230.144(d)(3)(ii).** If the surrendered securities originally did not provide for cashless conversion or exchange by their terms and the holder provided consideration, other than solely securities of the same issuer, in connection with the amendment of the surrendered securities to permit cashless conversion or exchange, then the newly acquired securities shall be deemed to have been acquired at the same time as such amendment to the surrendered securities, so long as, in the conversion or exchange, the securities sold were acquired from the issuer solely in exchange for other securities of the same issuer.

\* \* \* \* \*

(vii) *Estates.* Where a deceased person was an affiliate of the issuer, securities held by the estate of such person or acquired from such estate by the estate beneficiaries shall be deemed to have been acquired when they were acquired by the deceased person, except that no holding period is required if the estate is not an affiliate of the issuer or if the securities are sold by a beneficiary of the estate who is not such an affiliate.

**Note to § 230.144(d)(3)(vii).** While there is no holding period or amount limitation for estates and estate beneficiaries which are not

affiliates of the issuer, paragraphs (c) and (h) of this section apply to securities sold by such persons in reliance upon this section.

(viii) *Rule 145(a) Transactions.* The holding period for securities acquired in a transaction specified in § 230.145(a) shall be deemed to commence on the date the securities were acquired by the purchaser in such transaction, except as otherwise provided in paragraphs (d)(3)(ii) and (ix) of this section.

(ix) *Holding company formations.* Securities acquired from the issuer in a transaction effected solely for the purpose of forming a holding company shall be deemed to have been acquired at the same time as the securities of the predecessor issuer exchanged in the holding company formation where:

(A) The newly formed holding company's securities were issued solely in exchange for the securities of the predecessor company as part of a reorganization of the predecessor company into a holding company structure;

(B) Holders received securities of the same class evidencing the same proportional interest in the holding company as they held in the predecessor, and the rights and interests of the holders of such securities are substantially the same as those they possessed as holders of the predecessor company's securities; and

(C) Immediately following the transaction, the holding company has no significant assets other than securities of the predecessor company and its existing subsidiaries and has substantially the same assets and liabilities on a consolidated basis as the predecessor company had before the transaction.

(x) *Cashless exercise of options and warrants.* If the securities sold were acquired from the issuer solely upon cashless exercise of options or warrants issued by the issuer, the newly acquired securities shall be deemed to have been acquired at the same time as the exercised options or warrants, even if the options or warrants exercised originally did not provide for cashless exercise by their terms.

**Note 1 to § 230.144(d)(3)(x).** If the options or warrants originally did not provide for cashless exercise by their terms and the holder provided consideration, other than solely securities of the same issuer, in connection with the amendment of the options or warrants to permit cashless exercise, then the newly acquired securities shall be deemed to have been acquired at the same time as such amendment to the options or warrants so long as the exercise itself was cashless.

**Note 2 to § 230.144(d)(3)(x).** If the options or warrants are not purchased for cash or property and do not create any investment

risk to the holder, as in the case of employee stock options, the newly acquired securities shall be deemed to have been acquired at the time the options or warrants are exercised, so long as the full purchase price or other consideration for the newly acquired securities has been paid or given by the person acquiring the securities from the issuer or from an affiliate of the issuer at the time of exercise.

(e) *Limitation on amount of securities sold.* Except as hereinafter provided, the amount of securities sold for the account of an affiliate of the issuer in reliance upon this section shall be determined as follows:

(1) If any securities are sold for the account of an affiliate of the issuer, regardless of whether those securities are restricted, the amount of securities sold, together with all sales of securities of the same class sold for the account of such person within the preceding three months, shall not exceed the greatest of:

\* \* \* \* \*

(2) If the securities sold are debt securities, then the amount of debt securities sold for the account of an affiliate of the issuer, regardless of whether those securities are restricted, shall not exceed the greater of the limitation set forth in paragraph (e)(1) of this section or, together with all sales of securities of the same tranche (or class when the securities are non-participatory preferred stock) sold for the account of such person within the preceding three months, ten percent of the principal amount of the tranche (or class when the securities are non-participatory preferred stock) attributable to the securities sold.

(3) *Determination of amount.* For the purpose of determining the amount of securities specified in paragraph (e)(1) of this section and, as applicable, paragraph (e)(2) of this section, the following provisions shall apply:

(i) Where both convertible securities and securities of the class into which they are convertible are sold, the amount of convertible securities sold shall be deemed to be the amount of securities of the class into which they are convertible for the purpose of determining the aggregate amount of securities of both classes sold;

(ii) The amount of securities sold for the account of a pledgee of those securities, or for the account of a purchaser of the pledged securities, during any period of three months within six months (or within one year if the issuer of the securities is not, or has not been for a period of at least 90 days immediately before the sale, subject to the reporting requirements of section 13 or 15(d) of the Exchange Act) after a default in the obligation secured

by the pledge, and the amount of securities sold during the same three-month period for the account of the pledgor shall not exceed, in the aggregate, the amount specified in paragraph (e)(1) or (2) of this section, whichever is applicable;

**Note to § 230.144(e)(3)(ii).** Sales by a pledgee of securities pledged by a borrower will not be aggregated under paragraph (e)(3)(ii) with sales of the securities of the same issuer by other pledgees of such borrower in the absence of concerted action by such pledgees.

(iii) The amount of securities sold for the account of a donee of those securities during any three-month period within six months (or within one year if the issuer of the securities is not, or has not been for a period of at least 90 days immediately before the sale, subject to the reporting requirements of section 13 or 15(d) of the Exchange Act) after the donation, and the amount of securities sold during the same three-month period for the account of the donor, shall not exceed, in the aggregate, the amount specified in paragraph (e)(1) or (2) of this section, whichever is applicable;

(iv) Where securities were acquired by a trust from the settlor of the trust, the amount of such securities sold for the account of the trust during any three-month period within six months (or within one year if the issuer of the securities is not, or has not been for a period of at least 90 days immediately before the sale, subject to the reporting requirements of section 13 or 15(d) of the Exchange Act) after the acquisition of the securities by the trust, and the amount of securities sold during the same three-month period for the account of the settlor, shall not exceed, in the aggregate, the amount specified in paragraph (e)(1) or (2) of this section, whichever is applicable;

(v) The amount of securities sold for the account of the estate of a deceased person, or for the account of a beneficiary of such estate, during any three-month period and the amount of securities sold during the same three-month period for the account of the deceased person prior to his death shall not exceed, in the aggregate, the amount specified in paragraph (e)(1) or (2) of this section, whichever is applicable: *Provided*, that no limitation on amount shall apply if the estate or beneficiary of the estate is not an affiliate of the issuer;

(vi) When two or more affiliates or other persons agree to act in concert for the purpose of selling securities of an issuer, all securities of the same class sold for the account of all such persons during any three-month period shall be aggregated for the purpose of

determining the limitation on the amount of securities sold;

(vii) The following sales of securities need not be included in determining the amount of securities to be sold in reliance upon this section:

(A) Securities sold pursuant to an effective registration statement under the Act;

(B) Securities sold pursuant to an exemption provided by Regulation A (§ 230.251 through § 230.263) under the Act;

(C) Securities sold in a transaction exempt pursuant to section 4 of the Act (15 U.S.C. 77d) and not involving any public offering; and

(D) Securities sold offshore pursuant to Regulation S (§ 230.901 through § 230.905, and Preliminary Notes) under the Act.

(f) *Manner of sale.* (1) The securities shall be sold in one of the following manners:

(i) *Brokers' transactions* within the meaning of section 4(4) of the Act;

(ii) Transactions directly with a *market maker*, as that term is defined in section 3(a)(38) of the Exchange Act; or

(iii) *Riskless principal transactions* where:

(A) The offsetting trades must be executed at the same price (exclusive of an explicitly disclosed markup or markdown, commission equivalent, or other fee);

(B) The transaction is permitted to be reported as riskless under the rules of a self-regulatory organization; and

(C) The requirements of paragraphs (g)(2) (applicable to any markup or markdown, commission equivalent, or other fee), (g)(3), and (g)(4) of this section are met.

**Note to § 230.144(f)(1):** For purposes of this paragraph, a *riskless principal transaction* means 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 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 to satisfy the order to sell.

(2) The person selling the securities shall not:

(i) Solicit or arrange for the solicitation of orders to buy the securities in anticipation of or in connection with such transaction, or

(ii) Make any payment in connection with the offer or sale of the securities to any person other than the broker or dealer who executes the order to sell the securities.

(3) Paragraph (f) of this section shall not apply to:

(i) Securities sold for the account of the estate of a deceased person or for the

account of a beneficiary of such estate provided the estate or estate beneficiary is not an affiliate of the issuer; or

(ii) Debt securities.

(g) \* \* \*

(1) Does no more than execute the order or orders to sell the securities as agent for the person for whose account the securities are sold;

(2) Receives no more than the usual and customary broker's commission;

(3) Neither solicits nor arranges for the solicitation of customers' orders to buy the securities in anticipation of or in connection with the transaction; *Provided*, that the foregoing shall not preclude:

(i) Inquiries by the broker of other brokers or dealers who have indicated an interest in the securities within the preceding 60 days;

(ii) Inquiries by the broker of his customers who have indicated an unsolicited bona fide interest in the securities within the preceding 10 business days;

(iii) The publication by the broker of bid and ask quotations for the security in an inter-dealer quotation system provided that such quotations are incident to the maintenance of a bona fide inter-dealer market for the security for the broker's own account and that the broker has published bona fide bid and ask quotations for the security in an inter-dealer quotation system on each of at least twelve days within the preceding thirty calendar days with no more than four business days in succession without such two-way quotations; or

(iv) The publication by the broker of bid and ask quotations for the security in an alternative trading system, as defined in § 242.300 of this chapter, provided that the broker has published bona fide bid and ask quotations for the security in the alternative trading system on each of the last twelve business days; and

**Note to § 230.144(g)(3)(ii).** The broker should obtain and retain in his files written evidence of indications of bona fide unsolicited interest by his customers in the securities at the time such indications are received.

\* \* \* \* \*

(h) *Notice of proposed sale.* (1) If the amount of securities to be sold in reliance upon this rule during any period of three months exceeds 5,000 shares or other units or has an aggregate sale price in excess of \$50,000, three copies of a notice on Form 144 (§ 239.144 of this chapter) shall be filed with the Commission. If such securities are admitted to trading on any national securities exchange, one copy of such

notice also shall be transmitted to the principal exchange on which such securities are admitted.

(2) The Form 144 shall be signed by the person for whose account the securities are to be sold and shall be transmitted for filing concurrently with either the placing with a broker of an order to execute a sale of securities in reliance upon this rule or the execution directly with a market maker of such a sale. Neither the filing of such notice nor the failure of the Commission to comment on such notice shall be deemed to preclude the Commission from taking any action that it deems necessary or appropriate with respect to the sale of the securities referred to in such notice. The person filing the notice required by this paragraph shall have a bona fide intention to sell the securities referred to in the notice within a reasonable time after the filing of such notice.

(i) *Unavailability to securities of issuers with no or nominal operations and no or nominal non-cash assets.* (1) This section is not available for the resale of securities initially issued by an issuer defined below:

(i) An issuer, other than a business combination related shell company, as defined in § 230.405, or an asset-backed issuer, as defined in Item 1101(b) of Regulation AB (§ 229.1101(b) of this chapter), that has:

(A) No or nominal operations; and

(B) Either:

(1) No or nominal assets;

(2) Assets consisting solely of cash and cash equivalents; or

(3) Assets consisting of any amount of cash and cash equivalents and nominal other assets; or

(ii) An issuer that has been at any time previously an issuer described in paragraph (i)(1)(i).

(2) Notwithstanding paragraph (i)(1), if the issuer of the securities previously had been an issuer described in paragraph (i)(1)(i) but has ceased to be an issuer described in paragraph (i)(1)(i); is subject to the reporting requirements of section 13 or 15(d) of the Exchange Act; has filed all reports and other materials required to be filed by section 13 or 15(d) of the Exchange Act, as applicable, during the preceding 12 months (or for such shorter period that the issuer was required to file such reports and materials), other than Form 8-K reports (§ 249.308 of this chapter); and has filed current "Form 10 information" with the Commission reflecting its status as an entity that is no longer an issuer described in paragraph (i)(1)(i), then those securities may be sold subject to the requirements of this section after one year has elapsed

from the date that the issuer filed "Form 10 information" with the Commission.

(3) The term "Form 10 information" means the information that is required by Form 10 or Form 20-F (§ 249.210 or § 249.220f of this chapter), as applicable to the issuer of the securities, to register under the Exchange Act each class of securities being sold under this rule. The issuer may provide the Form 10 information in any filing of the issuer with the Commission. The Form 10 information is deemed filed when the initial filing is made with the Commission.

■ 3. Amend § 230.145 by revising paragraphs (c), (d) and (e) and removing the authority citation following § 230.145 to read as follows:

**§ 230.145 Reclassification of securities, mergers, consolidations and acquisitions of assets.**

\* \* \* \* \*

(c) *Persons and parties deemed to be underwriters.* For purposes of this section, if any party to a transaction specified in paragraph (a) of this section is a shell company, other than a business combination related shell company, as those terms are defined in § 230.405, any party to that transaction, other than the issuer, or any person who is an affiliate of such party at the time such transaction is submitted for vote or consent, who publicly offers or sells securities of the issuer acquired in connection with any such transaction, shall be deemed to be engaged in a distribution and therefore to be an underwriter thereof within the meaning of Section 2(a)(11) of the Act.

(d) *Resale provisions for persons and parties deemed underwriters.*

Notwithstanding the provisions of paragraph (c), a person or party specified in that paragraph shall not be deemed to be engaged in a distribution and therefore not to be an underwriter of securities acquired in a transaction specified in paragraph (a) that was registered under the Act if:

(1) The issuer has met the requirements applicable to an issuer of securities in paragraph (i)(2) of § 230.144; and

(2) One of the following three conditions is met:

(i) Such securities are sold by such person or party in accordance with the provisions of paragraphs (c), (e), (f), and (g) of § 230.144 and at least 90 days have elapsed since the date the securities were acquired from the issuer in such transaction; or

(ii) Such person or party is not, and has not been for at least three months, an affiliate of the issuer, and at least six months, as determined in accordance

with paragraph (d) of § 230.144, have elapsed since the date the securities were acquired from the issuer in such transaction, and the issuer meets the requirements of paragraph (c) of § 230.144; or

(iii) Such person or party is not, and has not been for at least three months, an affiliate of the issuer, and at least one year, as determined in accordance with paragraph (d) of § 230.144, has elapsed since the date the securities were acquired from the issuer in such transaction.

**Note to § 230.145(c) and (d):** Paragraph (d) is not available with respect to any transaction or series of transactions that, although in technical compliance with the rule, is part of a plan or scheme to evade the registration requirements of the Act.

(e) *Definitions.* (1) The term *affiliate* as used in paragraphs (c) and (d) of this section shall have the same meaning as the definition of that term in § 230.144.

(2) The term *party* as used in paragraphs (c) and (d) of this section shall mean the corporations, business entities, or other persons, other than the issuer, whose assets or capital structure are affected by the transactions specified in paragraph (a) of this section.

(3) The term *person* as used in paragraphs (c) and (d) of this section, when used in reference to a person for whose account securities are to be sold, shall have the same meaning as the definition of that term in paragraph (a)(2) of § 230.144.

■ 4. Amend § 230.190 by:

- a. Revising paragraphs (a)(2) and (a)(3); and
- b. Adding paragraph (a)(4).

The revisions and addition read as follows:

**§ 230.190 Registration of underlying securities in asset-backed securities transactions.**

- (a) \* \* \*
- (1) \* \* \*

(2) Neither the issuer of the underlying securities nor any of its affiliates is an affiliate of the sponsor, depositor, issuing entity or underwriter of the asset-backed securities transaction;

(3) If the underlying securities are restricted securities, as defined in § 230.144(a)(3), § 230.144 must be available for the sale of the securities, provided however, that notwithstanding any other provision of § 230.144, § 230.144 shall only be so available if at least two years have elapsed since the later of the date the securities were

acquired from the issuer of the underlying securities or from an affiliate of the issuer of the underlying securities; and

(4) The depositor would be free to publicly resell the underlying securities without registration under the Act. For example, the offering of the asset-backed security does not constitute part of a distribution of the underlying securities. An offering of asset-backed securities with an asset pool containing underlying securities that at the time of the purchase for the asset pool are part of a subscription or unsold allotment would be a distribution of the underlying securities. For purposes of this section, in an offering of asset-backed securities involving a sponsor, depositor or underwriter that was an underwriter or an affiliate of an underwriter in a registered offering of the underlying securities, the distribution of the asset-backed securities will not constitute part of a distribution of the underlying securities if the underlying securities were purchased at arm's length in the secondary market at least three months after the last sale of any unsold allotment or subscription by the affiliated underwriter that participated in the registered offering of the underlying securities.

\* \* \* \* \*

**§ 230.701 [Amended]**

■ 5. Amend 230.701, paragraph (g)(3), by revising the phrase “without compliance with paragraphs (c), (d), (e), and (h) of § 230.144” to read “without compliance with paragraphs (c) and (d) of § 230.144”.

■ 6. Amend § 230.903 by revising paragraph (b)(3)(iii)(A), the introductory text of paragraph (b)(3)(iii)(B) and paragraph (b)(3)(iv) to read as follows:

**§ 230.903 Offers or sales of securities by the issuer, a distributor, any of their respective affiliates, or any person acting on behalf of any of the foregoing; conditions relating to specific securities.**

- (b) \* \* \*
- (3) \* \* \*
- (iii) \* \* \*

(A) The offer or sale, if made prior to the expiration of a one-year distribution compliance period (or six-month distribution compliance period if the issuer is a reporting issuer), is not made to a U.S. person or for the account or benefit of a U.S. person (other than a distributor); and

(B) The offer or sale, if made prior to the expiration of a one-year distribution compliance period (or six-month distribution compliance period if the issuer is a reporting issuer), is made pursuant to the following conditions:

\* \* \* \* \*

(iv) Each distributor selling securities to a distributor, a dealer (as defined in section 2(a)(12) of the Act (15 U.S.C. 77b(a)(12)), or a person receiving a selling concession, fee or other remuneration, prior to the expiration of a 40-day distribution compliance period in the case of debt securities, or a one-year distribution compliance period (or six-month distribution compliance period if the issuer is a reporting issuer) in the case of equity securities, sends a confirmation or other notice to the purchaser stating that the purchaser is subject to the same restrictions on offers and sales that apply to a distributor.

**PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933**

■ 7. The authority citation for part 239 continues to read in part as follows:

**Authority:** 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z-2, 77z-3, 77sss, 78c, 78l, 78m, 78n, 78o(d), 78u-5, 78w(a), 78ll, 78mm, 80a-2(a), 80a-3, 80a-8, 80a-9, 80a-10, 80a-13, 80a-24, 80a-26, 80a-29, 80a-30, and 80a-37, unless otherwise noted.

\* \* \* \* \*

■ 8. Amend § 239.144 by revising paragraph (b) to read as follows:

**§ 239.144 Form 144, for notice of proposed sale of securities pursuant to § 230.144 of this chapter.**

\* \* \* \* \*

(b) This form need not be filed if the amount of securities to be sold during any period of three months does not exceed 5,000 shares or other units and the aggregate sale price does not exceed \$50,000.

\* \* \* \* \*

■ 9. Form 144 (referenced in § 239.144) is revised as set forth in the Appendix.

By the Commission.  
Dated: December 6, 2007.

Nancy M. Morris,  
Secretary.

**Note:** The following Appendix to the Preamble will not appear in the Code of Federal Regulations.

**Appendix**

BILLING CODE 8011-01-P

**UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C. 20549**

**FORM 144**

**NOTICE OF PROPOSED SALE OF SECURITIES  
PURSUANT TO RULE 144 UNDER THE SECURITIES ACT OF 1933**

**ATTENTION:** *Transmit for filing 3 copies of this form concurrently with either placing an order with a broker to execute sale or executing a sale directly with a market maker.*

1 (a) NAME OF ISSUER  (b) IRS IDENT. NO.  (c) S.E.C. FILE NO.	STREET  CITY  STATE  ZIP CODE	(e) TELEPHONE NO. NUMBER
1 (d) ADDRESS OF ISSUER		
2 (a) NAME OF PERSON FOR WHOSE ACCOUNT THE SECURITIES ARE TO BE SOLD	(b) RELATIONSHIP TO ISSUER	(c) ADDRESS STREET  CITY  STATE  ZIP CODE
2 (d) WORK LOCATION		

OMB APPROVAL  
OMB Number: 3235-0101  
Expires: December 31, 2009  
Estimated average burden hours per response ..... 2.00

SEC USE ONLY  
DOCUMENT SEQUENCE NO.  
  
CUSIP NUMBER  
  
WORK LOCATION

**INSTRUCTION:** *The person filing this notice should contact the issuer to obtain the I.R.S. Identification Number and the S.E.C. File Number.*

3 (a) Title of the Class of Securities To Be Sold	(b) Name and Address of Each Broker Through Whom the Securities are to be Offered or Each Market Maker who is Acquiring the Securities	SEC USE ONLY		(c) Number of Shares or Other Units To Be Sold <small>(See Instr. 3(c))</small>	(d) Aggregate Market Value <small>(See Instr. 3(d))</small>	(e) Number of Shares or Other Units Outstanding <small>(See Instr. 3(e))</small>	(f) Approximate Date of Sale <small>(See Instr. 3(f))</small> (MO. DAY YR.)	(g) Name of Each Securities Exchange <small>(See Instr. 3(g))</small>
		Broker-Dealer File Number	Number of Shares or Other Units					

**INSTRUCTIONS:**

1. (a) Name of issuer  
 (b) Issuer's I.R.S. Identification Number  
 (c) Issuer's S.E.C. file number, if any  
 (d) Issuer's address, including zip code  
 (e) Issuer's telephone number, including area code
2. (a) Name of person for whose account the securities are to be sold  
 (b) Such person's relationship to the issuer (e.g., officer, director, 10% stockholder, or member of immediate family of any of the foregoing)  
 (c) Such person's address, including zip code
3. (a) Title of the class of securities to be sold  
 (b) Name and address of each broker through whom the securities are intended to be sold  
 (c) Number of shares or other units to be sold (if debt securities, give the aggregate face amount)  
 (d) Aggregate market value of the securities to be sold as of a specified date within 10 days prior to the filing of this notice  
 (e) Number of shares or other units of the class outstanding, or if debt securities the face amount thereof outstanding, as shown by the most recent report or statement published by the issuer  
 (f) Approximate date on which the securities are to be sold  
 (g) Name of each securities exchange, if any, on which the securities are intended to be sold

**Potential persons who are to respond to the collection of information contained in this form are not required to respond unless the form displays a currently valid OMB control number.**

**TABLE I — SECURITIES TO BE SOLD**  
*Furnish the following information with respect to the acquisition of the securities to be sold and with respect to the payment of all or any part of the purchase price or other consideration therefor:*

Title of the Class	Date you Acquired	Nature of Acquisition Transaction	Name of Person from Whom Acquired <i>(If gift, also give date donor acquired)</i>	Amount of Securities Acquired	Date of Payment	Nature of Payment

**INSTRUCTIONS:** If the securities were purchased and full payment therefor was not made in cash at the time of purchase, explain in the table or in a note thereto the nature of the consideration given. If the consideration consisted of any note or other obligation, or if payment was made in installments describe the arrangement and state when the note or other obligation was discharged in full or the last installment paid.

**TABLE II — SECURITIES SOLD DURING THE PAST 3 MONTHS**

*Furnish the following information as to all securities of the issuer sold during the past 3 months by the person for whose account the securities are to be sold.*

Name and Address of Seller	Title of Securities Sold	Date of Sale	Amount of Securities Sold	Gross Proceeds

**REMARKS:**

**INSTRUCTIONS:**

See the definition of "person" in paragraph (a) of Rule 144. Information is to be given not only as to the person for whose account the securities are to be sold but also as to all other persons included in that definition. In addition, information shall be given as to sales by all persons whose sales are required by paragraph (c) of Rule 144 to be aggregated with sales for the account of the person filing this notice.

**ATTENTION:**

The person for whose account the securities to which this notice relates are to be sold hereby represents by signing this notice that he does not know any material adverse information in regard to the current and prospective operations of the Issuer of the securities to be sold which has not been publicly disclosed. If such person has adopted a written trading plan or given trading instructions to satisfy Rule 10b5-1 under the Exchange Act, by signing the form and indicating the date that the plan was adopted or the instruction given, that person makes such representation as of the plan adoption or instruction date.

\_\_\_\_\_  
 DATE OF NOTICE  
 \_\_\_\_\_  
 DATE OF PLAN ADOPTION OR GIVING OF INSTRUCTION,  
 IF RELYING ON RULE 10b5-1  
 \_\_\_\_\_  
 (SIGNATURE)  
 The notice shall be signed by the person for whose account the securities are to be sold. At least one copy of the notice shall be manually signed. Any copies not manually signed shall bear typed or printed signatures.

**ATTENTION: Intentional misstatements or omission of facts constitute Federal Criminal Violations (See 18 U.S.C. 1001)**

SEC 1147 (04-07)