



## SEC ADOPTS AMENDMENTS TO RULE 144 AND FORM S-3

By Vincent A. Vietti and Lauren W. Taylor

The October 2007 edition of this Newsletter summarized recent changes proposed by the Securities and Exchange Commission (SEC) to modernize and improve capital raising and reporting requirements, particularly for smaller public companies. The amendments to Rule 144 were approved generally on the terms proposed; will become effective February 15, 2008; and will be applicable to securities acquired before and after that date. The amendments to Form S-3 were approved, but not exactly as proposed, and will be effective January 28, 2008. As a result, although Form S-3 will be available for direct at the market offerings by smaller public companies that are listed on a national securities exchange, it will remain unavailable to OTCBB issuers. Below is a more detailed discussion of the final revised rules.

### Rule 144 Holding Period for Reporting Companies Reduced to Six Months; Elimination of Conditions Applicable to Non-Affiliates; No Tolling

Rule 144 has been amended to reduce the current one- and two-year holding periods for restricted securities of public companies to six months and one year, respectively. The six-month holding period requirement applies to the securities of issuers that have been subject to the reporting requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934 (the Exchange Act) for a period of at least 90 days before the Rule 144 sale. Restricted securities of a non-reporting issuer (those issuers that are not subject to the reporting requirements under the Exchange Act) will continue to be subject to a one-year holding period.

Under the amended Rule 144, non-affiliates may resell their restricted securities freely after meeting the applicable holding period requirement. The resale of restricted securities by a non-affiliate under Rule 144 will no longer be subject to any conditions of Rule 144 except the current public information requirements of Rule 144(c) (requires filing of all Exchange Act reports other than Forms 8-K during the 12 months preceding such sale), which will apply

for an additional six months after the six-month holding period requirement is met. As a result, non-affiliates will no longer be subject to the volume limitations, manner of sale requirements, and Form 144 filing requirements. The following chart summarizes the resale of restricted securities under Rule 144 by affiliates and non-affiliates of an issuer:

	Affiliate or Person Selling on Behalf of an Affiliate	Non-Affiliate (Has Not Been an Affiliate During the Prior Three Months)
<b>Restricted Securities of Reporting Issuers</b>	<p>During six-month holding period - no resales under Rule 144 permitted.</p> <p>After six-month holding period - 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</li> <li>• filing of Form 144 if sales exceed 5,000 shares or \$50,000 in any three-month period</li> </ul>	<p><u>During six-month holding period</u> - no resales under Rule 144 permitted.</p> <p>After six-month holding period but before one year – unlimited public resales under Rule 144 except that the current public information requirement still applies.</p> <p>After one-year holding period - unlimited public resales under Rule 144; need not comply with any other Rule 144 requirements.</p>
<b>Restricted Securities of Non-Reporting Issuers</b>	<p><u>During one-year holding period</u> - no resales under Rule 144 permitted.</p> <p><u>After one-year holding period</u> - may resell in accordance with all Rule 144 requirements, including:</p> <ul style="list-style-type: none"> <li>• current public information</li> <li>• volume limitations</li> <li>• manner of sale requirements for equity securities</li> <li>• filing of Form 144</li> </ul>	<p><u>During one-year holding period</u> - no resales under Rule 144 permitted.</p> <p><u>After one-year holding period</u> - unlimited public resales under Rule 144; need not comply with any other Rule 144 requirements.</p>

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The SEC had proposed to toll the holding period for both affiliates and non-affiliates for up to an additional six months while the security holder or any previous owner engaged in certain hedging transactions; for example, holding a short position or put equivalent position with respect to the securities. The SEC decided not to adopt the proposed tolling provisions out of concern that it would 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.

One significant modification from the amendments as proposed will be of particular interest to issuers that were previously reporting or non-reporting shell companies. The SEC had proposed to make Rule 144 available for the sale of restricted and non-restricted securities of such issuers 90 days after the filing with the SEC of information required on SEC Form 10 (Form 10 information) so long as the other conditions of Rule 144 were satisfied. In light of numerous comments regarding abuse and micro cap fraud occurring in connection with shell companies, the SEC revised the final amendments to require that at least one year has elapsed since the filing of the Form 10 information in order for Rule 144 to be available for the sale of any securities of such issuers. This applies irrespective of whether the issuer was a shell company at the time the securities were issued.

### **Form S-3 Available for Primary Offering of up to One-Third of the Public Float of Issuers Listed on a National Securities Exchange; Remains Unavailable to OTCBB Issuers**

The SEC had proposed to revise the eligibility requirements of Form S-3 (the short form used by issuers to register securities offerings under the Securities Act) to allow domestic private issuers to conduct primary offerings on the short form without regard to the size of their public float, so long as they satisfied the other eligibility conditions of the form and did not sell securities valued in excess of 20 percent of their public float in primary offerings.

The amendments were adopted with two significant modifications. First, the limitation on the amount of securities that can be offered by an issuer in any 12-month period was increased from 20 percent of public float to one-third of public float. Second, the use of Form S-3 for primary offerings will be available only to those issuers that have a class of common equity securities listed and registered on a national securities exchange. As revised, effective January 28, 2008, issuers with less than \$75 million in public float will be permitted to register primary offerings of their securities on Form S-3 so long as they:

- have a class of securities registered under the Exchange Act
- have been subject to the reporting requirements of the Exchange Act and timely filed all reports required to be filed thereunder for the preceding 12 months
- have a class of common equity securities that is listed and registered on a national securities exchange
- do not sell more than the equivalent of one-third of their public float in primary offerings over the previous period of 12 calendar months
- are not shell companies and have not been shell companies for at least 12 calendar months before filing the registration statement

Although the SEC had proposed to make Form S-3 available to issuers quoted on the OTC Bulletin Board, in light of the perceived lack of market following, the potential for price manipulation, and the absence of quantitative maintenance and corporate governance standards for such issuers, the SEC determined not to extend the availability of the Form to OTCBB issuers.

### **AUDITOR ATTESTATION REPORT REQUIRED UNDER SECTION 404 OF SARBANES-OXLEY MAY BE EXTENDED FOR AN ADDITIONAL YEAR**

In testimony before the United States House of Representatives Committee on Small Business on December 12, 2007, SEC Chairman Christopher Cox announced his intention to seek a one-year delay for smaller public companies to comply with the outside auditor attestation report required under Section 404(b) of Sarbanes-Oxley. Under the current rules, smaller public companies (those with a public float of less than \$75 million) are required to provide a report of its management's assessment of internal control over financial reporting beginning with fiscal years ending on or after December 15, 2007, and to provide the attestation report of its outside auditors of such controls beginning with fiscal years ending on or after December 15, 2008.

Commissioner Cox's proposal would extend the compliance date for the auditor attestation report for smaller public companies until an issuer's first fiscal year ending on or after December 15, 2009. Commissioner Cox stated that the delay is necessary since the SEC does not expect to complete the analysis of its study of the financial impact of the attestation report on larger public companies until early to mid 2008. His view was that smaller public companies should not be required to incur the costs of compliance until after the study has been completed. We will continue to follow this proposal as it works its way through the SEC. Stay tuned.

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Jeffrey H. Nicholas  
215.918.3639 or 609.895.6705  
[jnicholas@foxrothschild.com](mailto:jnicholas@foxrothschild.com)

Vincent A. Vietti  
609.896.4571  
[vietti@foxrothschild.com](mailto:vietti@foxrothschild.com)

Stephen M. Cohen  
215.299.2744  
[smcohen@foxrothschild.com](mailto:smcohen@foxrothschild.com)



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