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A legal update from Dechert's Corporate and Securities Group

SEC Shortens Holding Period for Restricted Securities

The Securities and Exchange Commission (the "SEC") has significantly reduced limitations on the resale of privately placed securities of companies reporting under the Securities Exchange Act of 1934, as amended (the "Exchange Act"). Under revised Rule 144 under the Securities Act of 1933, as amended (the "Securities Act"), unregistered, restricted securities ("Restricted Securities") may be resold without limitation or registration by non-affiliates of the issuer ("Non-Affiliates") six months after they are acquired from the issuer or an affiliate of the issuer, provided certain public information requirements are met. For decades, the holding period for Restricted Securities had been as long as three years and, until the action taken by the SEC, these limitations extended for up to two years. Affiliates ("Affiliates") of issuers reporting under the Exchange Act may make limited resales of Restricted Securities after six months from their acquisition from the issuer or from another affiliate of the issuer. Previously, such limited resales could only be made after holding such securities for a year. The amendments, adopted in a final rule issued on December 6, 2007, will go into effect on February 15, 2008.

The SEC noted that these revisions should serve to increase the liquidity of privately sold securities and decrease the cost of capital for public companies. The historical two-year restriction on unlimited resales of Restricted Securities extracted a heavy risk premium, reflected in steeply discounted prices of such securities. By reducing the holding period of Restricted Securities of companies reporting under the Exchange Act to six months, the SEC substantially reduced the risk premium associated with such securities, which could have a profound effect on the ability of reporting companies to use Restricted Securities to raise capital in unregistered offerings. This reduction of risk is further enhanced by the ability of shareholders, under revised Rule 144, to hedge their holdings in Restricted Securities by acquiring positions in publicly traded securities of the issuer. Also, demand for such Restricted Securities may be bolstered by foreign investors who do not experience lock ups under their own regulatory regime and may be attracted to U.S. offerings with a reduced holding period.

Revised Rule 144 benefits issuers that do not file periodic reports under the Exchange Act to a lesser extent. Restricted Securities of non-reporting companies may be sold freely by Non-Affiliates one year after their acquisition from the issuer or an affiliate of the issuer. Affiliates may make limited resales of such securities after holding such securities for one year.

On November 15, 2007, the SEC also amended Rule 145 under the Securities Act, which pertains to offers and sales of unregistered securities by persons involved in specified business transactions. Specifically, under revised Rule 145, the SEC largely eliminated the so-called "presumptive underwriter" position formerly set out in Rule 145(c), which previously impaired the ability of certain persons receiving securities in connection with a business combination or restructuring transaction from reselling such securities without restriction.

Background

Rule 144. The Securities Act requires the registration of all offers and sales of securities in interstate commerce in the United States unless they are specifically exempted. Section 4(l) of

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the Securities Act provides an exemption from registration for offers or sales of securities by persons other than an issuer, underwriter, or dealer. However, the definition of "underwriter" under this section is broad, covering any person who purchases a security with "a view to . . . the distribution" of such security, a concept that is not defined under the Securities Act. Rule 144 provides a safe harbor from the definition of "underwriter" to assist security holders in determining whether Section 4(l) is available in connection with a resale of securities. Security holders meeting the conditions of Rule 144 are not "underwriters" in connection with a resale of such securities and may therefore take advantage of the registration exemption provided by Section 4(1).

Revisions to the Holding Period Requirements

Resales of Restricted Securities by Non-Affiliates. The revisions of Rule 144 liberalize the previous restrictions on resales of Restricted Securities held by Non-Affiliates because they significantly reduce the holding requirements applicable to resales of such Restricted Securities. Now, under revised Rule 144, Non-Affiliates of an SEC reporting company[1] may make *unlimited* resales of Restricted Securities at any time after six months after the time they were acquired from an issuer or an Affiliate. To utilize this relaxed resale provision, the issuer must continue to satisfy the "current public information" requirement set forth in Rule 144(c) for the period between the end of the six-month holding period and one year from the date on which the Restricted Securities were acquired from the issuer or an Affiliate. Prior to the adoption of these revisions, Non-Affiliates could resell their Restricted Securities under the Rule 144 safe harbor only after such securities had been held for at least one year after the date they were acquired from the issuer or an Affiliate. Such resales could take place only subject to certain informational requirements applicable to the issuer and upon compliance by the seller with certain volume and manner of sale limitations. Such Restricted Securities could be sold on an unlimited basis only after they were held for a period of two years.

Revised Rule 144 creates a separate holding period for Restricted Securities in companies that do not report under the Exchange Act. Non-Affiliates may make *unlimited* resales of Restricted Securities one year after such securities were acquired from the issuer or an Affiliate. Resales by Non-Affiliates of both reporting and non-reporting companies are only permitted if the Non-Affiliate has not been an Affiliate during the three months immediately prior to such resale. There are no other restrictions on these resales.

Under revised Rule 144, resales of Restricted Securities by Non-Affiliates of reporting companies are not subject to the former volume and manner of sale restrictions. For example, such resales are not required to occur in "brokers' transactions," and Non-Affiliates are not required to file a Form 144 with the SEC, as was previously the case.

Resales of Restricted-Securities by Affiliates. As revised, Rule 144 also increases the liquidity of Restricted Securities held by Affiliates. Revised Rule 144 reduces the holding period applicable to sales by Affiliates to six months, so long as the issuer of such Restricted Securities is a reporting company under the Exchange Act. For companies not reporting under the Exchange Act, a one-year holding period remains in effect. Formerly, Affiliates could make limited resales of Restricted Securities in the affiliated issuer at any time after one year from the date of acquisition of such securities from the issuer or an Affiliate.

Resales of Restricted Securities by an Affiliate remain subject to certain volume limitations under Rule 144(e), the "current public information" requirement described in Rule 144(c) and the "brokers' transaction" requirement prescribed in Rule 144(f). Under the revised regulations, resales by Affiliates of debt securities and non-participating preferred stock in an affiliated issuer are not subject to the "brokers' transaction" requirement. In addition, an Affiliate must continue to file Form 144 (as amended) with the SEC in connection with resales of Restricted Securities in the affiliated issuer if such resales exceed $50,000 or 5,000 shares within any three-month period.

No Tolling Period. The SEC chose not to implement the tolling period that it had incorporated into the proposed revisions to Rule 144. There is no tolling of the six-month holding period if the security holder engages in certain hedging transactions.

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1 *See* Rule 144(b)(1)(i). A "reporting company" for purposes of revised Rule 144 is an issuer that is, and has been for at least 90 days immediately before the sale, subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act.

Amendment to Rule 145

Rule 145 sets forth the resale requirements under the Securities Act for persons offered or receiving securities in connection with a business combination or restructuring. As a general matter, prior to the revisions announced on December 6, 2007, Rule 145 deemed any party (other than the issuer or an affiliate of the issuer) in a business combination or restructuring involving the issuer to be an underwriter engaged in the distribution of the issuer's securities. The rule then set forth certain restrictions on the resale of securities received in such transactions by persons deemed to be underwriters.

Rule 145 formerly provided 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. Accordingly, any person party to such a transaction, other than the issuer or an affiliate of the issuer, who publicly offered for sale such securities was deemed to be an underwriter of those securities.

The SEC no longer believes that such a sweeping definition of underwriter is appropriate in business combinations and restructurings. As revised, Rule 145 generally eliminates the "presumptive underwriter" provision and related resale restrictions in Rule 145. However, in light of what the SEC perceives to be abusive sales of securities resulting from business combinations involving shell companies, the former provisions remain applicable to business combinations and restructurings that involve shell companies as defined in Rule 405 under the Securities Act (other than a "business-related shell company," as defined in that rule).

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