Legal ALERT
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PHILLIPS NIZER LLP

January 2008

SECURITIES LAW ALERT:
SEC ADOPTS SIGNIFICANT CHANGES TO RULE 144 AND RULE 145 AND EASES REGULATORY BURDENS FOR SMALLER PUBLIC COMPANIES

The Securities and Exchange Commission recently adopted major amendments[1] to Rules 144 and 145 under the Securities Act of 1933, which will become effective February 15, 2008 and apply to securities acquired before or after that date. These amendments will enhance liquidity for non-affiliate and affiliate holders of restricted securities and are expected to decrease the cost of capital for issuers by reducing the illiquidity discount for securities sold in private transactions. The SEC also adopted rules easing restrictions on use of Form S-3 by smaller public companies, eliminating Regulation S-B, and increasing the public float limit for small business issuers from its current $25 million to $75 million.

Amendments to Rule 144:

- *Shorter Holding Periods.* The SEC shortened the holding period for restricted securities issued by reporting issuers from one year to six months.

- *Non-affiliate Compliance.*
  - Non-affiliates of reporting issuers[2] may freely resell restricted securities:
    - after a six-month holding period, subject only to the public information condition,[3] and
    - without complying with any Rule 144 conditions for resales after a one-year holding period;
  - Non-affiliates of non-reporting issuers may freely resell restricted securities without complying with any Rule 144 conditions for resales after a one-year holding period.

- *Affiliate Compliance.* Affiliates[4] of reporting issuers may resell (1) securities of reporting issuers held for longer than six months and (2) securities of non-reporting issuers held for longer than one year, in each case, in accordance with the following Rule 144 conditions to the extent applicable:
  - adequate current public information about the company;
  - volume limitations;[5]
  - manner of sale requirements for equity securities;[6] and
  - notice through Form 144 filing requirements.[7]

- *Altered Manner of Sale Requirements for Equity and Debt Securities.*
  - Equity Securities. The manner of sale requirements for equity securities, applicable to resales by affiliates, has been revised to permit the resale of these securities through certain "riskless principal transactions"[8] 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 for a self-regulatory organization permit the transaction to be reported as riskless. The amended rule also expands the

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definition of a "brokers' transaction" for purposes of such resale by permitting a broker to insert bid and ask quotations for the security in an alternative trading system, provided that the broker has published bona fide bid and ask quotations for such security on each of the last 12 business days;
    - Debt Securities. The SEC has eliminated the manner of sale requirements for sales of debt securities by affiliates.

- *Raised Volume Limitations for Resales of Debt Securities.* The SEC amended Rule 144 to provide an alternative volume limitation calculation for debt securities,[9] permitting Rule 144 sales of up to 10% of a tranche of debt securities (or up to 10% of a class of non-participatory preferred stock) during any three-month period.

- *Raised Form 144 Filing Thresholds.* The thresholds that trigger Form 144 filing requirements for sales by affiliates have been raised to 5,000 shares or $50,000 over a three-month period, from 500 shares or $10,000.

The chart annexed as Exhibit A summarizes the new Rule 144 amendments applicable to the resale of restricted securities held by affiliates and non-affiliates.

Amendments to Rule 145:

- *Elimination of the Presumptive Underwriter Doctrine.* The amendments to Rule 145 eliminate the presumptive underwriter provision of Rule 145 except with respect to transactions involving shell companies (other than a business combination related shell company). Under the current doctrine, persons who are parties to, or affiliates of parties to, a Rule 145(a) business combination transaction are deemed to be under writers with respect to public offers and sales of shares received in that transaction. As a result, even if the acquiring company in a Rule 145(a) transaction registers the issuance of its shares, affiliates of the target company would not be able to publicly sell the shares they receive unless they are sold pursuant to a resale registration statement or in compliance with certain provisions of Rule 144. Under the amendments, a prior affiliate of the target company who is not an affiliate of the combined company after the transaction will no longer be presumptively deemed an underwriter in connection with the resale of the securities acquired in the transaction. Any party to a transaction of the type set forth in Rule 145(a) involving a shell company, other than the issuer, may resell the securities acquired in the transaction only in compliance with the resale restrictions of Rule 145(d).

- *Conforming the Resale Provision of Rule 145 to Rule 144.* The resale provisions of Rule 145(d) have been revised to conform them to the changes made to Rule 144.

Codification of SEC Staff Interpretations

The SEC has also codified various staff interpretations relating to Rule 144, including the following:

- stating that securities acquired by accredited investors pursuant to Section 4(6) of the Securities Act of 1933[10] are considered restricted securities;
- permitting tacking of holding periods when a company reorganizes into a holding company structure;
- permitting tacking of holding periods for conversions and exchanges of securities;
- deeming the acquisition dates for securities acquired pursuant to the cashless exercise of options and warrants as the dates the options or warrants were acquired;
- permitting a pledge of restricted securities to sell the pledged securities without having to aggregate the sale with sales by other pledges from the same pledgor (as long as there is no concerted action by those pledgees), for purposes of the Rule 144 volume limitation condition;
- permitting the Form 144 representations required from security holders relying on Securities Exchange Act Rule 10b5-1 to be made as of the date the holder adopted a trading plan or gave trading instructions; and
- confirming the unavailability of Rule 144 for the resale of securities by reporting and non-reporting shell companies[11] and blank check companies,[12] with the exception of business combination related shell companies.[13]

SEC Adopts Rules Easing Restrictions on Use of Form S-3 by Smaller Public Companies

The SEC adopted rules that will greatly expand the number of companies eligible to use Form S-3 for primary offerings, which go into effect on January 28, 2008. Under the new rules, registrants other than shell companies will be able to use Form S-3 for primary equity and debt offerings of securities, including shelf offerings, as long as the offerings stay within the size limitations imposed and satisfy the other eligibility requirements of the form. Under the prior rules, companies with less than $75 million in public float were ineligible to use Form S-3 for primary offerings, and had to rely upon Form S-1 or Form SB-2, which has certain disadvantages as compared to Form S-3, such as prohibiting the use of forward incorporation by reference.

The rules will permit companies with less than $75 million public float to register primary offering on Form S-3, provided that they:

- have a class of securities registered under Sections 12(b) or 12(g) of the Securities Exchange Act of 1934 or are required to file reports under Section 15(d), and have filed all reports required under these sections on a timely basis for the past 12 months;
- have a class of common equity that is listed or registered on a national securities exchange;
- are not shell companies and have not been shell companies for the past 12 months; and
- have not sold more than one-third of their public float in primary offerings using Form S-3 over the previous 12 calendar-month period.

As noted above, however, the final rule includes a requirement that the securities be listed on an exchange. Thus, companies whose securities trade solely on the OTC Bulletin Board or in the Pink Sheets will not be eligible to use Form S-3 and will continue to have to rely on private offerings, such as PIPEs, to raise capital in an expedited manner.

SEC Adopts Rules Eliminating Regulation S-B and moving scaled disclosure requirements to Regulation S-K

The SEC adopted rules that will significantly affect smaller public companies by making two principal changes. First, the new rules eliminate Regulation S-B, and move the disclosure traditionally found in Regulation S-B into a scaled disclosure format within Regulation S-K and Regulation S-X. Second the new rules expand the group of registrants that will be eligible to use these rules by increasing the public float for small business issuers from its current $25 million to $75 million and creating a new category known as "smaller reporting companies," essentially combining companies previously known as "small business issuers" with those known as "non-accelerated filers."

Under the new rules, which go into effect on February 4, 2008, small business issuers filing their next annual reports for a fiscal year ending on or after December 15, 2007, may use either Form 10-KSB as had traditionally been used, or Form 10-K, with the option of using the new scaled disclosure requirements in Regulation S-K instead of full Regulation S-K disclosure. After that annual report has been filed, small business issuers will be required to use Form 10-Q and 10-K for quarterly and annual reports and may again opt for the new scaled Regulation S-K disclosure. Companies that qualify for the first time as "smaller reporting companies," under the new definition, will have the option of using the scaled disclosure requirements in Regulation S-K when filing their next periodic reports after February 4, 2008.

Concurrent with the integration of Regulation S-B into Regulation S-K, the SEC also will phase-out small business registration statement forms SB-1, SB-2, and 10-SB, which will be rescinded on February 4, 2008. Companies filing a registration statement after this date will be required to file on the appropriate form without an "SB" designation. If a registration statement was filed on an "SB" form before February 4, 2008, and the company seeks to amend it after February 4, 2008, the company must file the amendment on a correct form without an "SB" designation, but may continue to use the disclosure format and content based on the "SB" form until six months after February 4, 2008.[14]

Practical Implications of Amendments

The amendments to Rule 144 represent a significant reduction of the applicable restrictions under such Rule, particularly with respect to the holding periods for the resale of restricted securities. While the amendments, which become effective on February 15, 2008, will have the immediate effects described above, it may take some time for practices applicable to offerings of unregistered securities to evolve to take advantage of the new rules.

The amendments to Rule 144 could result in the following consequences:

- The private capital raising protocols relating to registration rights and associated provisions for the pay ment of additional interest in the event of registration defaults will likely be modified or eliminated.
- The emergence of PIPEs without registration rights, at either higher discounts or with more warrant coverage.
- In the event that a reporting issuer fails to meet the current information condition during the period beginning six months after the date of initial issuance and ending one year after the date of initial issuance (or any such longer period when the securities may not be freely transferable), investors may require that the issuer pay additional interest, much the same as issuers have long been required to pay additional interest under past practices when they have been unable or unwilling to perform their registration obligations.[15]
- Revisions to standard Rule 144 representation letters to reflect the less onerous requirements.
- Increased use of unregistered stock in acquisitions.
- Registration rights agreements will remain attractive to non-affiliate investors in unregistered offerings of equity and debt securities for issuers that are not subject to the reporting requirements of the Securities Exchange Act, because such securities will not be freely tradeable until a full year after their issuance.
- Resale registration statements may still be required where affiliates acquire securities and wish to resell them or where an initial purchaser is affiliated with an issuer and wishes to make a market in the relevant securities.

We recommend that issuers with outstanding resale registration statements and registration rights agreements review the underlying documents to determine what impact the new rules might have on their transactions.

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1 See Securities Act Release No. 33-8869 (December 6, 2007).

2 For these purposes, reporting issuers are issuers that are, and have been for at least 90 days prior to a sale, subject to the reporting requirements under Section 13 or Section 15(d) of the Securities Exchange Act of 1934 (the "Exchange Act").

3 For a reporting issuer, compliance with the adequate current public information condition requires the issuer to have filed all required reports under Section 13 or Section 15(d) of the Exchange Act, other than Form 8-K reports, during the 12 months preceding the sale (or for the shorter period during which the issuer was required to file such reports). For a non-reporting issuer, compliance with the adequate current public information condition requires the public availability of basic information about the company, including three years of financial statements.

4 Rule 144(a)(1) provides that "[a]n affiliate of an 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."

5 Under Rule 144, sales are generally limited to the greater of the following during any three-month period: (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) for exchange listed securities, the average weekly reporting trading volume of trading in such securities during the preceding four calendar weeks.

6 The manner of sale requirements under Rule 144(f) require securities to be sold in "brokers' transactions" or in transactions directly with a "market maker." Additionally, the rule prohibits a selling securityholder 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.

7 A Form 144 must be submitted to the SEC prior to or concurrently with a sale under Rule 144 if the volume of sales that the affiliate has made or intends to make in a three-month period exceeds the applicable filing thresholds.

8 A riskless principal transaction is a transaction in which a broker or dealer, (1) after having received a customer's order to buy a security, purchases the security as principal in the market to satisfy the order to buy or (2) after having received a customer's order to sell a security, sells the security as principal to the market to satisfy the order to sell. When a fund purchases a security from an affiliated broker or dealer in a riskless principal transaction, the broker or dealer simultaneously acquires that security from another party. Because the broker or dealer is not selling the security out of its inventory, the broker or dealer is acting like an agent for all intents and purposes even though the transaction is structured so that title momentarily passes through the broker or dealer.

9 For purposes of the amendments, "debt securities" are defined to include fixed income securities as well as securities such as asset-backed securities and non-participating preferred stock that have debt-like characteristics.

10 Section 4(6) of the Securities Act provides an exemption from registration for offerings below $5 million that are made to accredited investors, do not involve advertising or public solicitation and for which a Form D filing is made.

11 A shell company is a company that has (1) no or nominal operations and (2) at least one of the following characteristics: (a) no or nominal assets: (b) assets consisting solely of cash or cash equivalents or (c) assets consisting of any amount of cash and cash equivalents and nominal other assets.

12 A blank check company is a company that (1) is in the development stage, (2) 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 (3) issues penny stock.

13 A business combination related shell company is a shell company formed by an entity that is not a shell company solely for the purpose of (1) changing the corporate domicile of that entity solely within the United States or (b) completing a business combination transaction among one or more entities other than the shell company, none of which is a shell company.

14 For example, a company that filed on Form SB-2 before February 4, 2008 would be required to file any pre- or post- effective amendments on Form S-1, but would be able to maintain the item requirement format of its Form SB-2 for up to six months after February 4, 2008.

15 To the extent that additional interest requirements are retained, it may be necessary to differentiate restricted securities from unrestricted securities in order to enable the issuer to identify which securities are entitled to receive additional interest. For example, in circumstances where some securities have been sold seven months after the closing (and are therefore unrestricted) but other securities have not been sold and the reporting issuer subsequently fails to satisfy the current information requirement, thereby result ing in such securities not being able to be sold in reliance upon Rule 144 until a year has elapsed from the closing, issuers would presumably prefer to pay additional interest only with respect to securities that remain restricted.

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Exhibit A

	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	During six-month holding period - no resale under Rule 144 permitted. After six-month holding period - may resell in accordance with all Rule 144 requirements, including: • Current public information, • Volume limitations, • Manner of sale requirements for equity securities, and • Filing of Form 144.	During six-month holding period - no resale under Rule 144 permitted. After six-month holding period but before one year - unlimited public resale under Rule 144 except that the current public information requirement still applies. After one-year holding period - unlimited public resale under Rule 144; need not comply with any other Rule 144 requirements.
Restricted Securities of Non-Reporting Issuers	During one-year holding period - no resale under Rule 144 permitted. After one -year holding period - may resell in accordance with all Rule 144 requirements, including: • Current public information, • Volume limitations, • Manner of sale requirements for equity securities, and • Filing of Form 144.	During one-year holding period - no resale under Rule 144 permitted. After one-year holding period - unlimited public resale under Rule 144; need not comply with any other Rule 144 requirements.

1 "Restricted securities" are securities acquired pursuant to one of the transactions listed in Rule 144(a)(3), such as a private placement.

2 "Control securities" are not defined in Rule 144. The term is commonly used to refer to securities held by an affiliate of the issuer, regardless of how the affiliate acquired the securities.

3 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.