

News Alert: SEC Amends Rule 144 Of The Securities Act Of 1933 Disclosure Requirements For Smaller Public Companies

As a service to our clients and friends, the Bilzin Sumberg Corporate & Securities Group shares the following summary of the recent adoption of amendments to Rule 144 of the Securities Act and the easing of disclosure requirements for smaller public companies by the Securities and Exchange Commission ("SEC"). We hope you find this information useful.

On November 15, 2007, the SEC adopted amendments to Rule 144 of the Securities Act with the intent to facilitate capital-raising in the United States and created a new category of issuers called "small reporting companies" to ease the reporting and disclosure burdens on a broader group of smaller public companies.

Rule 144 creates a safe harbor for sellers of public company securities who are not "underwriters" (those who purchase securities with the intent to distribute or sell) and thus are exempt from registration under Section 4(1) of the Securities Act. Important changes resulting from the amendments to Rule 144 include:

- Shortening the holding period for restricted securities of reporting companies from one year to six months where the issuer is subjected to Exchange Act reporting obligations for at least 90 days before the sale of the restricted securities;
- Permitting non-affiliates to resell restricted securities of a reporting company after a six month holding period, provided that only the current public information requirement under Rule 144(c) is satisfied and such non-affiliates have not been affiliates of the reporting company for at least three months before the sale;
- Permitting affiliates to also resell restricted securities of a reporting company after a six month holding period, provided that they meet all of the Rule 144 conditions of providing current public information, volume limitations, manner of sale and Form 144 notices;
- Non-affiliates of non-reporting companies continue to be required to hold their restricted securities for one year before any public resale, but after the one year holding period non-affiliates of non-reporting companies may resell under Rule 144 without any restrictions;
- Permitting non-affiliates to resell restricted securities of reporting companies after a one year holding period, regardless of the current reporting by the company and without any other restrictions;
- Raising the thresholds that trigger Form 144 notice filing requirements by affiliates from the greater of 500 shares or \$10,000 to 5,000 shares or \$50,000 within a three-month period, with the Form 144 filing requirement being eliminated for non-affiliates; and
- Eliminating the manner of sale requirements under Rule 144(f) for affiliate resales of debt securities and relaxing the volume limitations for debt securities by adding an alternate determination of volume limitations under Rule 144(e) permitting resales of debts securities in amounts up to 10% of that tranche of securities in a three month period.

The SEC did not adopt the proposed "tolling" provision for resales of restricted securities that would have required any affiliate or non-affiliate engaged in hedging during the six month holding period to toll the time, up to an additional six months, for which the hedging activities continued. The SEC stated that the difficult and costly task of tracking complex hedging transactions would frustrate the benefits of the shortened holding period and would make compliance with Rule 144 very difficult.

The effective date for these Rule 144 amendments stated above will be 60 days after their publication in the Federal Register. The shortened holding period and other amendments are intended to increase the liquidity of privately sold securities while decreasing the cost of capital for reporting companies without compromising investor protection.

In addition to the Rule 144 amendments, the SEC has also adopted other measures intended to alleviate disclosure burdens of small business issuers. These include:

- Replacing the "small business issuer" category with a new expanded "smaller reporting company" category to include most companies with less than \$75 million in public equity float or, if a company does not have a calculable public equity float, having revenues of less than \$50 million in the last fiscal year;
- Allowing the expanded category of "smaller reporting companies" to use reduced disclosure requirements;
- Phasing out, and eventually eliminating, Regulation S-B and Forms SB used by small business issuers and integrating the provisions of Regulation S-B into Regulations S-K and S-X; and
- Permitting all foreign companies to qualify as "smaller reporting companies" if they choose to file on domestic company forms and provide financial statements prepared under United States generally accepted accounting principles.

The effective date for these rules will be 30 days after their publication in the Federal Register.

This alert is based on oral discussions at the SEC's open meeting, the SEC's press release announcing the results of the open meeting and the SEC's summary statement on the matters. The specific language of the SEC rules and guidance and thus the actual terms of the amendments and measures discussed above will not be known until the relevant releases are published.

For additional information, please contact Alan D. Axelrod, co-chair of the Bilzin Sumberg Corporate & Securities Group, at (305) 350-2369 or at aaxelrod@bilzin.com.

The materials contained within this news alert do not constitute legal advice and are intended for informational purposes only, and no legal or business decision or any action should be based or taken on the content herein. The materials contained herein are not intended to be an advertisement and any unauthorized use of the materials is at the user's risk. Reproduction, distribution, republication and retransmission of any material contained within this document is prohibited without the express written consent of Bilzin Sumberg Baena Price & Axelrod LLP.

If you wish to be removed from Bilzin Sumberg's Corporate & Securities mailing list, please send your request to: legalupdate@bilzin.com.