



JONES DAY  
**COMMENTARY**

## SEC ADOPTS AMENDMENTS TO RULE 144 AND 145 AND OTHER REFORMS

In November and December 2007, the Securities and Exchange Commission adopted amendments to:

- revise restrictions on the resale of restricted securities under Rule 144 and the restriction on securities acquired in business combination transactions under Rule 145 of the Securities Act;
- expand the eligibility of Forms S-3 and F-3 to a larger number of companies for primary offerings of securities;
- expand the number of companies that qualify for the SEC's scaled disclosure for smaller reporting companies;
- provide two exemptions from the registration requirements of the Exchange Act for compensatory employee stock options; and
- adopt amendments relating to the information required by Form D and mandate electronic filing of Form D after a phase-in period.<sup>1</sup>

The SEC's proposals regarding these amendments were the subject of a more detailed *Jones Day Commentary* published last year.<sup>2</sup> In addition, the SEC will act on its proposed amendments to Regulation D in the near future.<sup>3</sup>

### REVISIONS TO RULES 144 AND 145

Rule 144 provides a safe harbor for resales of securities acquired in a private placement from the issuer, an affiliate of the issuer, or through a chain of transactions involving the issuer or such affiliate, as a result of which the securities are restricted and not freely transferable. To qualify for a Rule 144 resale, several conditions must be satisfied.

These amendments revised the holding period for both affiliates and non-affiliates for the resale of restricted securities.<sup>4</sup> In the adopting release, the SEC summarized the revised holding periods and resale restrictions using the following chart:

	<b>Affiliate or Person Selling on Behalf of an Affiliate</b>	<b>Non-Affiliate (and Has Not Been an Affiliate During the Prior Three Months)</b>
<b>Restricted Securities of Reporting Issuers</b>	<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>
<b>Restricted Securities of Non- Reporting Issuers</b>	<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>

In addition, the amendments:

- eliminated the previous manner of sale limitations for both affiliates and non-affiliates for resales of debt securities, nonparticipating preferred stock and asset-backed securities;
- changed the previous filing requirements for Form 144 by raising the thresholds that trigger the filing requirement to trades of 5,000 shares or \$50,000 within a three-month period for affiliates;
- changed the volume limitation relating to debt securities to allow for resales for the account of the selling securities holder within a three-month period in an amount that does not exceed 10 percent of the tranche or class of debt or preferred securities; and

- simplified other parts of Rule 144 and codified certain SEC staff interpretations relating to Rule 144.<sup>5</sup>

Rule 145 of the Securities Act provides that exchanges of securities in connection with business combination transactions, which are subject to shareholder approval, constitute sales of those securities, which must be registered under the Securities Act. Rule 145 deems persons who were parties to such transactions, other than the issuer or affiliates of such parties, underwriters under the SEC's presumptive underwriter doctrine and sets forth the restrictions on the resale of securities received in such transactions.

The amendments:

- eliminated the presumptive underwriter doctrine except with regard to transactions involving blank-check or shell companies; and

- revised the resale provisions of the rule for shell companies so that persons and parties deemed presumed underwriters are permitted to resell their securities to the same extent that affiliates of a shell company are permitted to resell their securities, under Rule 144, as proposed.

The amendments to Rules 144 and 145 become effective on February 15, 2008. The revised holding periods and other amendments that were adopted are applicable to securities acquired before or after February 15, 2008.

The aspects of the Rule 144 amendments that are likely to have the most significant impact are those that reduce by half the existing holding periods for securities of reporting companies and that eliminate the volume, manner of sale, and filing requirements for non-affiliate resales. These amendments, among others, are aimed at increasing the liquidity of privately placed securities. As a result, they may change, among other things, the way registration rights agreements are used in private placements and reduce the liquidated damages issuers' face in such agreements.

## REVISIONS TO THE ELIGIBILITY REQUIREMENTS FOR PRIMARY SECURITIES OFFERINGS ON FORMS S-3 AND F-3

The SEC amended the eligibility requirements of Forms S-3 and F-3 to allow a larger number of domestic and foreign private issuers to conduct primary securities offerings on these forms, so long as they meet certain conditions.<sup>6</sup> These conditions require the issuer to:

- satisfy the other eligibility conditions of the respective forms, meaning mainly that they have a class of securities registered under the Exchange Act and have been timely in their Exchange Act filings;
- 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 any period of 12 calendar months if they have a public float below \$75 million; and

- are not shell companies and have not been shell companies for at least 12 calendar months before filing the registration statement.

The amendments to Forms S-3 and F-3 become effective on January 28, 2008.

The amendments are intended to provide a larger number of public companies the greater flexibility and efficiency in accessing the public securities markets afforded by Forms S-3 and F-3. The SEC estimated that once the amendments are effective, approximately 1,400 smaller reporting companies will be eligible to utilize Forms S-3 and F-3 and incorporate information by reference from their Exchange Act filings, including Exchange Act reports that were previously filed and those that will be filed in the future, as well as conduct primary offerings “off the shelf” under Rule 415 of the Securities Act.<sup>7</sup>

## SMALLER REPORTING COMPANY REGULATORY RELIEF AND SIMPLIFICATION

The SEC recently amended its disclosure and reporting requirements for small business issuers.<sup>8</sup> The disclosure and reporting requirements under Regulation S-B available for small business issuers, which were less extensive and burdensome than those that apply to other larger issuers under Regulation S-K, previously applied only to issuers with a public float of less than \$25 million.

The amendments:

- expanded eligibility for the scaled disclosure and reporting requirements for smaller companies by making the requirements available to all companies with up to \$75 million in public float;
- simplified disclosure and reporting requirements for smaller companies eligible to use them—small business issuers and nonaccelerated filers—by combining for most purposes these categories into one category called “smaller reporting companies”;

- simplified the disclosure and reporting requirements for smaller reporting companies by integrating current Regulation S-B disclosure requirements for smaller companies into the disclosure requirements of Regulation S-K; and
- phased out over time the “SB” forms for smaller companies.

The SEC has provided current small business issuers the option to file their next annual report for a fiscal year ending on or after December 15, 2007, on either Form 10-KSB or Form 10-K. Additionally, small business issuers may continue to file their periodic reports using Regulation S-B and the “SB” forms until their next annual report is filed. Thereafter, subsequent periodic reports must be filed on a form that does not have the “SB” designation.

The amendments become effective on February 4, 2008, except for Form 10-QSB, which will be removed effective October 31, 2008, and Regulation S-B and Form 10-KSB, which will be removed effective March 15, 2009.

These amendments will allow a larger number of companies to take advantage of the SEC’s scaled, or reduced, disclosure requirements and simplify the regulatory requirements for smaller reporting companies.

## **EXEMPTION OF COMPENSATORY EMPLOYEE STOCK OPTIONS FROM REGISTRATION UNDER SECTION 12(G) OF THE EXCHANGE ACT**

The SEC amended Rule 12h-1 of the Exchange Act to provide two exemptions from the registration requirements of Section 12(g) of the Exchange Act for compensatory employee stock options.<sup>9</sup> The grant of employee stock options by a company may be subject to registration if the company has 500 or more holders of record of options and has assets in excess of \$10 million. As a result of such grants, private companies that would not otherwise be subject to the registration and ongoing disclosure requirements of the Exchange Act may become subject to these requirements.

The amendments provide an exemption from the registration requirement of Section 12(g) of the Exchange Act for:

- compensatory employee stock options issued under employee stock option plans of private, non-reporting issuers; and
- compensatory employee stock options of issuers that have registered a class of security under Section 12 of the Exchange Act or are required to file reports pursuant to Section 15(d) of the Exchange Act.

The amendments became effective on December 7, 2007.

The effect of these amendments is to allow greater use of compensatory stock options by private companies without the concern of having to satisfy registration and ongoing disclosure obligations.

## LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General e-mail messages may be sent using our "Contact Us" form, which can be found at [www.jonesday.com](http://www.jonesday.com).

**Thomas C. Daniels**

1.216.586.7017

[tcdaniels@jonesday.com](mailto:tcdaniels@jonesday.com)

**Alexander A. Gendzier**

1.212.326.7821

[agendzier@jonesday.com](mailto:agendzier@jonesday.com)

**Christopher M. Kelly**

1.216.586.1238/

1.212.326.3438

[ckelly@jonesday.com](mailto:ckelly@jonesday.com)

**Richard M. Kosnik**

1.212.326.3437

[rkosnik@jonesday.com](mailto:rkosnik@jonesday.com)

**Timothy J. Melton**

1.312.269.4154

[tjmelton@jonesday.com](mailto:tjmelton@jonesday.com)

## NOTES

- 1 It is anticipated that the SEC will post the adopting release for the amendments and mandatory filing of Form D in the near future. The phase-in period for voluntary Form D electronic filings will begin on September 15, 2008, and electronic filing will become mandatory on March 16, 2009. The amendments to Form D information requirements will become effective on September 15, 2008. Press Release, U.S. Securities and Exchange Commission, *SEC Facilitates Smaller Company Access to Capital Markets: Also Approves Electronic Filing and Changes to Form D* (Dec. 11, 2007), available at <http://www.sec.gov/news/press/2007/2007-259.htm>.
- 2 *Jones Day Commentary, SEC Proposes Private Offering Reforms and Other Relief for Smaller Companies* (June 2007), available at [http://www.jonesday.com/pubs/pubs\\_\\_detail.aspx?pubID=S4359](http://www.jonesday.com/pubs/pubs__detail.aspx?pubID=S4359). The *Jones Day Commentary* addressed the following six proposals to reform private offerings and provide other relief for smaller companies: Revisions to Rule 144 and Rule 145 to Shorten Holding Period for Affiliates and Non-Affiliates, Securities Act Release No. 33-8813 (June 22, 2007), available at <http://www.sec.gov/rules/proposed/2007/33-8813.pdf>; Revisions to the Eligibility Requirements for Primary Securities Offerings on Forms S-3 and F-3, Securities Act Release No. 33-8812 (June 20, 2007), available at <http://www.sec.gov/rules/proposed/2007/33-8812.pdf>; Smaller Reporting Company Regulatory Relief and Simplification, Securities Act Release No. 33-8819, Exchange Act Release No. 34-56013 (July 5, 2007), available at <http://www.sec.gov/rules/proposed/2007/33-8819.pdf>; Exemption of Compensatory Employee Stock Options from Registration under Section 12(g) of the Securities Exchange Act of 1934, Exchange Act Release No. 34-56010 (July 5, 2007), available at <http://www.sec.gov/rules/proposed/2007/34-56010.pdf>; Electronic Filing and Simplification of Form D, Securities Act Release No. 33-8814, Exchange Act Release No. 34-55980 (June 29, 2007), available at <http://www.sec.gov/rules/proposed/2007/33-8814.pdf>; and Revisions of Limited Offering Exemptions in Regulation D, Securities Act Release No. 33-8828 (August 3, 2007), available at <http://www.sec.gov/rules/proposed/2007/33-8828.pdf>.
- 3 On August 3, 2007, the SEC proposed amendments to Regulation D. Revisions of Limited Offering Exemptions in Regulation D, Securities Act Release No. 33-8828 (August 3, 2007), available at <http://www.sec.gov/rules/proposed/2007/33-8828.pdf>.
- 4 The SEC's adopting release regarding the amendments to Rule 144 and Rule 145 is Securities Act Release No. 33-8869 (Dec. 6, 2007), available at <http://www.sec.gov/rules/final/2007/33-8869.pdf>. The SEC adopted the amendments substantially as proposed with the following modifications, among others:
  - the proposed tolling provision and related amendments that would have tolled the six-month holding period while a security holder is engaged in certain hedging transactions (such as short positions or put equivalent positions) were eliminated; and
  - the Form 144 filing threshold was raised to 5,000 shares or \$50,000 instead of the proposed 1,000 shares and \$50,000.
- 5 The SEC also amended the one-year distribution compliance period in Category 3 of Regulation S applicable to U.S. issuers to reduce that period to six months, thereby conforming that Regulation S requirement to the revisions to the Rule 144 holding period.
- 6 The SEC's adopting release regarding the amendments to the eligibility requirements for primary securities offerings on Forms S-3 and F-3 is Securities Act Release No. 33-8878 (Dec. 19, 2007), available at <http://www.sec.gov/rules/final/2007/33-8878.pdf>. The SEC adopted the amendments substantially as proposed with the following modifications:
  - the limitation on the amount of securities that can be offered by companies under the new rules was increased from 20 percent to one-third of their public float; and

- Rule 401(g) of the Securities Act was amended to provide that violations of the one-third cap would also violate the requirements as to proper form under Rule 401 even though the registration statement previously has been declared effective.
- 7 Press Release, U.S. Securities and Exchange Commission, SEC Facilitates Smaller Company Access to Capital Markets: Also Approves Electronic Filing and Changes to Form D (Dec. 11, 2007), available at <http://www.sec.gov/news/press/2007/2007-259.htm>.
- 8 The SEC's adopting release regarding the amendments to smaller reporting company regulatory relief and simplification is Securities Act Release No. 33-8876, Exchange Act Release No. 34-56994, (Dec. 19, 2007), available at <http://www.sec.gov/rules/final/2007/33-8876.pdf>. The SEC adopted the amendments substantially as proposed with the following modifications:
- included an index of scaled disclosure requirements in the definition of smaller reporting company at the beginning of Regulation S-K to highlight items that contain the scaled disclosure requirements specific to smaller reporting companies;
  - phased out the "SB" forms over time, rather than eliminating them immediately;
  - moved the financial statement rules for smaller reporting companies into a new Article 8 of Regulation S-X and require two years of comparative audited balance sheet data of smaller reporting companies; and
  - permitted smaller reporting companies to choose to comply with both the nonfinancial and financial item requirements on an item-by-item basis when these disclosures are provided consistently.
- 9 The SEC's adopting release regarding the amendments to the exemption of compensatory employee stock options from registration under Section 12(g) of the Exchange Act is Exchange Act Release No. 34-56887 (Dec. 3, 2007), available at <http://www.sec.gov/rules/final/2007/34-56887.pdf>. The SEC adopted the amendments substantially as proposed with the following modifications:
- Regarding the exemption for private, non-reporting issuers:
    - the transferability and ownership restrictions on holders of shares issued on exercise of compensatory employee stock options were eliminated; and
    - an issuer's obligation to provide certain required information to holders of shares received on exercise of compensatory employee stock options was eliminated.
  - Regarding the exemption for public reporting issuers:
    - the category of issuers eligible to rely on the exemption was expanded to include any issuer required to file periodic reports under Section 13 or Section 15(d) of the Exchange Act.

Jones Day publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our "Contact Us" form, which can be found on our web site at [www.jonesday.com](http://www.jonesday.com). The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm.