

**RECENT DEVELOPMENTS FROM THE SEC:  
S-3 Eligibility, Rule 144/145 Amendments, Reg. D Proposals**

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**I. Introduction – Common Themes**

- A. Decreased costs of capital for public companies
- B. Increased focus on blank check stock companies and shell companies

**II. Amendments to Eligibility Criteria of Form S-3/F-3**

- A. Current Eligibility Rules
  - 1. Registrant Requirements
    - (a) Has class of securities registered under Section 12 of '34 Act
    - (b) Subject to the reporting requirements of Sections 12 of 15(d) of '34 Act for at least 12 calendar months
    - (c) Timely filed all reports required to be filed during the preceding 12 calendar months
    - (d) No material defaults under loans or long-term leases; no missed dividend or sinking fund payments on preferred stock
  - 2. Transaction Requirements
    - (a) Primary offerings for companies with \$75 million of public float
    - (b) Primary offerings of non-convertible investment grade securities
    - (c) Secondary offerings of stock of a class listed on a national securities exchange
- B. New Eligibility Rules
  - 1. Effective date: January 28, 2008
  - 2. New rules don't require for primary offerings
    - (a) a minimum public float
    - (b) debt securities to be of investment grade

3. Primary offering generally allowed for issuers who:
  - (a) satisfy registrant requirements
  - (b) have a class of common equity securities listed on a national securities exchange
  - (c) are not a shell company, and have not been one for 12 calendar months
  - (d) do not sell more than one-third of their public float over any period of 12 calendar months (if they have a public float of less than \$75 million)
4. Limitations on issuing shares if public float is less than \$75 million
  - (a) Calculate the amount with a two-step process
    - i. determine public float prior to the sale (60 day look-back period)
    - ii. aggregate gross amount of sales during the past 12 months
  - (b) requirement is dropped once issuer has more than \$75 million public float
  - (c) depending on fluctuations on market prices, amount that may be sold under this limitation may increase or decrease from the time of filing
  - (d) if violate one-third rule, issuer is deemed to have violated the registration statement form requirement even if declared effective

### **III. Amendments to Rule 144**

#### **A. General**

1. Rule 144 in unregistered offerings
2. Effective date: February 15, 2008
3. Securities of blank check stock and shell companies are not generally eligible for the safe harbor; review III(E) below

B. Revised holding period

1.

		<b>Affiliate Status of Seller</b>	
		Affiliate	Non-Affiliate
<b>Subject Securities Issued by</b>	Reporting Issuers	First 6 months – no resales permitted Thereafter – may sell in compliance with Rule 144	First 6 months – no resales permitted Second 6 months – unlimited public resales so long as the issuer meets the public information requirement Thereafter – unlimited resales
	Non-Reporting Issuers	First 12 months – no resales permitted Thereafter – may sell in compliance with Rule 144, including volume limitations	First 12 months – no resales permitted Thereafter – unlimited resales

2. Amendment to tacking rules

- (a) Securities issued in certain corporate reorganizations may tack holding period of prior security if meet certain audits
- (b) Securities issued on conversion/exchange have special tacking requirements

C. Manner of sale

- 1. Riskless principal transactions now permitted
- 2. Alternative trading system quotations qualifiedly acceptable as “broker’s transactions”
- 3. No manner of sale restrictions for debt securities
- 4. Form 144 requirement amendments
  - (a) 5,000 shares or \$50,000 within a three-month period.
  - (b) Relationship with 10b5-1 plans

D. Volume limitations

- 1. Not applicable to non-affiliates (other than pledgees)

2. Pledges no longer required to aggregate with other pledgees unless operating in concert; must still aggregate sales with pledgors
  3. Debt securities - alternative volume limit of 10% of a particular series or tranche (or class in the case of non-participating preferred stock)
- E. Blank check stock and shell corporations
1. Securities issued by a ‘shell company,’ whether or not a reporting company, cannot be sold in reliance on Rule 144. The safe harbor is temporarily restricted for former shell companies.
  2. *Definition of ‘shell company’ for Rule 144 purposes:* Generally, an issuer with no or nominal operations and either
    - (a) no or nominal assets;
    - (b) assets consisting solely of cash and cash equivalents; or
    - (c) assets consisting of any amount of cash and cash equivalents and nominal other assets.
  3. *Sunset provision for former shell companies.* Holders of securities issued by a former shell company where the issuer
    - (a) is subject to the reporting requirements of the ’34 Act,
    - (b) has filed all required reports, other than reports on Form 8-K, for the prior 12 months (or such shorter period as the issuer has been subject), and
    - (c) has filed current “Form 10 information,” may rely on Rule 144 one year after the Form 10 information is filed.
  4. “*Form 10 information*” refers to the information that is required by Form 10 or Form 20-F, as applicable, to register under the ’34 Act the issuer’s securities.

#### **IV. Amendments to Rule 145**

- A. Background
- B. New presumption in 145(c)
- C. Treatment of shell companies

#### **V. Proposals to Amend Regulation D**

- A. Background
  1. Reg. D and Form D proposals
  2. Private pool release from December 2006
- B. New exemption 507
  1. Exempts sales to ‘large accredited investors’

*Large accredited investor:* Generally, an accredited investor with more assets or investments. Legal entities without asset requirements would be considered large accredited investors. For entities with asset requirements under the definition of accredited investor,

- a legal entity, with \$10 million in investments, instead of \$5 million
- an individual person, with \$2.5 million in investments or an annual income of \$400,000 (or \$600,000 with one's spouse), instead of \$1 million or \$200,000 (or \$300,000), respectively

2. Permits limited advertising

C. Integration

1. Interpretive guidance

- (a) completed 4(2) offerings described in registration statements
- (b) contemplation of public offering while conducting a private placement
- (c) the guidance from the Black Box and Squadron Ellenoff no action letters is still available
- (d) filing of a registration statement as general solicitation / general advertising

2. Proposal to change the bright-line test to 90 days

D. Bad Actor Prohibitions

1. Reg. D not available where the issuer is disqualified itself or the presence of certain persons, including predecessor entities, affiliates, directors, executive officers, general partners, managing members, beneficial owners of 20% or more of the issuer's equity or promoters, disqualifies the issuer.

2. Disqualifiers (length of disqualification would be 5-10 years depending on severity)

- (a) filed a registration statement within the last five years that is the subject of a currently effective permanent or temporary injunction or an administrative stop order;
- (b) criminal conviction in the last 10 years in connection with the offer, purchase or sale of a security or involved making a false filing with the SEC;
- (c) subject of an adjudication or determination within the last five years by a federal or state regulator that the person violated federal or state securities or commodities laws or a law under which a business involving investments, insurance, banking or finance is regulated;
- (d) subject to a court order, judgment or decree entered within the last five years restraining or enjoining the person from engaging in any conduct or practice involving securities and other similar businesses, including an order for failure to comply with Rule 503 (the filing of Form D);

- (e) subject to a cease and desist order entered within the last five years issued under federal or state securities or similar laws; or
- (f) subject to a suspension or expulsion from membership in or association with a member of a national securities exchange or national securities association for an act or omission constituting conduct inconsistent with just and equitable principles of trade.

E. Proposed definitional amendments

1. Accredited Investor

- (a) an alternative test to assets for ‘investments owned’
- (b) expand the list of legal entities to include any LLC, Indian tribe, labor union, governmental body or other legal entity with substantially similar attributes.
- (c) recalculate dollar amounts every five years to adjust for inflation.

2. Investments

3. Accredited natural person

- (a) repeated proposal from 12/06
- (b) targets natural person investors in 3(c)(1) funds
- (c) creates two-step qualification for assets and investments

F. Form D

1. Proposals restructure form substantially

2. Require electronic filing

- (a) accomplished via internet
- (b) hardship exemptions prohibited
- (c) would still require EDGAR codes (thus Form ID)

3. Unify Form D and Form U-2 (universal consent to service of process form)

4. Electronic filing as general solicitation or general advertising

**Garth Jensen** has represented issuers in initial public offerings and other equity and debt offerings aggregating over \$12.4 billion of proceeds. Garth has represented over a dozen public companies listed on the New York Stock Exchange, American Stock Exchange, Nasdaq and foreign exchanges, representing them in various mergers, acquisitions and other transactions as well as counseling on corporate governance and general regulatory compliance issues. He has substantial experience in international mergers and acquisitions as well as cross-border securities offerings.

Mr. Jensen is honored among *The Best Lawyers in America* and has been ranked by Chambers USA among *America's Leading Business Lawyers* for the last several years.



**David Aarestad**, an associate in the Commercial Law & Securities Practice Group, joined Holme Roberts & Owen LLP in 2007. Mr. Aarestad has substantial experience in transactional finance, including offerings of debt, equity, asset-backed securities, hybrid securities and high-yield notes. Mr. Aarestad's experience also includes advising clients as to compliance under the Securities Act of 1933, the Securities Exchange Act of 1934 and NYSE rules. He has also advised broker-dealer clients about various NASD and SEC compliance issues and has negotiated a grant of specific relief from NASD.

Prior to joining HRO, Mr. Aarestad practiced in London at Herbert Smith and then in Denver at Ballard Spahr Andrews and Ingersoll LLP.

