

# UPDATE

---

## **News of Developments in the Financial Sector and Related Areas**

---

---

### **\* *IN THIS ISSUE* \***

---

#### *Sale of Restricted Securities*

#### *Quarterly Banking Profile*

---

#### *Sale of Restricted Securities*

On December 6, 2007, the Securities and Exchange Commission ("SEC") issued final amendments to its rules which became effective on February 15, 2008, to reduce the restrictions on the sale of unregistered and restricted securities. The Securities Act of 1933 (the "1933 Act") generally requires that all sales of securities be registered unless the transaction is exempt from registration.

Rule 144 of the 1933 Act provides a safe harbor for the sale of restricted securities. Rule 144 requires restricted securities to be held for a particular length of time and prescribes the conditions which must be satisfied prior to the sale of the securities. The rule also distinguishes between security holders who are affiliates, such as directors and executive officers of a company, and stockholders who are not affiliates and companies that are publicly traded and those that are not publicly traded.

Securities acquired by security holders which have not been registered under the 1933 Act are referred to as "restricted" securities. In addition, securities held by affiliates of an issuer, referred to as "controlled" securities, are addressed by Rule 144. One of the primary purposes of

Rule 144 is to permit the sale of restricted securities and controlled securities without having to comply with the costly and time consuming process of registering the securities with the SEC.

Securities that have not been registered under the 1933 Act are often placed with select investors in a private placement that carry a description, located on either the face or back of the certificate, of restrictions on the ability of the holder of the certificate to sell or otherwise transfer the certificate. Restricted securities issued in this manner are generally referred to as "legend" stock. When issuing restricted securities in a private placement, one of the requirements of state and federal securities laws is the requirement that investors represent in writing that they are purchasing the shares for investment intent and not with the intent to resell the shares. The purpose of having a legend on stock certificates is to alert purchasers to the restrictions imposed upon the stock. Shares issued in a private placement that are not publicly traded should contain a legend on the certificate indicating the restrictions on the shares. However, the absence of the legend or restrictive language on a certificate does not mean that the stock is freely traded and unrestricted. Many times the legend and restriction has been left off by accident or management of the company, as issuer, is not aware of the requirement to place the restriction or legend upon the certificate.

A typical legend indicating that a certificate represents restricted securities would read: The securities represented by this certificate have not been registered under federal or state securities laws, and were acquired by

the registered holder pursuant to a representation that such holder was acquiring such securities for investment. These securities may not be sold, pledged, hypothecated, transferred or assigned in the absence of an effective registration statement for the securities under applicable federal or state securities laws or an opinion of counsel satisfactory to the company to the effect that registration is not required thereunder.

Prior to the recent amendments, Rule 144 included limitations on the number of shares that could be sold in any three-month period, manner-of-sale restrictions and, in the case of restricted securities, a minimum holding period of at least one year. The amended rules significantly relaxed the restrictions of Rule 144 by (i) reducing the current minimum holding period for restricted securities from one year to six months; (ii) permitting persons who have been non-affiliates of a company for the past ninety days to sell an unlimited amount of the restricted securities after a six month holding period so long as the issuer meets the current public information requirements of Rule 144 and to sell restricted securities without any conditions after a one year holding period (versus the former requirement of two years); and (iii) eliminating the Form 144 notice requirements for sales by non-affiliates and increasing the thresholds that trigger the Rule 144 filing requirements for sales by affiliates.

Restricted securities of companies that are not subject to the reporting requirements of the Securities Exchange Act of 1934 (the "1934 Act") must be held for one year before any public resale. After this one year, a non-affiliate may freely resell such securities without regard to any of the Rule 144 conditions.

Although the provisions of the amendments to Rule 144 shorten the initial holding period for securities held by affiliates for from one year to six months for restricted

securities, the amendments will continue to impose various restrictions, such as the current public information requirement, the volume limitation and the requirement to file a notice of proposed sale on Form 144.

Under the amendments, a significant change was made to Rule 145 dealing with affiliates of an acquired company who received registered shares. Under the amendments, these shareholders of the target company who receive registered shares and do not become affiliates of the acquirer will be able to immediately resell the shares held by them without registration, assuming there is not a *shell* company involved in a transaction. A shell company is defined generally as a company with nominal or no operations and nominal or no assets. There are also additional restrictions under the amendments relating to securities issued by a shell company. Although the amendments took effect on February 15, 2008, they will be retroactive on securities issued prior to that date. As a result, securities issued prior to the effective date may take advantage of the new amendments.

Our firm is available to discuss sale of restricted securities and the impact of the recent amendments regarding the sale of restricted securities.

### ***Quarterly Banking Profile***

The Federal Deposit Insurance Corporation ("FDIC") has issued its *Quarterly Banking Profile* reflecting the financial results for the first quarter of this year. More than half of all insured institutions reported lower net income in the first quarter which is the lowest quarterly net income for the industry since insured institutions posted an aggregate net loss in the fourth quarter of 1990. Loans that were noncurrent (90 days or more past due or in nonaccrual status) increased by 24% during the first quarter. The report is available on the website of the FDIC at [www.fdic.gov](http://www.fdic.gov).