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SECURITIES ACT OF 1933
Release No. 6099/August 2, 1979

Resales of Restricted and Other Securities

AGENCY: Securities and Exchange Commission.

ACTION: Interpretations of rules.

SUMMARY: The Commission has authorized the issuance of a release which sets forth the views of its staff on various interpretive questions relating to the resale of restricted and other securities. The purpose of the release is to resolve certain recurring issues that have arisen under the Commission's rules applicable to such resales.

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SUPPLEMENTARY INFORMATION: Commencing in September 1977, the Commission issued a number of releases¹ concerning changes in certain of its rules under the Securities Act of 1933 the "1933 Act") [15 U.S.C 77a et seq.] relating to the resale of restricted² and other securities. The changes discussed in those releases have resulted in numerous oral and written requests for interpretations of the new provisions. To provide guidance on the matters raised by the requestors and on other significant recurring issues as well, the Commission has authorized the issuance of this release setting forth the views of its Divisions of Corporation Finance and Market Regulation.

The interpretations contained in this release primarily relate to Rule 144 [17 CFR 230.144] under the 1933 Act, although interpretations of Rule 145(d) [17 CFR 230.145(d)], 148 [17 CFR 230.148], and 237 [17 CFR 230.237] under the Act also are set forth herein. The Commission previously issued an interpretive release on Rule 144 in September 1972.³ All of the issues discussed in the prior release have been included herein, although in a somewhat different form than that in which they originally appeared. The prior release may therefore be considered superseded by this release. It should be noted that some of the views expressed in the prior release no longer apply, and attention in this regard is directed to Items (29), (81) and (84) herein.

This release also discusses the staff's current views on various recurring issues that have arisen under

¹See in this regard Release Nos. 33-5865 (September 16, 1977) [42 FR 47848], 33-5918 (March 29, 1978) [43 FR 14445], 33-5932 (May 15, 1978) [43 FR 21660], 33-5979 (September 19, 1978) [43 FR 43709], 33-5980 (September 20, 1978) [43 FR 43726], 33-5995 (November 8, 1978) [43 FR 54229], and 33-6032 (March 5, 1979) [44 FR 15610].

²The term "restricted securities" is defined in Rule 144 (a)(3) and includes securities acquired in non-public offerings, such as those under Section 4(2) of the 1933 Act, as well as securities acquired in offerings made in reliance upon Rule 240 [17 CFR 230.240] under the Act.

³Release No. 33-5306 (September 26, 1972) [37 FR 23180].

the rules mentioned above. Although many of these issues have previously been dealt with by the staff in interpretive letters that are publicly available, the staff has, upon reflection, revised some of the positions expressed in those letters. Attention in this regard is particularly directed to Items (9), (12), (22), (28), (30), (34), (47), (62), (69) and (70) herein. It should be noted, however, that this release does not discuss all of the matters dealt with in prior interpretive letters on the subject rules issued by the staff. To the extent that the views expressed in those letters are not discussed in this release, those views may still be considered to represent the staff's position on the questions raised.

The Commission is hopeful that the issuance of this release will reduce the need for members of the public to request interpretive advice from the staff regarding the rules in question. Although the staff will continue to respond to requests for such advice, it will adhere to its past practice of not providing a substantive response to letters involving the following: (1) hypothetical situations (responses to such inquiries can be misconstrued in actual fact situations), (2) the removal of restrictive legends from securities (the removal of such legends is subject solely to the discretion of the issuer of the securities), (3) whether a person is an affiliate⁴ (this is a factual question which the staff is not in a position to resolve from a distance), and (4) requests for a no-action position regarding securities acquired after April 15, 1972 (Rule 144 became effective on that date and the Commission stated at the time that its staff would not consider no-action requests for securities acquired thereafter).⁵

Finally, to assist readers of the release, a brief paraphrase of each rule provision being interpreted has been included, where appropriate, at the beginning of each series of interpretations relating to that provision. Also, to avoid confusion, it should be noted that the references herein to subparagraphs of the rules in question follow the classification system set forth in volume 17 of the Code of Federal regulations. For example, subparagraph (d)(4)(ii) of

Rule 144 corresponds to subparagraph (d)(4)(B) under the original classification system used for the rule at the time of its adoption.

TABLE OF CONTENTS

	<i>Page</i>
I. INTERPRETATIONS APPLICABLE TO ALL FOUR RULES	9
II. RULE 144	10
A. Definitions—Rule 144(a)	10
1. Rule 144(a)(2)(i)	10
2. Rule 144(a)(2)(ii)	11
3. Rule 14(a)(2)(iii)	13
4. Rule 144(a)(3)	14
B. Conditions to be Met—Rule 144(b)	17
C. Current Public Information—Rule 144(c)	19
1. Rule 144(c)(1)	19
2. Rule 144(c)(2)	25
D. Holding Period for Restricted Securities—Rule 144(d)	27
1. Rule 144(d)(1)	27
2. Rule 144(d)(2)	29
3. Rule 144(d)(3)	34
4. Rule 144(d)(4)	37
E. Limitation on Amount of Securities Sold—Rule 144(e)	43
1. General	43
2. Unlimited Resale Provision	48
3. Rule 144(e)(3)	55
F. Manner of Sale—Rule 144(f) and (g)	62
1. Transactions with a Market Maker	62

⁴An "affiliate" of an issuer is defined in Rule 144(a)(2) as a "person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such issuer."

⁵Release No. 33-5223 (January 11, 1972) [37 FR 596].

2. Brokers' Transactions	78	(2) <i>Question:</i> Is prior approval by the Commission or its staff necessary before a person may rely on any of the rules?
G. Form 144—Rule 144(h)	81	
H. Miscellaneous	84	<i>Answer:</i> No. Rules 144, 145(d), 148 and 237 are designed to be self-operative. Accordingly, neither the Commission nor its staff will respond to requests for approval of proposed transactions under the rules.
1. Call Options Traded on National Securities Exchanges	84	
2. Short Sales Against the Box	97	
2. Availability of Rule 144	99	II. RULE 144
III. RULE 145(d)	101	A. Definitions
IV. RULE 148	104	1. <i>Rule 144(a)(2)(i):</i> The term "person" includes the seller of securities under the rule, his spouse, and any of his or her spouse's relatives who share his home.
V. RULE 237	107	
I. INTERPRETATIONS APPLICABLE TO ALL FOUR RULES		(3) <i>Question:</i> Are the seller and all members of his family, including those who have established permanent homes of their own, considered to be one person for purposes of the rule?

(1) *Question:* Are there any restrictions on securities sold in reliance upon Rules 144, 145(d), 148 and 237?

Answer: No. If all applicable conditions of the rule under which the securities are sold are satisfied, the purchaser receives unrestricted securities. However, if the purchaser is an affiliate of the issuer, he must resell the securities either pursuant to a registration statement or in a manner (such as compliance with the conditions of Rule 144) that demonstrates an underwriter⁶ is not involved.

⁶The term "underwriter" is broadly defined in Section 2(11) of the 1933 Act and includes

any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in direct or indirect underwriting of any such undertaking; . . . As used in this paragraph the term 'issuer' shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect control with the issuer.

Answer: No. The definition of the term "person" was not intended to aggregate members of a family who are independent of the seller, assuming that such persons do not act in concert in selling securities under the rule. However, if a family member resides elsewhere on a temporary basis (e.g., a child attending college) but maintains his permanent home with the seller, that member's sales under Rule 144 would be aggregated with those of the seller.

(4) *Question:* If a person transfers restricted securities to his or her spouse as part of proceedings which lead to a divorce settlement, must subsequent sales of the transferee under the rule be aggregated with those of the transferor?

Answer: No. If the spouse to whom the securities were transferred maintains an independent home from the transferor and does not act in concert with the transferor in selling securities under the rule, such individual is considered to be a separate person for purposes of the rule.

2. *Rule 144(a)(2)(ii):* The term "person" includes any trust or estate in which the seller owns 10% or more of the total beneficial interest or serves as trustee, executor, or in any similar capacity.

(5) *Question:* Does Rule 144(a)(2)(ii) require a

bank which serves as executor or trustee for various estates and trusts to aggregate the sale transactions for its own account under the rule with sale transactions of the estates and trusts which it administers?

Answer: Yes.

(6) *Question:* Conversely, must the individual trusts and estates administered by the bank be considered one "person" because they share a common fiduciary?

Answer: No. The sharing of a common fiduciary does not, by itself, require the trusts and estates to be treated as a single unit.⁷

(7) *Question:* Are directors of a charitable organization deemed to act in a capacity similar to that of an executor or trustee within the meaning of Rule 144(a)(2)(ii) so that sales by such directors under Rule 144 must be aggregated with those of the charitable organization?

Answer: No. Such directors are not deemed by analogy to serve in a capacity similar to that of a trustee or executor. Accordingly, sales of restricted securities by directors of a charitable organization need not be aggregated with sales by the organization, assuming that the director and the organization do not act in concert in selling securities under the rule.

3. *Rule 144(a)(2)(iii):* The term "person" includes any corporation or other organization in

which the seller of securities under Rule 144 beneficially owns 10 percent or more of any class of equity securities or 10 percent or more of the equity interest.

(8) *Question:* Would a parent company and a second-tier subsidiary (e.g., a company wholly-owned by a direct subsidiary of the parent) be treated as one person under the rule with respect to sales of restricted securities of another issuer held in their respective investment portfolios?

Answer: Yes. The parent in such circumstances is the beneficial owner of more than 10% of the equity securities of the second-tier subsidiary. Accordingly, they are considered to be a single person and the sales of both under the rule must be aggregated.

4. *Rule 144(a)(3):* The term "restricted securities" includes securities acquired from the issuer or an affiliate thereof in a transaction or chain of transactions not involving a public offering.

(9) *Question:* Are the securities held by a trust or estate which is not an affiliate of the issuer considered to be restricted under any of the following circumstances:

(a) The securities were acquired in the open market by the settlor, who was an affiliate of the issuer at the time the securities were transferred to the trust?

(b) The securities were acquired in the open market by the decedent, who was an affiliate at the time of death, and were transferred to the estate as a result of the death of the decedent?

(c) The securities were acquired in the open market by the trustee or executor, who is an affiliate?

Answer: The securities may be restricted in situation (a), but would not be restricted in situations (b) and (c). Ordinarily, securities acquired in the open market are not considered to be restricted securities for purposes of Rule 144 because they are acquired in public transactions. However, where such securities are acquired by an affiliate and then transferred in a non-public transaction to another person, such as a trust, the securities become restricted. Thus, in situation (a) above, the securities would be considered restricted if they were sold by the settlor to the trust. If, however, the securities were donated by the settlor to the trust, they would be considered restricted only for that

⁷It should be noted, however, that if the fiduciary administers the trusts and estates in a manner that results in their acting in concert together, they would be treated as one person by virtue of paragraph (e)(3)(vi) of the rule. That paragraph states that

When two or more affiliates or other persons agree to act in concert for the purpose of selling securities of an issuer, all securities of the same class sold for the account of all such persons during any period of three months shall be aggregated for the purpose of determining the limitation on the amount of securities sold.

period of time the settlor remained an affiliate. This is due to the fact that, in a gift transaction, the donee assumes the status of the donor for purposes of Rule 144. Since the donor (i.e., the settlor) in situation (a) would be subject to Rule 144 with respect to sales of any securities acquired by him in the open market so long as he remains an affiliate, the donee (i.e., the trust) likewise would be subject for that period of time. But if the donor ceases to be an affiliate, he would be free to sell the open-market securities immediately without any restrictions, and the donee similarly could sell such securities in the same manner.

In situation (b), the securities are not restricted in the hands of the estate because there was no transaction in which an affiliate transferred securities to the estate. (Death is not considered to have created such a transaction).

In situation (c), the securities are not restricted in the hands of the trust or estate because they were acquired in the open market for the account of an entity (i.e., the trust or estate) which is not an affiliate. The fact that the trustee or executor is an affiliate does not change the result so far as the trust or estate is concerned because the trustee or executor is not acting on its own behalf in acquiring the securities but on behalf of the non-affiliate trust or estate. The trustee or executor in situation (c), however, would have to aggregate its personal sales, pursuant to Rule 144(a)(2)(ii), with those of the trust or estate.

(10) *Question:* Is Rule 144 available for the sale of securities acquired by an underwriter or finder as compensation for services rendered in connection with a registered public offering?

Answer: No. The securities held by the underwriter or finder are not considered "restricted securities" because they were not acquired "in a transaction or chain of transactions not involving any public offering." Accordingly, Rule 144 may not be relied upon for their sale.⁸

B. Conditions to be Met

Rule 144(b): Any person who sells restricted securities for his own account and any person who sells restricted or other securities for the account of an affiliate of the issuer shall be deemed not to be engaged in a distribution of the securities and therefore not an underwriter if all of the conditions of the rule are met.

(11) *Question:* Must a former affiliate comply with Rule 144 when he seeks to sell securities acquired by him in the open market while he was an affiliate?

Answer: No. The rule applies only to sales of restricted and other securities by affiliates and sales of restricted securities by non-affiliates. Securities acquired in the open market are not restricted. And, since the seller is no longer an affiliate, the sale of non-restricted securities by him is not subject to Rule 144.

(12) *Question:* If an affiliate donates nonrestricted securities to a charitable organization and subsequently ceases to be an affiliate, must the charitable organization continue to comply with the requirements of Rule 144?

Answer: No. The donee in such circumstances should be in no worse position than the donor. And since the donor, as a former affiliate, would not have to comply with the provisions of Rule 144 with respect to the resale of non-restricted securities, the donee likewise need not comply.

(13) *Question:* Must all of the provisions of Rule 144 be complied with when an affiliate seeks to rely upon it for the sale of non-restricted securities?

Answer: No. The two-year holding period requirement of paragraph (d) of the rule need not be

that it will not recommend any enforcement action to the Commission if an underwriter (or a finder) sells such securities pursuant to the provisions of Rule 144 (except for the provision requiring Form 144 to be filed) under certain conditions. The conditions are: (1) the securities were originally registered as part of the public offering, and (2) at least two years have elapsed from the date of the last sale of the public offering. See, e.g., letter re *Communications Properties, Inc.* dated March 13, 1978.

⁸Although it is clear from an interpretive standpoint that Rule 144 is not available for the sale of securities received by an underwriter or finder in connection with a registered public offering, the Division of Corporation Finance has stated in a number of letters

complied with if the securities are not restricted. All other conditions of the rule, however, must be satisfied by the affiliate before he can rely on it for the resale of such securities.

C. Current Public Information

1. *Rule 144(c)(1)*: There shall be available adequate current public information with respect to the issuer of securities sold under the rule. In the case of an issuer subject to the periodic reporting requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934 (the "1934 Act") [15 U.S.C. 78a et seq.], this condition shall be satisfied if the issuer has been subject to such requirements for at least 90 days immediately preceding the sale of the securities and has filed all of the reports required to be filed under those sections during the 12 months preceding the sale (or such shorter period that the issuer was required to file such reports).

(14) *Question*: May sales of an issuer's securities be made in reliance upon Rule 144 during the 90-day period following the date on which the issuer initially became subject to the periodic reporting requirements of Section 13 or 15(d) of the 1934 Act?

Answer: No. Rule 144(c)(1) clearly requires that issuers subject to the reporting requirements of Section 13 or 15(d) must have been so subject for at least 90 days prior to any sales under the rule and have filed all required reports during that period.

Illustration 1: **FACTS**: Y, a non-public company, goes public through a 1933 Act registration statement which became effective on May 1, 1979. X owns restricted securities of Y and wants to sell them on May 15, 1979. **INTERPRETATION**: Rule 144 is not available to X on May 15 because Y company has not been subject to Section 15(d) for at least 90 days. On August 1, 1979, 90 days after the effective date of its 1933 Act registration statement, Y will have been subject to the requirements of Section 15(d) for the minimum period required by Rule 144(c)(1). Accordingly, X may rely on the rule on that date, assuming Y has filed all reports required during the preceding 90 days and all other requirements of the rule are satisfied.

Illustration 2: **FACTS**: Y, a company not previously subject to the period reporting requirements of Section 13 or 15(d) of the 1934 Act, filed a Form 10 registration statement [17 CFR 249.210] under the Act on February 1, 1979. The registration

statement became effective on April 1, 1979. X owns restricted securities of Y and wants to sell them on May 1, 1979. **INTERPRETATION**: Rule 144 is not available to X on May 1 because Y has not been subject to the requirements of Section 13 for at least 90 days. On July 1, 1979, 90 days after the date of effectiveness of the Form 10 registration statement, Y will have been subject to the requirements of Section 13 for the minimum period specified in Rule 144(c)(1). Accordingly, X may rely on the rule on that date, assuming Y has filed all reports required during the preceding 90 days and all other requirements of the rule are satisfied.

(15) *Question*: May an issuer which is delinquent in filing periodic reports required under Section 13 or 15(d) of the 1934 Act properly assert that it is in compliance with the public information requirement of Rule 144(c)(1) because it makes available the information specified in Rule 144(c)(2)?⁹

Answer: No. The provisions of Rule 144(c)(2) are applicable only to issuers which are not subject to Section 13 or 15(d). Accordingly, an issuer subject to either Section 13 or 15(d) must file the reports required thereunder in order to satisfy Rule 144(c)(1).

(16) *Question*: May a seller of restricted securities rely upon the issuer's representation in its most recent periodic report that it has filed all reports required under Section 13 or 15(d) of the 1934 Act?

Answer: Generally, Yes. Rule 144(c)(1) states that a seller under the rule may rely on a statement made by the issuer in its most recent quarterly or annual report filed under the 1934 Act that it (the issuer) has filed all reports required under Section 13 or 15(d) during the preceding 12 months, or such shorter period that it was required to file such reports. The rule also provides, however, that if the seller knows or has reason to believe that the issuer has not complied with the requirements of Section 13 or 15(d), the seller may not rely on the statement by the issuer concerning compliance with Section 13 or 15(d).

Illustration 1: **FACTS**: Y company stated in its most recent report on Form 10-Q that it had filed all

⁹See Part 2 of Section C of this release for a description of the information specified in Rule 144(c)(2).

