FREQUENTLY ASKED QUESTIONS ABOUT RULE 144 AND RULE 145

Understanding Rule 144 under the Securities Act of 1933

What is Rule 144?

Rule 144 permits public resales of the following, without having to register the resale with the Securities and Exchange Commission (the "SEC"):

- unregistered securities acquired directly from an issuer, referred to as "restricted" securities, and
- unrestricted securities held by affiliates of the issuer, referred to as "control" securities

See "*What are restricted securities?*" and "*What are control securities?*"

A person selling restricted securities or control securities who satisfies all applicable conditions of Rule 144 in connection with the transaction is deemed not to be an "underwriter" as defined in Section 2(a)(11) of the Securities Act of 1933 (the "Securities Act"), and therefore may rely on the Section 4(1) exemption for the resale of securities. *See* "*What are the basic requirements of Rule 144?*"

The SEC amended Rule 144 effective February 15, 2008. The amendments reduced the restrictions on unregistered resales of securities into the public markets.

What are the basic requirements of Rule 144?

There are five basic requirements of Rule 144, although not all requirements apply to every sale.

Affiliates of the issuer must comply with all five requirements. However, sellers who are not affiliates at the time of the sale, and have not been affiliates for the three months preceding the sale, must only comply with (1) the holding period requirement and (2) the current public information requirement (which is only applicable to non-affiliate sellers if the issuer is a reporting company). These requirements are as follows:

- *Current public information*. Specified current information concerning the issuer must be publicly available. *See* "Rule 144(c) - Current Public Information Requirement."
- *Holding period*. A six-month holding period is required for "restricted securities" of an issuer that has been a reporting company for at least 90 days. A one-year holding period is required for "restricted securities" of a non-reporting company. *See* "Rule 144(d) - Holding Period Requirement" and "*What are restricted securities?*"

- *Volume limitation*. The amount of securities that can be sold in any three-month period for listed companies is limited to the greater of (i) one percent of the shares or other units of that class outstanding, or (ii) the average weekly trading volume during the four calendar weeks preceding the filing of a Form 144, or if no such notice is required, the date of receipt of the order to execute the transaction. The amount of securities that can be sold in any three-month period for companies with over-the-counter, or OTC, securities is limited to one percent of the shares or other units of that class outstanding. *See* "Rule 144(e) – Volume Limitations." Rule 144 also has an alternative volume limit of up to 10% of the tranche (or class) outstanding for debt securities.

- *Manner of sale*. Equity securities (but not debt securities) must be sold in unsolicited "brokers' transactions," directly to "market makers," or in "riskless principal transactions." *See* "Rule 144(f) and (g) - Manner of Sale Requirements."

- *Notice of sale*. The seller must file a Form 144 with the SEC at the time the sell order is placed with the broker if the seller is an affiliate and intends to sell during any three-month period more than 5,000 shares or securities with a value in excess of $50,000. *See* Rule 144(h).

Which securities are subject to Rule 144?

Restricted securities and control securities are subject to Rule 144. For purposes of Rule 144, "securities" include common stock, preferred stock, and debt securities, and the term "debt securities" includes asset-backed securities and nonparticipating preferred stock. *See* "Securities Subject to Rule 144."

Is Rule 144 the exclusive means by which restricted or control securities may be sold?

No. Rule 144 provides a non-exclusive safe harbor under Section 4(a)(1) of the Securities Act for selling security holders that seek to resell their restricted securities or control securities. Public resales of restricted securities and control securities outside the safe harbor may be made under other available exemptions under the Securities Act. *See* the preliminary note to Rule 144.

Who is responsible for complying with Rule 144?

The seller of "restricted" or "control" securities must comply with Rule 144 to obtain the benefit of the exemption from registration provided by Section 4(a)(1) of the Securities Act for resales by persons who are not underwriters.

Rule 144 also provides assurance that the exemption under Section 4(a)(4) of the Securities Act is available for a broker participating in the resale. A broker should seek to ensure that the relevant transactions comply with Rule 144 because otherwise, the broker might be deemed to be engaged in a distribution requiring a registration statement rather than in an ordinary trading transaction.

Issuers also should seek to ensure that the relevant transactions comply with Rule 144. The SEC expects issuers to establish reasonable internal procedures to prevent violations of the federal securities laws by their officers, directors, and employees. *See* "*What happens if a*

purported Rule 144 transaction does not, or cannot, strictly comply with Rule 144?"

What happens if a purported Rule 144 transaction does not, or cannot, strictly comply with Rule 144?

A selling security holder that does not comply with Rule 144 and does not have an alternative available exemption from registration requirements may be deemed an underwriter that has sold without registration. Non-compliance could result in rescission of the transaction, civil liability, or even criminal liability. However, the practical exposure to the consequences of non-compliance with Rule 144 may be relatively small because of the following potential fallback alternatives:

- *Other exemptions may be available*. For example, the exemption under Section 4(a)(1) of the Securities Act, applicable to persons who are not an issuer, underwriter, or dealer, may be available, especially if securities have been held for a long period of time.
- *The trade can be broken*. However, breaking a trade can be expensive if the price of the stock has changed since the trade date. In addition, a seller who is an "insider" under Section 16 of the Securities Exchange Act of 1934 (the "Exchange Act") and who must break a trade should do so through the broker's error account in order to avoid having both a sale and purchase that could have adverse Section 16 consequences.

Securities Subject to Rule 144

What are restricted securities?

Restricted securities are securities that have been acquired in transactions exempt from the registration requirements of Section 5 of the Securities Act. Restricted securities include, among other things, stock issued prior to an issuer's initial public offering; stock issued in private placements by the issuer or issuer securities acquired privately from affiliates of the issuer; securities issued in Rule 144A transactions or sold in a transaction under the Section 4(a)(7) exemption (enacted in December 2015); and equity securities of domestic issuers acquired from the issuer, a distributor, or any of their respective affiliates in a transaction subject to the conditions of Rule 901 or Rule 903 of Regulation S. However, securities sold in a Regulation A offering are not restricted securities.

What are control securities?

Control securities are securities owned by any person who directly or indirectly controls the issuer – either alone or as a member of a control group. The SEC uses the term "affiliate" to describe such a control person. *See* "*Who are affiliates?*" below.

Who are affiliates?

Under Rule 405 of the Securities Act, an "affiliate" of or person "affiliated" with a specified person shall mean a person that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person specified.

An individual's status as an affiliate is a fact-specific inquiry which must be determined by considering all relevant facts in accordance with Rule 405. The rule

provides that the term "control" (including the terms "controlling," "controlled by" and "under common control with") means the possession, direct or indirect, of the power to direct or cause the direction of management and the policies of a person, whether through the ownership of voting securities, by contract, or otherwise. The SEC has stated that an individual's status as a director, officer, or 10% shareholder is one fact which must be taken into consideration in determining affiliate status (*see American Standard*, Oct. 11, 1972). In addition, under Section 16(a) of the Exchange Act, every person who is directly or indirectly the owner of more than 10 percent of any class of any equity security that is registered under the Exchange Act, or who is a director or an officer of the issuer of such security, must file statements setting forth the amount of all equity securities of such issuer of which the filing person is a beneficial owner. These individuals usually are considered affiliates.

Are all control securities subject to Rule 144?

Yes. Even securities acquired by an affiliate in the open market become subject to Rule 144 as "control securities."

Rule 144(c) - Current Public Information Requirement

What must a reporting company do to comply with the current public information requirement?

A reporting company satisfies the public information requirement if it has been subject to the reporting requirements of Section 13 or Section 15(d) of the Exchange Act for a period of at least 90 days and has filed all reports required during the 12 months preceding the sale (or such shorter period that the company was required to file reports).

What must a non-reporting company do to comply with the current public information requirement?

A non-reporting company satisfies the current public information requirement by making "publicly available" the information specified in Rule 15c2-11(a)(5)(i) to (xiv) and (xvi). This information is similar to the information required to be included in an annual report to shareholders.

What must an insurance company do to comply with the current public information requirement?

An insurance company satisfies the current public information requirement if it is regulated by the state in which it is domiciled and files the reports described in Section 12(g)(2)(G)(i) of the Securities Act.

Rule 144(d) - Holding Period Requirement

When does the holding period requirement apply?

Restricted securities cannot be resold under Rule 144 until the security holder has satisfied the applicable holding period. *See "What are restricted securities?"* There is no holding period for unrestricted securities.

What is the holding period for securities of a reporting company?

Rule 144 requires a selling security holder to hold shares of a reporting company for six months after the securities are fully paid for.

What is the holding period for securities of a non-reporting company?

Rule 144 requires a selling security holder to hold shares of a non-reporting company for one year after the securities are fully paid for.

When does the holding period commence?

Generally, the holding period commences once the securities are fully paid for.

If securities are financed through the issuer, the holding period commences immediately upon purchase of the securities if the loan:

- provides for full recourse against the purchaser;
- is fully collateralized by assets other than the purchased securities having a fair market value at least equal to the purchase price of the securities purchased; and
- is discharged by payment in full prior to the sale of securities.

For securities financed through an independent third party, the securities are considered fully paid at the time of purchase from the issuer if the loan is made on a full recourse basis. However, if the issuer collateralized the loan from the third party, the securities are not considered fully paid.

What is "tacking" of holding periods and when is tacking permitted?

Tacking can be a complicated analysis and must be reviewed in light of all of the facts and circumstances. Generally, the "tacking" concept of Rule 144 permits a holder of restricted securities to aggregate the separate holding periods of prior owners of the restricted securities in order to satisfy the holder's applicable holding period requirement. A selling security holder may tack, or include as part of its own holding period, the holding period of a prior holder unless the securities were purchased from an affiliate, in which case the holding period starts over.

In addition, tacking based on prior holdings of different securities is allowed when the new securities simply continue the holder's existing investment in another form. For example, in calculating the holding period of restricted shares of common stock, a security holder may tack (or include prior holding periods) for:

- stock dividends, stock splits, and recapitalizations;
- conversions or exchanges;
- change of domicile by the issuer;
- contingent issuances;
- acquisitions pursuant to anti-dilution rights; and
- cashless exercises of options and warrants.

Tacking also is allowed in holding company formations when:

- the newly formed holding company's securities were issued solely in exchange for the securities of the predecessor company as part of the reorganization of the predecessor company into the holding company structure;
- the security holders received securities of the same class evidencing the same proportional interest in the holding company as they held in the predecessor, and the same rights and interests as the securities exchanged; and

- the holding company was newly formed, and immediately following the transaction has no significant assets except the predecessor securities, and substantially the same assets and liabilities on a consolidated basis as the predecessor company had before the transaction.

A change in legal form of an enterprise normally will restart the holding period for restricted securities of that issuer. However, under the SEC's guidance, a holder of restricted securities may tack the holding period for the two entities if the following conditions are satisfied:

- the controlling agreement entered into at the time of the formation of the predecessor entity specifically contemplated the change in legal form;
- the partners or members seeking to tack had no veto or voting right over the reorganization;
- the reorganization does not result in a change in the business or operations of the surviving entity;
- the proportionate equity interests in the successor are the same as the interests in the predecessor; and
- the equity holders provide no additional consideration for the securities they receive in exchange for their equity interests in the predecessor entity.

When is tacking not permitted?

Tacking is not permitted for, among other things, exercises by an estate of a decedent's stock options, or purchases of restricted securities in private transactions from an affiliate.

Is tacking permitted for a REIT's common stock acquired upon redemption of operating partnership ("OP") units in an "UPREIT" structure?

Yes. In a traditional UPREIT structure, the holding period for shares of the real estate investment trust ("REIT") common stock acquired upon redemption of OP units commences on the date that the underlying OP units were acquired.

In an umbrella partnership REIT ("UPREIT") structure, the REIT serves as (or controls) the general partner of an OP subsidiary that owns the real estate assets through which the REIT conducts its business. The REIT's only material assets are partnership units in its OP ("OP units"). The OP issues OP units to sellers in private unregistered offerings as consideration for their contribution of real estate. (By contributing real estate to the OP in exchange for OP units, sellers of real estate assets are able to defer taxes payable on the gains from the sale of the real estate assets until the OP units are sold or are redeemed by the REIT for cash or REIT common stock.)

In the traditional UPREIT structure, each OP unit is the economic equivalent of one share of REIT common stock. Generally, after a one-year holding period, OP units may, at the holder's option, be tendered to the OP for redemption for cash or, at the REIT's option, for shares of the REIT's common stock on a 1-to-1 basis (or a different fixed ratio). The OP units are typically deemed "restricted securities" under Rule 144.

The Staff of the SEC (the "Staff") has determined that in a typical UPREIT structure, each OP unit represents the same proportionate right to the assets of an OP as a share of REIT common stock. Therefore, a holder of REIT common stock received upon the redemption of OP units should be able to "tack" its holding period to

the date that the OP units were acquired; in this case, the holder retains the same amount of economic risk and the same proportionate share of the underlying real estate assets before and after the redemption. The Staff agreed that, in a typical UPREIT structure, the Rule 144 holding period for REIT common stock acquired upon the redemption of OP units commences on the date the OP units were initially acquired, and not on the date of the redemption. In making this determination, the Staff's analysis depended on the facts that (a) the holder pays the full purchase price for the OP unit at the time the OP unit is acquired from the OP, (b) each OP unit is the economic equivalent of one share of REIT common stock, representing the same right to the same proportional interest in the same assets, (c) the issuance of REIT common stock upon redemption of an OP unit is at the discretion of the REIT and (d) no additional consideration is paid by the holder for the REIT's common stock.[1]

Is tacking permitted for a parent corporation's common stock acquired upon exchange of partnership interests in an umbrella operating partnership in an "up-C" structure?

In an "up-C" structure, a holder exchanges partnership interests in an umbrella operating partnership (OP units) into shares of its parent corporation. The Staff has clarified that for purposes of Rule 144(d)(1), the holding period for the corporation's shares issued in up-C transactions commences upon the earlier acquisition of the OP units. The Staff's conclusion is based on the following conditions: (i) the OP unit holders paid the full purchase price for the OP units at the time they were acquired from the umbrella OP; (ii) the up-C governing documents contemplate and provide the terms for the exchange of OP units for the corporation's shares, such that the OP unit holder has the same economic risk as if it were a holder of the corporation's shares during the entire period it holds the OP units; and (iii) no additional consideration is paid by the OP unit holders for the corporation's shares.[2]

Rule 144(e) - Volume Limitations

What is the volume limitation?

The amount of securities that can be sold in any three-month period for listed companies is limited to the greater of:

- one percent of the shares or other units of that class outstanding, or
- the average weekly trading volume during the four calendar weeks preceding the filing of the Form 144, or if no such notice is required, the date of receipt of the order to execute the transaction.

The amount of securities that can be sold in any three-month period for companies with OTC securities is limited to one percent of the shares or other units of that class outstanding.

The three-month period is a rolling period that includes only the three months immediately preceding the date of sale. The four-week period includes only the

[1] Bank of America, N.A., Merrill Lynch, Pierce, Fenner & Smith Incorporated, SEC Staff Letter (March 14, 2016) is available at: https://www.sec.gov/divisions/corpfin/cf-noaction/2016/bankofamerica-merrilllynch-pfs-031416-144.htm.

[2] SEC Staff Letter (November 1, 2016) is available at: https://www.sec.gov/divisions/corpfin/cf-noaction/2016/up-c-110116-144.htm.

four calendar weeks (not the 20 business days) preceding the filing of the Form 144 notice or, if no notice is required, the date of receipt of the order by the broker or the date the securities are sold directly to a market maker.

What is the alternative volume limitation for debt securities?

In addition to the volume limitations listed above, Rule 144 has an alternative volume limitation of up to 10% of the tranche (or class) outstanding for debt securities. Debt securities under Rule 144 include asset-backed securities and nonparticipating preferred stock.

Which sellers must comply with the volume limitation?

Affiliates selling securities under Rule 144 must comply with the volume limitations whether the company is a reporting or a non-reporting company. *See "Who are affiliates?"*

Which sellers do not need to comply with the volume limitation?

- Non-affiliate estates.
- Non-affiliate beneficiaries of estates.
- Non-affiliates of a reporting company who have held their restricted securities for six months, provided the issuer is current in its filings and the seller has not been an affiliate during the preceding three months.
- Non-affiliates of a non-reporting company who have held their restricted securities for one year, provided the seller has not been an affiliate during the preceding three months.

Are sales outside of Rule 144 included in the volume limitation computation?

Sales outside of Rule 144, such as registered sales and sales under Section 4(a)(1), are not included in the volume limitation computation. However, any sales outside Rule 144 during the three months preceding the Rule 144 sale must be disclosed in Table II of Form 144.

Should sellers take into account decreases and increases in trading volume when computing the volume limitation?

Decreases in trading volume can be disregarded when they occur after the Form 144 has been filed. Increases can be locked in by filing a new Form 144.

How should convertible securities and the securities underlying them be computed in the volume limitation if both are sold during the same three-month period?

If both convertible securities and the securities underlying them have been sold during the same three-month period, the volume limit should be computed as if the convertible securities had actually been converted.

How do security holders of newly formed holding companies determine the average weekly trading volume?

If a Section 12 registrant becomes a wholly owned subsidiary of a holding company in a reorganization, security holders of the newly formed holding company may take into account the subsidiary's average weekly reported trading volume when computing the number of shares that can be sold under Rule 144(e).

What is "aggregation," and when must sales by two or more persons be aggregated?

Aggregation can be a complicated analysis and must be reviewed in light of all of the facts and circumstances. Generally, the "aggregation" principles of Rule 144 require different holders to aggregate their sales of restricted securities with sales made by other "affiliated" or "associated" holders of restricted securities in order to determine whether the combined amount of aggregated securities exceeds the volume limitations of Rule 144.

Aggregation can either be "vertical" or "horizontal." Vertical aggregation requires the transferor of the restricted securities to aggregate its sales with those sales of restricted securities made by its immediate transferees. Similarly, in some instances, vertical aggregation may require that a transferee of restricted securities aggregate its sales of restricted securities with those sales made by the transferor. Horizontal aggregation under Rule 144 requires unaffiliated transferees of restricted securities to aggregate sales of restricted securities with sales of other transferees.

Sales by two or more persons or entities must be aggregated in the following situations:

- When individuals act together, for example, by collectively deciding the timing of sales and how much each will sell, these individuals must aggregate their sales.
- All individuals must aggregate their sales when the individuals are considered to be one "person." For example, individuals must aggregate their sales if they are family members of, and living in the same household as, an affiliate.
- Sales by trusts and estates must by aggregated with sales by individuals who are family members of, and living in the same household as, an affiliate if such family members collectively own a 10% or greater beneficial interest in the trust or estate, or if such family members serve as trustee or executor of the trust or estate.
- Sales of securities by corporations or other entities must be aggregated with sales by persons who are family members of, and living in the same household as, an affiliate of the corporation or entity if such family members collectively have a 10% or greater equity interest in the corporation or other entity.

Aggregation also applies to gifts and pledges of shares. *See* "Special Situations."

Rule 144(f) and (g) - Manner of Sale Requirements

What is the manner of sale requirement?

In a Rule 144 transaction, securities must be sold in:

- unsolicited brokers' transactions within the meaning of Section 4(a)(4) of the Securities Act,
- transactions directly with a market maker, or
- riskless principal transactions.

To whom does the manner of sale requirement apply?

The manner of sale requirement applies only to affiliates. *See "Who are affiliates?"*

What is an "unsolicited brokers' transaction"?

For purposes of Rule 144, an "unsolicited brokers' transaction" includes transactions by a broker in which

the broker does no more than execute the order or orders to sell the securities as agent for the person for whose account the securities are sold. The broker must not receive more than the usual and customary broker's commission.

What actions by a broker will not be deemed a solicitation of a buy order?

A broker that maintains a market for the issuer's securities may continue to do so without being deemed to have solicited buy orders if, prior to receipt of the Rule 144 order, it had published quotes in an interdealer quotation system 12 out of the 30 preceding days in succession, with no more than four consecutive business days without such quotations.

The issuance of research reports by the broker will not be deemed a solicitation of buy orders if:

- the reports are issued in the broker's regular course of business;
- similar reports concerning the issuer have previously been issued by the broker;
- the broker receives no consideration from the seller from the issuance of the reports; and
- the reports are not issued for the purpose of facilitating any part of the seller's transaction.

In addition, the broker will not be deemed to be making a solicitation if the broker makes inquiries of:

- other brokers or dealers who have indicated an interest in the securities during the preceding 60 days; or
- customers who have indicated a bona fide unsolicited interest in the securities within the preceding 10 business days.

In addition, Rule 144 provides that a broker's publication of bid and asked quotations in an alternative trading system or a non-exchange trading venue will not be considered a solicitation of a buy order if the broker has published quotations in the same market on each of the last 12 business days.

What is a transaction directly with a market maker?

Rule 144(f) allows securities to be sold directly to market makers, as that term is defined in Section 3(a)(38) of the Exchange Act. The market maker exception will apply only if the market-making firm purchases the Rule 144 securities as principal. The term "market maker" includes specialists, block positioners, and OTC market makers.

The normal activities of a market maker are deemed not to involve a solicitation of a buy order of the type prohibited by Rule 144. When the purchase transaction has been completed and the market maker is at risk, it may solicit buyers. Block positioners for listed securities are exempted from the no solicitation requirement once they are committed to buy the stock at a particular price and the purchase is time-stamped.

When does a riskless principal transaction meet the manner of sale requirement?

Riskless principal transactions are the equivalent of brokers' transactions, *i.e.*, the matching of a buyer and seller, without the intermediary taking a proprietary interest in the securities. In order to meet the manner of sale requirement, securities must be sold in a riskless principal transaction where:

- the offsetting trades are executed at the same price (exclusive of an explicitly disclosed

markup or markdown, commission equivalent, or other fee);

- the transaction is permitted to be reported as riskless under the rules of the applicable self-regulatory organization; and
- the requirements of an unsolicited brokers' transaction are met.

Is there a manner of sale requirement for debt securities?

No. Rule 144 does not contain a manner of sale requirement for debt securities.

Notice of Sale on Form 144

Which sellers need to file a notice of sale on Form 144?

A notice of sale on Form 144 needs to be filed only when the selling shareholder is an affiliate. *See "Who are affiliates?"*

When does a Form 144 need to be filed?

The notice of sale on Form 144 generally must be filed at the time the order to sell is placed with the broker or the securities are sold to a market maker. However, no filing is required if the number of securities does not exceed 5,000 shares or other units and the aggregate sale price does not exceed $50,000 in any three-month period. The form can only be filed when the person has a bona fide intention to sell the securities referred to in the notice.

What are the filing procedures for a Form 144?

Three copies must be filed with the SEC and one copy with the principal exchange on which the securities are traded. Although the SEC does not require that the Form 144 be sent electronically to the EDGAR database, some filers choose to do so. Misstatements or omissions can be corrected without penalty by filing an amended form. However, if the corrections demonstrate that the seller did not comply with certain conditions of Rule 144, Rule 144 will not be available.

Does filing a Form 144 obligate a person to sell under the rule?

No. Form 144 does not obligate a person to sell under the rule. There is no penalty for not selling as planned.

What are the implications of the seller signing the Form

144?

By signing the Form 144, the seller represents that the seller does not know of any non-disclosed material adverse information about the issuer.

Unavailability of Rule 144 for Securities of Shell Companies

What are shell companies?

A shell company, as defined in Rule 405 of the Securities Act, is a registrant with no or nominal operations and either no or nominal assets, assets consisting solely of cash and cash equivalents, or assets consisting of any amount of cash and cash equivalents and nominal other assets.

Can shell companies take advantage of Rule 144?

No, securities issued by a shell company cannot be sold in reliance on Rule 144. Notwithstanding this general rule, securities issued by a company that subsequently becomes a shell company can be sold in reliance on

Rule 144. Also, Rule 144 may become available for securities issued originally by a shell company that is no longer a shell company if the company:

- is a reporting company;
- has filed all required reports during the preceding 12 months (or any shorter period during which the company has been subject to reporting requirements); and
- has filed current "Form 10 information" with the SEC reflecting that it is no longer a shell company. See Rule 144(i).

Special Situations

How does Rule 144 apply to bonus plans?

Shares acquired under a bonus plan are free of restrictions if:

- the issuer is a reporting company;
- there is an active trading market for the securities; and
- the number of shares being distributed is relatively small in relation to the number of shares of that class issued and outstanding.

Affiliates who receive shares under a bonus plan are subject to Rule 144, but not the holding period requirement.

If these three conditions are not met, the shares are restricted. The holding period commences when shares are allocated to the participant's account (even when vesting is delayed). *See* "*Who are affiliates?*" and "Rule 144(d) - Holding Period Requirement."

How does Rule 144 apply to employee purchase plans?

If the plan is unregistered, the shares are restricted, and all participants are subject to all of the requirements of Rule 144. The holding period begins when the shares are fully paid for.

Does Rule 144 apply to a gift of shares?

Gifts are not deemed to be sales. Thus, gift transactions are not subject to any of the limitations of Rule 144. However, as a general rule, the donee stands in the shoes of the donor and is subject to the restrictions of Rule 144. The donor is obligated to aggregate, for purposes of the volume limits of the rule, all of the donor's sales with those of all of the donees for a period of six months (reporting companies) or one year (non-reporting companies) following each gift. *See* "*What is 'aggregation,' and when must sales by two or more persons be aggregated?*" Until the Rule 144(b) six-month/one-year holding periods are satisfied, a donee must sell under Rule 144 and must aggregate the donee's sales under the rule with those of the donor (but not with sales of other donees).

After the donated securities have satisfied the six-month or one-year holding period (with tacking permitted), non-affiliate donees can sell without restriction. However, the donor must aggregate all sales during the six-month/one-year period following the gift/pledge with all donees' sales of securities during the three months preceding the donor's sales. *See* "Rule 144(d) - Holding Period Requirement."

Does Rule 144 apply to a pledge of shares?

A pledge must be "bona fide" in order for the pledgee to be able to sell under Rule 144. Ordinarily, the pledgee can tack the pledgor's holding period. The pledgee

must aggregate with the pledgor until the Rule 144(b) six-months/one-year cutoff is met. The pledgor must aggregate with all pledgees. *See* "*What is 'aggregation,' and when must sales by two or more persons be aggregated?*" and "*What is "tacking" of holding periods and when is tacking permitted?*"

Under Rule 144(b), if the combined holding period for the pledgor and pledgee meets the six-month/one-year holding period, in the event of a default by the pledgor, the pledgee would be able to publicly sell the pledged stock in foreclosure of the pledge as freely saleable stock. Once the holding period is satisfied, the pledgee is free to sell without restriction. However, the pledgor must still aggregate its sales with all pledgees' sales for six months/one year following the pledge.

How does Rule 144 apply to trusts and estates?

Non-affiliate trusts and estates that hold unrestricted securities do not have to comply with Rule 144, even if the trustee, executor, or beneficiary is an affiliate. Non-affiliate trusts and estates and non-affiliate beneficiaries holding restricted securities are required to comply only with the current public information and notice of sale requirements of Rule 144. *See* "*Who are affiliates?*," "*What are restricted securities?*," and "Rule 144(c) - Current Public Information Requirement."

An affiliate who acts as trustee or executor must aggregate his personal sales with all sales made by the trust or estate. If a trust or estate were to sell restricted securities under the rule, it would not have to aggregate with the sales by the trustee or executor, unless such sales were made in concert.

Does Rule 144 apply to short sales of restricted securities?

Yes, all of the conditions of Rule 144 must be met at the time of the short sale. Restricted securities that subsequently become free of restrictions cannot be used to cover short sales that did not meet all the Rule 144 requirements at the time the short sale was effected.

What happens when an affiliate transfers securities acquired in the open market?

The Staff has provided guidance on two situations. If (i) an affiliate-pledgor defaults on a loan secured by a bona fide pledge of company securities acquired in the open market (*i.e.*, these securities are not "restricted securities" in the pledgor's hands) or (ii) if an affiliate-donor transfers, by a bona fide gift, company securities acquired in the open market, in both cases, the securities are still "restricted securities" in the hands of the pledgee or donee because they have been "acquired directly or indirectly from the issuer, or from an affiliate of the issuer, in a transaction or chain of transactions not involving any public offering." If the pledgee/donee is a non-affiliate and has not been an affiliate during the preceding three months, the pledgee/donee may resell such securities pursuant to Rule 144(b)(1) without regard to the holding period requirement in Rule 144(d) but subject to the current public information requirement in Rule 144(c)(1), as applicable. No other requirements in Rule 144 are applicable to the resale.

How does Rule 144 apply to an affiliated fund's distribution-in-kind of portfolio company securities to fund investors?

Under Rule 144, in order for non-affiliated fund investors to receive freely tradeable securities, an affiliated fund is required to hold securities for one year

before effecting a distribution-in-kind. If a fund effects a distribution-in-kind after a six-month holding period, sales by fund investors would be aggregated for purposes of the Rule 144 volume limitations until the one-year holding period is met, severely limiting the benefits of a distribution-in-kind. *See* "Rule 144(e) - Volume Limitations."

Understanding Rule 145 of the Securities Act

What is Rule 145?

Rule 145 provides that exchanges of securities in connection with reclassifications of securities, mergers or consolidations, or asset transfers subject to shareholder vote, constitute sales of securities. Under Rule 145, if a party to one of these transactions is a shell company, Rule 145(c) deems any party to that transaction (other than the issuer, or any person who is an affiliate of the issuer when the transaction is submitted for vote or consent) who publicly offers or sells securities of the issuer acquired in connection with the transaction to be engaged in a distribution and therefore to be an "underwriter" who must comply with the restrictions on sales of those securities set forth under Rule 145.

These parties are permitted to resell their securities to the same extent that affiliates of a shell company are able to do so under Rule 144. The securities can be sold, subject to Rule 144 conditions, once at least 90 days have elapsed after the securities were acquired. The same six-month holding period as in Rule 144 allows non-affiliated parties to resell their securities, subject only to the current public-information condition. *See* "Rule 144(c) - Current Public Information Requirement." After a one-year holding period, non-affiliated parties can resell without any resale limitations.

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