

ABA

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via e-mail to: rule-comments@sec.gov

Ms. Nancy M. Morris, Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: File No. S7-11-07

Ladies and Gentlemen:

The Committee on Federal Regulation of Securities (the “Committee”) of the American Bar Association Section of Business Law submits this letter in response to the request of the Securities and Exchange Commission (the “Commission”) for comments on Revisions to Rule 144 and Rule 145 to Shorten Holding Period for Affiliates and Non-Affiliates, Release No. 33-8813 (June 22, 2007) [72 Fed. Reg. 128 at 36822 (July 5, 2007)] (the “Proposing Release”).

The views expressed in this letter have not been approved by the American Bar Association’s (the “Association”) House of Delegates or Board of Governors and should not be construed as representing policy of the Association. In addition, this letter does not represent the official position of the Association’s Section of Business Law, nor does it necessarily reflect the views of all members of the Committee.

The general agreement of the majority of the members who drafted or reviewed this comment letter may be summarized as follows:

- The purpose and meaning of Rule 144¹ under the Securities Act of 1933 (the “Securities Act”),² are well understood and the retention of a “Preliminary Note” is no longer necessary. If a Preliminary Note is retained, the Commission should also retain paragraph (j) of Rule 144,³ which provides that the Rule 144 safe harbor is not the exclusive means to comply with Section 4(1)⁴ of the Securities Act. We further recommend that the Commission amend Rule 144(j) to provide that the Rule 144 safe harbor is not the exclusive means to comply with the trading exemptions provided by Section 4(3)⁵ or Section 4(4)⁶ of the Securities Act.
- We support the Commission’s proposal to codify the Staff interpretations identified in the Proposing Release. If any particular facts and circumstances require a different application than the interpretation(s) codified in the rule as adopted, as with any Commission rule practitioners would be free to seek no-action or interpretative relief from the Staff.
- We support the Commission’s proposed amendments to shorten the Rule 144(d)⁷ holding periods.
- Given the lack of empirical evidence cited in the Proposing Release of abuses in the process of hedging restricted securities and the lack of any policy rationale or discussion of investor protection needs in the Proposing Release, we respectfully submit that tolling of holding periods should not be reinstated, even in the limited manner proposed.
- We do not believe a new definition of the term “affiliate” should be adopted specifically for Rule 144.
- The manner of sale and volume conditions should be eliminated for debt securities. Unlike common stock, it would not be practical to impose volume limitations on debt securities, some of which may be viewed as “trading by appointment.”
- We agree with the elimination of the manner of sale requirements of Rule 144(g)⁸ for resales of restricted securities by non-affiliates, but do not object to their retention for

¹ Persons deemed not to be engaged in a distribution and therefore not underwriters, 17 C.F.R. §230.144 (2007).

² 15 U.S.C. §77a-§77z-3 (2004).

³ Non-exclusive rule, 17 C.F.R. §230.144(j) (2007).

⁴ 15 U.S.C. §77d(1) (2004).

⁵ 15 U.S.C. §77d(3) (2004).

⁶ 15 U.S.C. §77d(4) (2004).

⁷ 17 C.F.R. §230.144(d) (2007).

⁸ Brokers’ transactions, 17 C.F.R. §230.144(g) (2007).

resales by affiliates. Brokers serve a useful function as “gatekeepers” and can provide substantial assistance with resales by affiliates effected pursuant to the rule.

- Generally, we see no need to retain the requirement to file a notice of sales made under Form 144.⁹ If the Commission, however, decides to retain the notice requirement, we recommend that (i) it be restricted to persons required to file reports under Section 16(a)¹⁰ of the Securities Exchange Act of 1934 (the “Exchange Act”);¹¹ (ii) the reporting thresholds should be increased and (iii) Form 4¹² be amended to replace Form 144 by providing space for disclosure of resales made pursuant to Rule 144.
- The Commission should delete the presumptive underwriter doctrine of Rule 145(c)¹³ under the Securities Act.
- The holding periods for resales of restricted securities should be identical, irrespective of whether the resales involve employee benefit plan securities pursuant to Rule 701(g)(3)¹⁴ under the Securities Act or equity securities of reporting issuers acquired pursuant to Regulation S¹⁵ under the Securities Act.

I. SINCE THE PURPOSE AND MEANING OF RULE 144 UNDER THE SECURITIES ACT ARE WELL UNDERSTOOD, THE RETENTION OF A “PRELIMINARY NOTE” IS NO LONGER NECESSARY. IF A PRELIMINARY NOTE IS RETAINED, THE COMMISSION SHOULD RETAIN PARAGRAPH (j) OF RULE 144, WHICH PROVIDES THAT THE RULE 144 SAFE HARBOR IS NOT THE EXCLUSIVE MEANS TO COMPLY WITH SECTION 4(1) OF THE SECURITIES ACT. WE ALSO RECOMMEND THAT THE COMMISSION AMEND RULE 144(j) TO PROVIDE THAT THE RULE 144 SAFE HARBOR IS NOT THE EXCLUSIVE MEANS TO COMPLY WITH THE TRADING EXEMPTIONS PROVIDED BY SECTION 4(3) OR SECTION 4(4) OF THE SECURITIES ACT.

The Commission proposes to streamline and simplify the text of the Preliminary Note to Rule 144. The Preliminary Note (and the revised version proposed in 1997¹⁶) describes the purposes and policies of the rule and outlines the regulatory analysis used to support the

⁹ Notice of Proposed Sale of Securities Pursuant to Rule 144 Under the Securities Act of 1933, 17 C.F.R. §239.144 (2007).

¹⁰ 15 U.S.C. §78p(a) (2004).

¹¹ 15 U.S.C. §78a-§78mm (2004).

¹² Statement of Changes of Beneficial Ownership of Securities, 17 C.F.R. §249.104 (2007).

¹³ Reclassification of securities, mergers, consolidations and acquisitions of assets, 17 C.F.R. §230.145(c) (2007).

¹⁴ Resale limitations, 17 C.F.R. §230.701(g)(3) (2007).

¹⁵ Offers or sales of securities by the issuer, a distributor, any of their respective affiliates, or any person acting on behalf of any of the foregoing; conditions relating to specific securities, 17 C.F.R. §230.903(b)(3)(iii)(A) (2007).

¹⁶ Revision of Rule 144, Rule 145 and Form 144, Release No. 33-7391 [File No. S7-7-97] (Feb. 20, 1997).

Commission's determination that one who sells securities in accordance with the conditions of Rule 144 will not be deemed an "underwriter" of a securities offering, so that the trading exemptions provided by Sections 4(1), 4(3),¹⁷ and 4(4)¹⁸ of the Securities Act are available to the selling security holder and the broker/dealer to whom or through whom the sale is made.

When the rule was adopted in 1972,¹⁹ it was the first in a series of safe-harbor exemptions the Commission adopted.²⁰ Unlike today, the Commission had no exemptive rulemaking authority, so that a rule prescribing detailed conditions to use the Securities Act trading exemptions was a radical departure from the historical norm, under which rules narrowly defined discrete statutory terms. Moreover, the rule covered the entire resale process in terms of Sections 4(1), 4(3) and 4(4). As a result, it appears that the Commission perceived the necessity of explaining its actions in the Preliminary Note, with its strong emphasis on investor protection as the purpose of the rule. The proposed revised preliminary note, however, does not preserve any of the substantive premises on which Rule 144 was originally based.

We believe that the commentary included in the current Preliminary Note is valuable (even to the rare lay reader seeking explication of the rule) and, whatever action the Commission takes, it should reaffirm the principles stated in the Preliminary Note. Nevertheless, the underlying rationale for the Preliminary Note was based on considerations that may no longer be necessary. More than ten years have passed since the Congress amended the Securities Act to confer broad exemptive authority on the Commission,²¹ so the question of authority in the promulgation of Rule 144 is no longer an issue. Moreover, the Commission and the securities bar have more than 35 years of experience in the administration, interpretation and application of the rule. A comprehensive body of literature, largely consisting of the Division of Corporation Finance Staff's interpretative correspondence, has developed. The results of these events are that the purpose and meaning of the rule are well understood and the retention of a "Preliminary Note" is no longer necessary. Accordingly, we recommend that the Commission reaffirm the principles of the Preliminary Note in any adopting release and remove the Preliminary Note in its entirety, rather than substitute the proposed revision.

If the Commission determines to include the proposed revised "Preliminary Note," we recommend that the second paragraph (as well as the proposed revision to Rule 144(b)(2)) be revised to remove the statement that suggests that an affiliate who sells unrestricted securities might be an underwriter. Under Section 2(a)(11)²² of the Securities Act, an intermediary

¹⁷ 15 U.S.C. §77d(3) (2004).

¹⁸ 15 U.S.C. §77d(4) (2004).

¹⁹ Notice of Adoption of Rule 144, Release No. 33-5223, [1971-1972 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,487 (Jan. 11, 1972) ("Release 5223").

²⁰ Rules 145, 146, 147 and 148 under the Securities Act [17 C.F.R. §§230.145-148 (2007)].

²¹ Section 28 of the Securities Act, Pub.L. 104-290, Oct. 11, 1996, Title I, §105(a) (110 Stat. 3424), and amended, Pub.L. 105-353, Nov. 3, 1998, Title III, §301(a)(5) (112 Stat. 3235) [codified at 15 U.S.C. §77z-3 (2004)].

²² 15 U.S.C. §77b(a)(11) (2004).

