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VOLUME 17, NO. 20 AUGUST 14, 1979

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 releases[1] 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 restricted[2] 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 The prior release may therefore be considered superseded by this release.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

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[1]See 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].

[2]The 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.

[3]Release 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 affiliate[4] (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

[4]An "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."

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

I. INTERPRETATIONS APPLICABLE TO ALL FOUR RULES

(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 underwriter[6] is not involved.

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

> any person who has purchsed 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.

(2) *Question:* Is prior approval by the Commission or its staff necessary before a person may rely on any of the rules?

Answer: 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.

II. RULE 144

A. Definitions

1. *Rule 144(a)(2)(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.

(3) *Question:* 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?

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 tansactions 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

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[7] It 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 agre 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]

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[8]Although 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 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.

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 by 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

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 Informaton**

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 Secton 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

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

reports required to be filed within the preceding 12 months. In fact, Y had not filed a Form 8-K required during that period. X owns restricted securities of Y and wants to sell them. INTERPRETATION: X may rely on the statement made by Y and sell his securities under Rule 144, unless he knows or has reason to believe that the statement is incorrect.

Illustration 2: FACTS: Y company stated in its Form 10-Q for the quarter ended March 31, 1979 that it had filed all reports required during the preceding 12 months. X, who owns restricted securities of Y, decides on October 1, 1979 to sell them. He determines that the most recent periodic report by Y on file with the Commission is the 10-Q referred to above. INTERPRETATION: X cannot rely on Rule 144 because he has reason to believe that Y has not filed a Form 10-Q for the quarter ended June 30, 1979. The Form 10-Q for that quarter was required to be filed by July 15, 1979, and the fact that 2-1/2 months have elapsed from its due date provides X with a substantial indication that the 10-Q in fact has not been filed. In such circumstances, X should contact Y directly to determine the status of the 10-Q.

(17) *Question:* If an issuer which has been filing periodic reports with the Commission pursuant to Section 15(d) of the 1934 Act finds that it is no longer obligated to file reports under that section, may it voluntarily continue filing reports pursuant to that provision in order to satisfy the current public information requirement of Rule 144?

Answer: Yes. Continued voluntary reporting under Section 15(d) (or under Section 13, as well) is permissible in order to satisfy the requirements of Rule 144(c).

2. *Rule 144(c)(2):* 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 which is not subject to Section 13 or 15(d) of the 1934 Act, this condition shall be satisfied if the issuer makes publicly available the information concerning itself specified in subsections (i) to (xiv) and subsection (xvi) of Rule 15c2-11(a) (4) [17 CFR 240.15c2-11(a)(4)] under the Act.

(18) *Question:* If an issuer is not subject to the periodic reporting requirements of Section 13 or 15(d) of the 1934 Act, how may it satisfy the current public information requirement of Rule 144?

Answer: The issuer may comply in two ways: (1) it may make publicly available the information concerning itself specified in Rule 15c2-11(a)(4), or (2) it may voluntarily become subject to the reporting requirements of Section 13 by filing a Form 10 registration statement under Section 12(g) of the 1934 Act.

(19) *Question:* Is there a minimum period prior to a sale under Rule 144 during which the information specified in Rule 15c2-11(a)(4) must be available to the public before Rule 144(c)(2) will be deemed satisfied?

Answer: No. The rule requires only that that information be publicly available.[10]

(20) *Question:* What must an issuer do to assure itself that the information concerning itself specified in Rule 15c-11(a)(4) is considered "publicly available" within the meaning of Rule 144(c)(2)?

Answer: The issuer should make the information available on an ongoing and continuous basis (e.g., through the issuance of annual and quarterly reports) to security holders, market makers, brokers, financial statistical services, and any other interested persons.

Illustration: FACTS: Y company is not subject to Section 13 or 15(d) of the 1934 Act. X owns restricted securities of Y and wants to sell such securities. Y has furnished the information specified in Rule 15c2-11 to the broker for X. INTERPRETATION: Rule 144 is not available to X. Furnishing the specified information solely to the broker through whom X proposes to sell his restricted securities does not make such information publicly available.

D. Holding Period for Restricted Securities

1. *Rule 144(d)(1):* Restricted securities sold pursuant to the rule must be beneficially owned and fully paid for by the seller for at least two years prior to their sale.

(21) *Question:* If restricted securities of the same class are acquired at different times, it is

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[10] *See* Item (20) herein for the staff's view of when the information is considered to be "publicly available."

necessary for the holder to be able to trace the securities to their respective purchase dates at the time any of them are sold?

Answer: Yes. In order to assure that the holding period requirement of Rule 144 is satisfied, the seller must be able to trace the specific securities being sold.

Illustration: FACTS: On April 1, 1977, X acquired 5,000 shares of restricted securities of Y company. On December 1, 1977, X acquired an additional 5,000 shares of restricted securities of Y. On May 1, 1979, X wants to sell 4,000 shares of his restricted securities. INTERPRETATION: Rule 144 is available to X, provided he sells the particular restricted securities acquired on April 1, 1977.

(22) *Question:* When does the holding period commence with respect to restricted securities issued under an employee benefit plan which requires the plan participants to remain as employees for a specified period of time before the securities will vest?

Answer: The holding period in such circumstances will commence when the securities are allocated to the account of an individual plan participant. The fact that the securities may not vest until some later date does not alter the result.

(23) *Question:* If restricted securities are to be issued pursuant to a written agreement, does the holding period for such securities commence on the date of the agreement or on the date the securities are delivered?

Answer: The answer to this question depends on when the person who will receive the securities is deemed to have paid for the securities and thereby assumed the full risk of economic loss with respect to them. If that risk is assumed as of the date of the agreement, then the holding period starts on that date, even though actual delivery of the securities may not occur until later. Conversely, if the risk of loss is not assumed until the date of delivery, the holding period will not commence until the securities are actually delivered.

2. *Rule 144(d)(2)*: A promissory note or other obligation given to the person from whom the securities are purchased shall not be deemed full payment of the purchase price unless the note or other obligation: (i) provides for full recourse against the purchaser; (ii) is secured by collateral, other than the securities purchased, having a fair market value at least equal to the purchase price of the securities; and (iii) is discharged by payment in full prior to the sale of the securities. Similarly, entering into an installment purchase contract with the seller shall not constitute full payment unless the three conditions specified above are met.

(24) *Question*: What is the effect of giving a promissory note to the seller that fails to comply with conditions (i) or (ii) above?

Answer: The holding period for the securities is tolled and will not begin to run until both conditions are satisfied. If the conditions are not satisfied during the life of the note, the holding period will not commence until the note is fully paid. Even if both conditions are satisfied and the securities are then held for two years, the holding period requirement will not be met and Rule 144 will not be available until the note is paid in full prior to the time the securities are resold.

(25) *Question*: Will the holding period be tolled if the purchaser pays the seller in full for the securities but obtains the funds to do so from a non-affiliate third party to whom he has given a promissory note that fails to satisfy either the full recourse or collateralization requirements of the rule?

Answer: No. The conditions in Rule 144(d)(2) are applicable only when the purchase of securities is financed through the seller. In the above situation, the purchaser completed the transaction involving the purchase of the securities by paying the seller in full, and his holding period commenced at that point. The fact that the proceeds for the purchase were obtained through the issuance of a promissory note to a non-affiliate third party does not alter this result.

(26) *Question*: If the purchaser gives a promissory note to the seller that is secured by collateral which later increases in market value beyond the amount of the outstanding obligation on the note, may the purchaser withdraw the excess collateral without affecting the holding period under Rule 144(d)?

Answer: Yes. Rule 144(d)(2) requires only that the collateral have a market value at least equal to the purchase price of the securities.

(27) *Question*: Conversely, if the collateral decreases in market value below the amount of the

outstanding obligation on the note, will it be necessary for the purchaser to deposit additional collateral to cover the difference in order to avoid tolling the holding period?

Answer: Yes. The fair market value of the collateral for the note must at all times be equal to the outstanding obligation. If the fair market value of the collateral falls below the amount of the outstanding obligation, the holding period in Rule 144(d) will be tolled until the fair market value of the collateral is at least equal to the amount of the outstanding obligation.

(28) *Question*: If an installment contract is entered into for the purchase of restricted securities and it fails to satisfy the full recourse of collateralization requirements of Rule 144(d)(2), is the holding period for all of the securities covered by the contract tolled until such time as the final installment payment is made, or may the holding period commence for some of the securities at the time equivalent payments for them are made under the contract?

Answer: The holding period in such circumstances may commence on a staggered basis, as illustrated below.

Illustration: FACTS: X enters into an installment contract for the purchase of 1,000 restricted shares of Z company stock for $50,000. The contract does not provide for full recourse against X. Annual payments of $10,000 each are to be made on July 1 of each successive year, beginning on July 1, 1979. INTERPRETATION: Under this contract, X will in effect pay one-fifth of the total purchase price on July 1 of each year. Accordingly, the holding period for one-fifth of the shares will commence with the payment of each installment. Therefore, the holding period for 200 shares will commence when the first payment of $10,000 is made on July 1, 1979 and the holding period for additional segments of 200 shares will commence when further payments of $10,000 are made in the future.

It should be noted that the computation of the holding period indicated above will not be affected by the presence or absence in the installment contract of a clause releasing specified numbers of shares from the contract as individual installment payments are made. Similarly, the fact that the purchaser fails to make all of the required installment payments and therefore receives only a portion of the shares covered by the contract will not alter the computation of the holding period with respect to those shares which are received.

3. *Rule 144(d)(3)* The holding period for equity securities shall be tolled during the period that the seller had a short position in, or any put or other option to dispose of, securities of the same class or securities convertible into securities of that class. The holding period for nonconvertible debt securities shall also be tolled under the same circumstances.

(29) *Question:* Does the existence of a short position in, or a put or other option to sell, securities toll the holding period for all restricted securities of that class held by a person or only the number of restricted securities equal to those subject to the short position, put, or other option to sell?

Answer: The holding period is tolled only for the number of restricted securities equivalent to the number of securities subject to the short, put, or other option to sell.

Ilustration: FACTS: On April 15, 1978, X acquired 10,000 shares of restricted common stock of Y company. X is not an affiliate of Y. On February 1, 1979, X sold short 2,000 shares of common stock of Y. On May 1, 1979, X covered his short with the securities that he purchased in the open market. INTERPRETATION: The three-month period during which X had a short position in 2,000 shares of Y's common stock would be excluded from the computation of the two-year holding period for 2,000 shares of the restricted stock of Y company held by X. The holding period for the 8,000 other shares of Y restricted stock held by X, however, would not be affected by the short sale and would therefore continue to run during the three-month period the shorth existed.

(30) *Question*: Is a put or other option to sell securities deemed to exist in any of the following situations:

(a) An employee receives restricted securities under an employee benefit plan and is given the right to sell the securities back to his employer at a specified price?

(b) A company purchases assets in exchange for some of its restricted securities and agrees to compensate the seller with additional securities if a specified resale price for the securities originally issued is not obtained during a certain period of time?

Answer: Each of the above situations involves a put or other option to sell. In each instance, the

holder of restricted securities possesses a right which assures him a certain minimum price for his securities. Thus, neither the employee in situation (a) nor the seller of assets in situation (b) are at complete risk with respect to their securities during the period their respective rights are exercisable. Accordingly, under Rule 144(d)(3) the holding period for each person is tolled during the period the right may be utilized.

Illustration: FACTS: X is participant in the employee benefit plan of Y company. X receives shares of Y on March 1 pursuant to the plan. The plan provides that, for a 30-day period each year commencing on September 1, participants in the plan may sell their shares back to Y at a specified price. INTERPRETATION: X's holding period for the shares would be tolled during the 30-day period each year that he can exercise his right to sell the shares back to Y.

4. *Rule 144(d)(4)*: This section describes how the holding period under the rule should be computed in certain specific situations.

(31) *Question*: Will a trust be able to tack the holding period of the settlor to its own in the following situations involving restricted securities:

(a) The securities held by the trust were donated to it by the settlor?

(b) The securities held by the trust were sold to it by the settlor?

Answer: Tacking will be permitted in situation (a) but not in situation (b). Rule 144(d)(4)(vi) permits a trust to tack the settlor's holding period to its own where the securities are donated by the settlor to it. But if the securities are sold to the trust in a private transaction unregistered under the 1933 Act, an investment decision has been made (unlike the gift situation) that destroys the affinity between the settlor and the trust so far as the computation of the holding period is concerned.

(32) *Question*: Must an estate which holds securities that were restricted in the hands of the decedent comply with the holding period requirement of Rule 144 in the following situations:

(a) The estate is an affiliate of the issuer of the securities?

(b) The estate is not an affiliate of the issuer?

(c) The estate is not an affiliate of the issuer but one of the beneficiaries is?

Answer: The holding period requirement must be complied with in situation (a) but not in situations (b) and (c). Although an estate which is an affiliate must comply with the holding period requirement, Rule 144(d)(4)(vii) permits the estate to tack the holding period of the decedent to its own. If the estate ceases to be an affiliate, or never was an affiliate, then it need not comply with the holding period requirement, regardless of the fact that one or more beneficiaries is an affiliate. Any beneficiary who is an affiliate and receives restricted securities from the estate may tack the holding period of both the decedent and the estate to his own, pursuant to Rule 144(d)(4)(vii).

(33) *Question*: Will the tacking of holding periods be permitted in any of the following situations?

(a) An individual transfers restricted shares to a corporation solely in exchange for a portion of its outstanding securities?

(b) An individual transfers restricted shares to a corporation solely in exchange for all of its outstanding securities?

(c) A corporation transfers without consideration restricted shares held in its investment portfolio to one of its wholly-owned subsidiaries?

Answer: Tacking will be permitted in situations (b) and (c) but not in situation (a). In situations (b) and (c) the transferor retained complete control over the transferee and there was, therefore, no shift in the economic risk of the investment in the restricted securities. In situation (a), however, some of the economic risk was shifted to the other shareholders of the transferee corporation and therefore a new holding period for that corporation must commence under the rule.

(a) A closely-held limited partnership distributes to its security holders on a pro-rata basis restricted securities of another issuer held in its investment portfolio?

(b) A closely-held corporation distributes to its security holders on a pro-rata basis restricted securities of another issuer held in its investment portfolio?

Answer: Tacking will be permitted in both situations.[11] Thus, the limited partners of the partnership and the shareholders of the corporation who receive restricted securities of another issuer may add the holding period of the corporation or partnership to their own.[12] However, the shareholders or limited partners in such circumstances may be required to aggregate their sales under the volume limitation provisions of Rule 144 for up to two years after the distribution, as indicated in Item (45) herein.

(35) *Question:* Will tacking of holding periods be permitted in either of the following situations:

(a) A corporation changes its domicile by reincorporating in another state?

(b) A corporation undergoes a recapitalization which results in a change in the par value of the restricted securities previously issued by it?

Answer: Tacking will be permitted in both situations, assuming the substance of the corporation (viz., the nature of its business and management) in each instance remains essentially the same as before.

(36) *Question:* Will a person who acquires restricted securities by exercising warrants and paying cash be able to tack the holding period of the warrants to that of the resticted securities?

Answer: No. Rule 144(d)(4)(ii) permits tacking only if the consideration surrendered upon exericse of the warrants consists solely of other securities of the same issuer. In this instance, securities *and* cash were surrendered, with the result that the exercise of the warrants is deemed to involve the acquisition of new restricted securities for which tacking is not permitted.

E. Limitation on Amount of Securities Sold

1. *General:* Rule 144(e) states that, subject to certain exceptions, the amount of securities that can be sold under the rule during any three-month period shall not exceed the greater of one percent of the outstanding securities of the class being sold or the average weekly trading volume for the class during the four-week period preceding the sale of the securities.

(37) *Question:* How is the three-month period for measuring sales under the rule computed?

Answer: The period includes only the three months immediately preceding the date of sale under the rule.

Illustration: FACTS: On April 12, X decides to sell the maximum number of Y Company shares allowable under Rule 144. The volume limit at the time is 15,000 shares. X has made the following sales of Y stock since the beginning of the year: 7,000 shares on January 5, 2,000 on January 20 and 3,000 on February 15. INTERPRETATION: X may immediately sell 10,000 shares of Y stock, since he has sold only 5,000 shares during the three-month period (viz., January 13 - April 12) immediately preceding the date on which he intends to sell more shares of Y stock. Moreover, if the volume limit remains unchanged, X could sell an additional 2,000 shares on April 20, since the sale of a similar number of shares on January 20 would no longer have to be considered under the volume limitation provision, due to the fact it would be outside the three-month measuring period on that date.

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[11]The answer assumes that the security holders are not required to furnish any consideration in return for the distributed securities. If they must furnish consideration (e.g., where their interests in the distributing entity are being redeemed), the tacking of holding periods will not be permitted.

[12]It should be noted that the distribution by a partnership or corporation of another entity's securities to its own security holders (commonly known as a "spin-off") may be deemed to involve a transaction that is subject to registration under the 1933 Act. See, e.g., Release No. 33-4982 (July 2, 1969) [34 FR 11581]. Thus, the staff's position permitting tacking in the spin-off situations outlined in Item (34) should not be construed as approval of the use of spin-offs to achieve novel unregistered distributions of the securities of non-public issuers. The Division of Corporation Finance, however, has indicated that it will not recommend any enforcement action to the Commission if a spin-off is made without registration under the following circumstances: (1) both the distributing entity and the entity whose securities are being distributed are subject to the periodic reporting requirements of the 1934 Act and are currently in compliance with such requirements, and (2) the distributing entity is not part of the group in control of the other entity. See letter re *American Express Company* dated August 25, 1975.

(38) *Question:* How is the four-week period for computing the average weekly trading volume determined?

Answer: Rule 144(e)(1) makes it clear that the period includes only the four calendar weeks (rather than the 20 business days) preceding the filing of the notice on Form 144 required by paragraph (h) of the rule, or, if no such notice is required, the date of receipt of the order to execute the transaction by the broker or the date of execution of the transaction directly with a market maker.

(39) *Question:* If the average weekly trading volume increases during the three-month measuring period, may a person sell additional amounts of securities equal to the increase?

Answer: Yes. But in determining the new amount limitation, the person must exclude from the computation of the average weekly trading volume any securities that he sold during the new four-week period in which the increased trading volume occurred. Further, the person must file an amended Form 144 indicating the amount of additional securities he wants to sell.

Illustration: FACTS: On September 1, X, who has not made any sales under Rule 144 during the preceding three months, decides to sell the maximum number of Y company shares allowable under Rule 144. The average weekly trading volume for Y company during the four preceding calendar weeks was 20,000 shares, an amount greater than one percent of the outstanding shares of the class. X then proceeds to sell 20,000 shares on September 1. On September 15, X notes that the average weekly trading volume for Y shares during the four preceding weeks was 30,000 shares. INTERPRETATION: X may sell up to 5,000 additional shares on September 15 but should file an amendment Form 144 indicating the amount of additional securities he wants to sell. The determination that X may sell 5,000 additional shares was made as follows:

Total number of shares traded during the preceding 4 calendar weeks (30,000 average per week multiplied by 4 weeks)	120,000
Less shares traded by X during the 4 week period	(20,000)
Total shares upon which revised volume limit may be computed	*100,000*
Divided by the 4 weeks in the period	÷ 4
Average weekly volume during the preceding 4 weeks (excluding the shares traded by X)	25,000
Less shares traded by X during the preceding 3 months	(20,000)
Additional number of shares which X can sell on Sept. 15	5,000

(40) *Question:* If the average weekly trading volume decreases during the three-month measuring period, may the seller nevertheless rely on the trading volume figure utilized at the time Form 144 was filed for the period?

Answer: Yes.

Illustration: FACTS: On April 1, X, who has not made any sales under Rule 144 during the preceding three months, decides to sell the maximum number of Y company shares allowable under the rule. The average weekly trading volume during the preceding four calendar weeks was 20,000 shares, an amount greater than one percent of the outstanding shares of the class. X files on April 1 a Form 144 for the sale of 20,000 shares. On May 1, X, who has sold 16,000 shares since April 1, notes that the average weekly trading volume during the four preceding weeks has decreased to 15,000 shares. INTERPRETATION: X may sell 4,000 additional shares during the remaining two months of his three-month measuring period, even though the average weekly trading volume has decreased below the amount already sold.

(41) *Question:* May a seller of securities under Rule 144 make concurrent sales of securities of the same class outside the rule without violating the rule's volume limitations?

Answer: Yes. Rule 144(e)(3)(vii) provides that securities sold pursuant to an effective registration statement under the 1933 Act or pursuant to an exemption provided by Regulation A under the Act or in a transaction exempt pursuant to Section 4 of the Act and not involving any public offering need not be included in determining the amount of securities sold in reliance upon the rule.