

## Manual of Publicly Available Telephone Interpretations

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### C. RULE 144

1. Rule 144

Rule 144 is not available to the issuer of the securities. A subsidiary, which is not a bank or trust company, that acts as trustee for its parent's employee benefit plan would not be permitted to rely on Rule 144 for sales of its parent's securities in connection therewith. See Securities Act Release No. 5306.

2. \*\* Rule 144 \*\*

Unregistered resales of restricted securities may be made in markets outside the United States, including foreign exchanges, in reliance on Rule 144 or the safe-harbor provisions of Regulation S. Any arrangement to return the restricted securities to United States markets may indicate, as suggested by Release No. 33-7190, an evasive scheme to avoid registration, which would invalidate any safe-harbor claim.

3. \*\* Rule 144 \*\*

A person holds only restricted securities and has held them for less than one year. Such person cannot effect a short sale of securities of that class, and then cover with such person's restricted securities (even though the restricted securities are now eligible for sale) since the initial short sale did not qualify under Rule 144. See Q.82, Release No. 33-6099.

4. \*\* Rule 144 \*\*

Provided that one year has elapsed since the last sale under the registration statement, a non-affiliate underwriter may resell shares received as compensation for its services in connection with a registered offering of securities in accordance with the provisions of Rule 144, except for the notice requirement. See Wendy's Int'l Inc. (July 24, 1983). If the underwriting firm transfers such shares to its employees as compensation, Rule 144 may be applied constructively and an employee may tack the firm's holding period for purposes of Rule 144(d), but must aggregate sales of the distributed shares with those of other employees, as well as those by the underwriter, for a one-year period from the date of the transfer to the employees.

5. \*\* Rule 144 \*\*

An underwriter may resell the unsold portion of a sticky public offering as if it were compensation (wait one year from close of offering, follow Rule 144 except for filing form), provided that one year has elapsed since the last sale under the registration statement.

6. \*\* Rule 144 \*\*

Underwriters often acquire registered shares as underwriting compensation. A purchaser of such shares from an underwriter receives restricted securities, unless the sale is made with an

appropriate, current prospectus, or unless the sale is made pursuant to the requirements of Rule 144 (except for the notice requirement) and one year has elapsed since the last sale under the registration statement. For purposes of Rule 144(d), a purchaser that receives restricted securities may include the underwriter's holding period provided that the underwriter is not an affiliate of the issuer.

7. Rule 144

Securities received pursuant to a Bankruptcy Code proceeding under the circumstances described in Section 1145(a) of the Bankruptcy Code would not be deemed restricted securities because they would have been received in a "public offering" under Section 1145(c) of the Code.

8. Rule 144

A company in bankruptcy proposes to issue stock to an unrelated party for the acquisition of another business. Although the issuance will be part of the court-approved reorganization plan, it will not meet the requirements for the Securities Act exemption afforded by Section 1145(a) of the Bankruptcy Code because the issuance will not be in exchange for a bankruptcy claim or administrative expense. The company will rely on Section 4(2) of the Act for its registration exemption. Securities purchased under the Code but not exempt under 1145(a) are restricted securities under Rule 144(a)(3) and Rule 144 will be the only available exemptive rule for the public resale of the securities.

9. Rule 144

Warrants originally issued in tandem with common shares are now traded separately. Holders of the warrants who wish to sell rather than exercise them, must consider the warrants a class of securities separate from the common stock for purposes of complying with the volume limitations of Rule 144(e).

10. Rule 144; Section 3(a)(6)

A company issued securities under Section 3(a)(6) but has lost its eligibility to use that exemption in the future. Shares held by affiliates of the company must be resold pursuant to the provisions of Rule 144, (except for the holding period provisions), absent registration or the availability of another exemption.

11. Rule 144; Rule 415

Where there is a sale of a block of shelf-registered securities directly by the issuer to an institutional purchaser, the securities will not be deemed to be "restricted securities" that are "acquired directly or indirectly from the issuer... in a transaction ... not involving any public offering." However, the purchaser of the securities will still have to determine whether it may be deemed an underwriter in connection with resales of such securities. Such a determination will depend upon the facts of the particular case.

12. \*\* Rule 144(a)(3) \*\*

An affiliate purchased common stock of its company in a private transaction from a non-affiliate who acquired the shares in the open market. Since such shares are not restricted securities within the meaning of Rule 144(a)(3), the one-year holding period requirement of Rule 144(d)(1) does

not apply to resales of these shares by the affiliate. However, all of the other requirements of the rule would have to be complied with by the affiliate for any of its sales of the shares under the rule.

13. Rule 144(a)(3)

Securities were inadvertently issued to a Company's employees under a stale S-8 registration statement. For purposes of resale by the purchasing employees, the securities would be treated as if they were unrestricted because of the policy not to penalize innocent purchasers in an illegal offering.

14. Rule 144(a)(3)

An affiliate transfers securities acquired in the open market to her spouse (a non-affiliate) pursuant to, and on or subsequent to the date of, a divorce settlement agreement. The non-affiliate spouse need not consider such securities restricted because the securities were not "sold" to the spouse by the affiliate.

15. Rule 144(a)(3)

Securities often are issued under forms of employee benefit plans where the basis for non-registration of the distribution is other than a "no-sale" theory under Section 2(a)(3). Such plans include stock option plans and excess compensation plans for directors where the securities are issued pursuant to the Section 4(2) private offering exemption of Regulation D thereunder. All such securities issued after June 29, 1989 are restricted securities under Rule 144(a)(3).

16. Rule 144(a)(3)

An underwriter receives as compensation for managing an exempt industrial development bond offering warrants to purchase securities of the corporation using the industrial development bond-financed facility. Such warrants will be deemed restricted securities for purposes of Rule 144.

17. \*\*\*\* Rule 144(a)(3) \*\*\*\*

A private company spun off shares of another private company to its 200 common stock holders. The stockholders were given an information statement that complied substantially with Schedule 14C under the Exchange Act. Transfer restrictions were placed on the shares to ensure that no market developed in advance of registration of the securities under the Exchange Act. The transaction was unregistered. Consistent with VK/AC Holding, Inc. (Aug. 22, 1996), the shares distributed were not "restricted securities" as defined in Rule 144(a)(3) and would be freely resaleable after the transfer restrictions expire.

18. Rule 144(a)(3)

Shares acquired in a private transaction from the spouse of an affiliate, who has the same home as the affiliate, are considered restricted securities, since the spouse and the affiliate are regarded as the same person under Rule 144(a)(2).

19. Rule 144(a)(3); Section 4(6)

Securities issued under Section 4(6) are deemed restricted securities even though they are not referred to specifically in the definition of the term "restricted securities" set forth in Rule 144.

20. Rule 144(c)

If securities are sold pursuant to Rule 144 at various times over a three-month period, the issuer must continue to satisfy the "current public information" requirement at the time each sale is made, not just at the beginning of the period when Form 144 is filed.

21. Rule 144(c)

There is a risk in selling under Rule 144 during the 15-day period following the filing of Form 12b-25, because if the missing report or portion thereof is not filed during that period, the issuer may be deemed not current until it is filed.

22. Rule 144(c)(1)

Where an effective Form S-1 registration statement is followed by registration pursuant to 12(g) of the Exchange Act, the 90-day reporting period required by Rule 144(c) commences with the effective date of the Form S-1.

23. Rule 144(c)(1)

A corporation had a registered public offering in 1981. Since then, it has continuously filed periodic reports under Section 15(d) of the Exchange Act, even though it has always had fewer than 300 shareholders. The corporation has just had a second public offering. In view of the history of voluntary reporting, the Division staff was of the view that holders of restricted securities need not wait 90 days from the effective date of the registration statement before commencing sales of such securities pursuant to Rule 144.

24. Rule 144(c)(1)

An issuer was required to file a Form 10-Q on February 14, 1983. Because its executive offices had burned down in early February, the issuer filed a Form 12b-25 for an extension of time, extending the due date for the Form 10-Q to March 2. The issuer was unable to file on March 2, and thereby became delinquent. A director, however, sold the issuer's stock on March 4 under Rule 144. Before the sale was made, the director's broker checked with the Commission's New York office, and was told that the issuer was current in its Exchange Act filings. This information was, of course, incorrect. The issuer's attorney was advised that Rule 144 was not available for the sale by the director, because the director's relationship to the issuer was such that the director had reason to believe that the issuer was not current in reporting. It should be noted that a seller under Rule 144 may not rely on a verbal representation by any Division staff member as to the current reporting status of an issuer, and Division staff members therefore will decline to answer inquiries on such matters. A seller can rely only on current representations in the periodic reports filed by the issuer, or a written representation by the issuer to that effect.

25. Rule 144(c)(1)
- Company may check "yes" box on Form 10-Q cover page even if all required reports were not filed on time so long as they are filed by the date of the filing of the Form 10-Q.
26. Rule 144(c)(1)
- Reports filed under section 30(a) of the Investment Company Act satisfy the current public information requirement of Rule 144(c)(1).
27. Rule 144(c)(1)
- A parent has guaranteed the outstanding debt securities (all of which are unlisted) of its wholly owned subsidiary and furnishes summarized disclosure with respect to the subsidiary in its Exchange Act reports. The subsidiary does not file Exchange Act reports. In these circumstances, the subsidiary will be deemed to satisfy the public information requirement of Rule 144(c)(1) with respect to the guaranteed debt securities so long as its parent satisfies that requirement with respect to itself and continues to provide summarized disclosure concerning the subsidiary (See SAB 53). Restricted debt securities of the subsidiary could be sold in accordance with the provisions of the rule.
28. Rule 144(c)(2)
- The public information standard of Rule 15c2-11 relating to issuers not subject to Sections 13(a) or 15(d) is met only if the Rule 15c2-11 information is current. It is irrelevant that broker-dealers may publish quotes on the issuer's securities "piggy-backing" from their prior quotes based on 15c2-11 information which was current at the time such quotations were initiated.
29. Rule 144(c)(2)
- The "current public information" requirement of Rule 144(c)(2) does not require the financial statements of non-reporting issuers to be either audited or prepared in compliance with Regulation S-X, since clauses (12) and (13) of Rule 15c2-11(a)(4) under the Exchange Act, to which Rule 144(c)(2) refers, do not require such financial statements.
30. Rule 144(c); Rule 12b-25(d)
- Rule 12b-25(d) prohibits an issuer from using a Securities Act registration statement predicated on timely filed reports (e.g. Form S-2 or Form S-3) until the Exchange Act report to which the extension applies is filed. That rule does not, however, prevent the issuer's security holders from making resales of the issuer's securities under Rule 144 unless the extension period has expired and the report is delinquent.
31. \*\* Rule 144(d) \*\*
- A pledgor who is an affiliate defaults on a loan that is secured by stock acquired in the open market. The pledgee may sell the stock without regard to the holding period requirement of Rule 144. A new holding period for the pledgee is not necessary because the securities were acquired involuntarily and therefore were not deemed to have been "sold" to the pledgee by the affiliate. Although Rule 144(k) applies only to restricted securities by its terms, the Division staff has agreed that Rule 144(k) could be applied constructively where a non-affiliate pledgee acquires

control securities and where under the calculation method prescribed by Rule 144(d)(3) a two-year holding period exists. These positions also would apply to an assignee of the rights under the pledge.

32. Rule 144(d)

If a preferred stockholder tenders shares to the issuer and receives in return cash plus a new series of preferred, the stockholder may tack its holding period for the old preferred to that for the new series.

33. \*\*\*\* Rule 144(d) \*\*\*\*

The holding period of creditors for their restricted shares began the date the debtor, who was then an affiliate of the issuer, was ordered by the court to transfer the shares to the creditors to satisfy a judgment. See EIF Holdings, Inc. (Oct. 1, 1996).

34. Rule 144(d)

New investors in a closely-held investment partnership, and existing partners to whom assets have been redistributed upon withdrawal of other partners, may rely on the position on tacking set forth in Question (34)(a), Release No. 33-6099, provided the fundamental character of the partnership is not changed.

35. Rule 144(d)

In a stock-for-stock acquisition, the closing will be delayed until the acquired corporation's year-end revenues have been determined, giving the acquiring corporation an out if such revenues do not reach a pre-determined level. The Rule 144 holding period for recipients of the acquiring corporation's stock will not begin until the closing because the recipients will not be at economic risk until that time.

36. Rule 144(d)

A closely-held corporation distributes restricted securities pro rata to its shareholders, three limited partnerships, which in turn distribute the restricted securities pro rata to their partners (about 10 people in each instance). Tacking of holding periods from corporation to partnership, and partnership to partner, is permitted for purposes of Rule 144(d).

37. Rule 144(d)

The phrase, "without recourse" appearing in Rule 144(d)(3)(iv) refers to recourse against the pledgor personally in the usual situation where the pledgor and borrower are the same person. This interpretation would not apply, however, if the pledgor and borrower were different persons, because Rule 144(d)(3)(iv) requires recourse only against the borrower under the note.

38. Rule 144(d)

The amendment to Rule 144(d)(1) adopted in Release No. 33-6862 does not change the resale situation for closely-held entities making in-kind distributions of restricted securities. The transfer of the restricted securities from the portfolio of the closely-held entity to its equity

holders will not disturb the holding period if the distribution is made ratably and without the payment of consideration for the transfer (See Item 34 of Release No. 33-6099).

39. Rule 144(d)

Question (22) of Release No. 33-6099, dealing with the holding period under Rule 144(d) for restricted securities under an employee benefit plan, does not apply where restricted securities are issued to an employee in connection with an individually negotiated employment agreement. The employee's holding period begins to run at the time the securities vest, assuming any conditions, such as continued employment, have been fulfilled.

40. Rule 144(d)

It is the Division's view that the provisions of Rule 144(d) permitting tacking of holding periods of a pledgor and pledgee continue to apply, notwithstanding the Supreme Court's decision in the Rubin case (449 U.S. 424 (1981)) that a pledge may be a sale for determining application of the anti-fraud provisions of the federal securities laws.

41. Rule 144(d)

A convertible debenture was originally convertible into common stock. The terms of the convertible debenture were modified to provide that the debenture could be converted into either common stock or bonds of the issuer. The view was expressed that the holding period for the bonds received upon conversion could be tacked to the holding period for the convertible debentures even though the debentures were not convertible into bonds when they were originally issued.

42. Rule 144(d)

Pro rata redemptions of partnership interests in a closely-held investment partnership with partners receiving distributions of restricted securities in kind, as for example in liquidation, would allow partners to tack the partnership holding period for purposes of Rule 144(d).

43. Rule 144(d)

An affiliate transfers restricted stock to a corporation of which the affiliate owns 84%. The corporation intends to sell the restricted stock and convey to the affiliate an interest in the corporation equal to the proceeds of the sale. Tacking by the corporation of the affiliate's holding period would not be permitted for purposes of Rule 144 because the transfer to the corporation is deemed to be a private sale which commences a new holding period for the purchaser.

44. \*\* Rule 144(d) \*\*

Paragraph (d)(3)(vii) of Rule 144, which provides an exemption from the one-year holding period requirement of the rule for sales of restricted securities by a non-affiliate estate, applies only to securities owned by the decedent. It does not exempt a non-affiliate estate from the one-year holding period requirement in the case of securities acquired by the estate upon the exercise of stock options held by the decedent.

45. Rule 144(d)

A person can transfer restricted securities to such person's H.R.10 Plan account without interrupting the holding period for such securities for purposes of Rule 144(d).

46. \*\* Rule 144(d) \*\*

A purchased 100 shares of restricted stock by executing a promissory note which did not meet the requirement of Rule 144(d)(2). Since such an obligation is not considered to be "full payment of the purchase price" under the rule, A's holding period commences only at such time or times as A actually makes payment on the note. A paid off half the amount of the note over one year ago and, accordingly, the holding period requirement for 50 shares (half the total of 100) has been met. A recently sold 50 shares of the restricted stock in a registered offering. The question presented was whether the shares sold in the registered offering must be regarded as the shares as to which the holding period had run. Although Rule 144 does not establish a guide for this situation, it was decided that A could deem the registration statement to relate solely to the shares for which the holding period requirement had not been satisfied. As a result, A may now sell all of the remaining 50 shares under Rule 144.

47. Rule 144(d)

Securities have been escrowed by an issuer as a contingent payment in connection with an acquisition. The escrow agreement gives the intended beneficiary the right to sell the securities during the life of the escrow, on condition that the sale proceeds are returned to the escrow account. Rule 144(d)(3)(iii) provides that securities acquired as a contingent payment in connection with the sale of a business shall be deemed to have been acquired at the time of the sale, for purposes of the holding period requirement of Rule 144(d). This provision, however, applies only to those securities that have actually been acquired in satisfaction of a contingency. Since the shares in this case are still subject to a contingency and have not been formally acquired, the beneficiary may not rely on Rule 144(d)(3)(iii) to satisfy the holding period requirement of the rule for sales made during the period the escrow arrangement is in effect.

48. Rule 144(d)

A corporation distributes to its employees as a bonus restricted securities of an unaffiliated issuer which it acquired at an earlier date. For purposes of the holding period provisions of Rule 144(d), the employees would not be able to tack the corporation's holding period to their own. The employer-employee relationship of the parties suggests that the distribution is being made as a form of compensation for service rendered, rather than as a gift (for which tacking would be permitted).

49. Rule 144(d)

An employee acquires restricted stock pursuant to a "price hook" plan, whereby the employee pays only a portion of the purchase price when acquiring the stock from the company. The remainder is to be paid when the stock is resold. The stock may not be resold under Rule 144, because the holding period requirement cannot be met under this arrangement, since the stock will not be fully paid for until the time of sale.

50. \*\* Rule 144(d) \*\*

Convertible notes with accrued but unpaid interest are exchanged for shares of the issuer. The holding period for the notes can be tacked to the holding period on the shares under Rule 144(d)(3)(ii) only if the exchange "consist[s] solely of other securities of the same issuer." Although the right to receive payment for the accrued interest could be construed as additional consideration that is inconsistent with Rule 144(d)(3)(ii), the Division staff's view is that the holding period for the convertible notes can be tacked to the holding period for all of the shares received in the exchange. This position is consistent with the Division staff's view of the same issue under Section 3(a)(9) of the Securities Act, which exempts certain exchanges where securities of the same issuer are the only consideration.

51. Rule 144(d)

A private offering is made on a minimum/maximum basis (i.e., shares are not issued and proceeds not delivered to the company from an escrow account unless a minimum amount is sold). The Rule 144 holding period for shares acquired in such an offering would begin at the time a shareholder pays for its shares and its payment is deposited in the escrow account. At that time, the shareholder is at risk for purposes of Rule 144(d), since it is committed to participating in the offering if the minimum amount is sold.

52. Rule 144(d)

For purposes of Rule 144, shares acquired pursuant to anti-dilution rights attaching to restricted securities are restricted securities themselves but their holding period is dated from the original placement of shares, not the exercise of the anti-dilution provisions.

53. Rule 144(d)

A Nevada corporation that holds restricted securities of another issuer effects a merger to change its domicile to Delaware. The restricted securities become the property of the Delaware successor as a result of the merger. Because of the exception for migratory transactions in Rule 145(a)(2), the merger is not a sale within the meaning of the Securities Act. The holding period of the Nevada predecessor for the restricted securities is not disturbed by the succession.

54. Rule 144(d)

The holder of restricted securities of a foreign private issuer exchanges them for an equivalent number of American Depositary Receipts with the depositary. The ADR will be a restricted security itself with a holding period identical to that on the underlying security. The ADR may be sold in reliance on Rule 144 to the same extent the underlying security could have been sold.

55. Rule 144(d)

A holder of restricted securities pledges the securities to a bank to secure payment of loan. In the event of default, the bank is required to exhaust the collateral before proceeding against the pledgor personally. For purposes of Rule 144(d)(3)(iv), the pledge is a recourse arrangement, so that the bank will have the benefit of the pledgor's holding period.

56. Rule 144(d)

The holding period for restricted securities acquired pursuant to a subscription agreement begins at the time the agreement is accepted by the issuer, rather than the date it is signed by the purchaser, or the date the shares are issued.

57. Rule 144(d)

A promissory note, secured by the restricted securities purchased with the note, will meet the collateral standard of Rule 144(d)(2)(ii) if the note is also secured by other property with independent fair market value at least equal to the purchase price of the restricted securities.

58. Rule 144(d); Section 3(a)(9)

When securities are exchanged for other securities of the issuer under Section 3(a)(9), the securities received assume the character of the exchanged securities. Thus, for example, if restricted securities are exchanged, the new securities are deemed restricted and tacking of the holding period of the former securities is permitted.

59. Rule 144(d)(2)

An officer purchases securities from an issuer paying the full purchase price in cash. Thereafter, the officer purchases an equal number of shares through the use of a promissory note, securing the note with the officer's first purchase of securities. The use of such collateral to secure the promissory note is within the requirements of Rule 144(d)(2)(ii), and the holding period for the second purchase would begin when the note is given to the issuer.

60. Rule 144(d)(2)

A company sold shares to its employees pursuant to a private placement. The employees could borrow the entire purchase price from a non-affiliate bank, giving a note guaranteed by the company and placing the shares in escrow. If the company had to repay the note, it could repurchase the shares at book value. The Division staff took the position that this arrangement was in substance the same as giving a note to the company in payment for the shares and, therefore, pursuant to Rule 144(d)(2), full payment of the purchase price was not satisfied.

61. \*\*\*\* Rule 144(d)(3) \*\*\*\*

A non-affiliate acquired warrants from an issuer more than two years ago in partial consideration for the sale of a subsidiary. The non-affiliate wanted to pay the exercise price with shares of the issuer that it planned to purchase just prior to the exercise (for tax reasons) and then tack the holding period of the warrants to the holding period for the shares received upon exercise. The holding period of warrants that are turned in for the spread's worth of shares underlying the warrants (a "cashless exercise") can be tacked to the holding period for the shares received. See Morgan Stanley & Co. (June 30, 1993). Because the proposed transaction would allow the non-affiliate to do indirectly what the non-affiliate could not do directly (pay the exercise price in cash and tack the holding period of the warrants to the holding period of the shares received upon exercise), tacking would not be permitted under Rule 144. A person using securities to exercise restricted stock purchase warrants should use the shorter of the holding period on the warrants or on the other securities used in payment to find the holding period for the shares received on exercise.

62. \*\*\*\* Rule 144(d)(3) \*\*\*\*

A change in the legal form of an enterprise from a partnership to a corporation will normally restart the holding period for restricted securities of the issuer. Counsel urged an exception to this where limited partners had granted to the general partner the right to reorganize the partnership, but did not specify the new legal form the business would take. Counsel argued that this exception was appropriate because, in Hygeia Sciences, Inc., (March 13, 1986), limited partners had ceded at the time of the original purchase of limited partnership interests to the general partner the right in the future to substitute stock of a corporation for the limited partnership interests. In Hygeia, the agreement amounted to an investment decision on the stock later received when the partnership was recast as a corporation, so that the substitution of stock for the partnership interests did not interrupt the former partners' holding period in the business. The Division staff declined to agree, however, that the Hygeia position would allow holding periods for the partnership interest to be tacked to the securities issued in the reorganization where no new legal form was specified at the time of granting the right to reorganize.

63. Rule 144(d)(3)(ii)

Where a seller surrendered a secured promissory note of the issuer as consideration for the cashless exercise of a warrant from the same issuer, the Division staff was of the view that the holding period of the note could not be tacked to the common stock received upon the exercise of the warrant. The note did not appear to be a "security" under the standards enunciated in Reves v. Ernst & Young, 110 S. Ct. 945 (1990), and therefore, it would not qualify as a security of the issuer for purposes of tacking under Rule 144(d)(3)(ii).

64. Rule 144(d)(3)(ii)

The payment of even a de minimis amount of cash upon a warrant exercise would preclude the holder from tacking the holding period of the common stock to the warrant under Rule 144(d)(3)(ii). The warrant exercise must be "cashless" (similar to the analysis under Section 3(a)(9)) in order to tack the holding period of the common stock to the warrant.

65. Rule 144(e)

A company's common stock traded both on an individual share basis and in units, each unit consisting of one share of common stock together with a detachable warrant. For purposes of Rule 144, the volume limitation for the common stock may be computed on the basis of all common shares traded, including those traded as part of a unit, since the common shares in the units are separable from the warrants.

66. Rule 144(e)

H transfers stock to W in connection with a divorce settlement. H and W need not aggregate sales under Rule 144 since they will cease to be married. Moreover, they will not be deemed to be selling in concert merely because of the settlement arrangement.

67. Rule 144(e)

The term "national securities exchange," as used in Rule 144(e), encompasses only exchanges which are registered with the Commission pursuant to Section 6(a) of the Exchange Act. Since Canadian exchanges are not so registered, the volume of securities traded on such an exchange may not be taken into account when computing the amount limitation under Rule 144.

68. Rule 144(e)

An individual sells both restricted convertible notes and restricted shares. The shares attributable to the notes sold plus the shares sold separately, amount to less than one percent of the outstanding stock. The Division's view is that such sales would be within the volume limitations of Rule 144(e).

69. Rule 144(e)

Where a U.S. partnership distributes restricted securities to its partners, and one of the partners, an Irish corporation, makes sales abroad in Canada, such sales must be aggregated with the domestic sales of the other partners to determine compliance with Rule 144(e) where aggregation with the other partners otherwise is required.

70. \*\* Rule 144(e) \*\*

An affiliate of an issuer is the general partner of three limited partnerships which hold restricted securities of the issuer. If such limited partnerships transfer the restricted securities to all the partners, the affiliate must, for purposes of determining its volume limit under Rule 144(e), aggregate its sales with those of the other partners under Rule 144 for a one-year period following the distribution (or until non-affiliates may sell the restricted securities pursuant to Rule 144(k), whichever is sooner).

71. \*\* Rule 144(e) \*\*

A closely-held investment partnership distributed all of its restricted securities of ABC Co. held in its portfolio to all of its partners on a pro rata basis. The partners must aggregate their sales of the distributed shares for a period of up to one year following the distribution for purposes of determining compliance with the volume limitations of Rule 144. See Question 45 of Release No. 33-6099. Sales by the individual partners of ABC Co. shares acquired other than from the partnership need not be included in the aggregation computation.

72. Rule 144(e)

The NASD's Electronic Bulletin Board is not an "automated quotation system" referred to in Rule 144(e). As a consequence, the market-based volume limitation the rule allows for securities listed on an exchange or quoted on NASDAQ is unavailable for securities quoted only over the Bulletin Board.

73. Rule 144(e)(1)

In computing average weekly trading volume where there is a public offering of shares by the issuer during the four-week period, the public offering is not included in the volume computation; however, increased volume in the aftermarket as a result of the offering can be included for purposes of the rule.

74. Rule 144(e)(1) and (h)

For purposes of computing volume limitations under Rule 144(e)(1)(ii) and (iii), the "four calendar weeks preceding the filing of notice" on Form 144 are the four weeks preceding the week in which the form is transmitted for filing in accordance with Rule 144(h).

75. Rule 144(e)(1)(i)

A company has notified its transfer agent of the issuance of additional common stock. No other announcement has been made. The rule permits the sale of 1% of the shares outstanding as shown by "the most recent report or statement published by the issuer." The notice to the transfer agent is insufficient publication to allow use of the increased number of shares for purposes of the alternative 1% volume limit of Rule 144(e).

76. Rule 144(e)(1)(ii)

The securities of an issuer, historically quoted on NASDAQ, have been listed on the New York Stock Exchange. Three weeks after listing, an affiliate of the issuer wishes to sell securities in reliance on Rule 144. For purposes of the market-based volume limitation of Rule 144(e)(1)(ii), the affiliate should use the last two weeks of reported volume on NASDAQ and the first two on the NYSE.

77. Rule 144(e)(1)(ii)

An affiliate wishing to sell shares pursuant to Rule 144 discovered reports filed with Treasury indicating that a broker-dealer had executed, during the last week of the four week period, a 100,000 share trade in the issuer's stock over NASDAQ that had not been reported in NASDAQ's report of weekly volume. NASDAQ had refused to change its reported volume to reflect this trade. The Division staff advised that the issuer would have to rely solely on NASDAQ's reported weekly volume.

78. Rule 144(e)(3)

Rule 144(e)(3)(vii) excludes from the aggregation calculation any securities sold pursuant to an effective Securities Act registration statement, pursuant to Regulation A, or pursuant to a transaction exempt under Section 4. Resales of securities sold in reliance upon the Regulation S exemption are similarly excluded from aggregation under Rule 144.

79. Rule 144(e)(3)(ii)

If a pledgor defaults on several pledges, each pledgee may resell restricted collateral securities in the amount permitted by Rule 144, less any sales made by the pledgor during the relevant period. In making its volume computation, the pledgee need not take into account any sales made by the other pledgees if there is no other basis for aggregating such sales.

80. Rule 144(e)(3)(ii)

Non-affiliates pledged unrestricted bank holding company securities to the holding company's affiliated bank as collateral for loans made by the affiliated bank in the ordinary course of its business. Following default, the affiliated bank foreclosed and sought to sell the holding company securities. The Division staff took the position that sales of pledged securities by the affiliated bank could be effected pursuant to Rule 144 since the bank was effecting the sale as a pledgee in a bona fide loan situation and its decision to sell was occasioned solely by the borrowers' default. For purposes of Rule 144(e), the Division staff also took the position that such sales would have to be aggregated with any other sales by the bank as pledgee, but not with other sales by the pledgors. The latter conclusion was based on the fact that had the pledgors sold the securities

themselves, they would not have been subject to Rule 144. The bank could not, however, use Rule 144(k) to effect its resales.

81. \*\* Rule 144(e)(3)(iii) \*\*

An affiliate of an issuer gives shares to a person who, in turn, gives some of those shares to a second donee during the holding period. The affiliate and both donees will be required to aggregate their sales for purposes of the volume test of Rule 144(e) for one year from the date of the affiliate's gift. If the shares are restricted securities and the first donee is an affiliate, the two donees will be required to aggregate for one year from the date of the gift from one donee to the other.

82. Rule 144(f)

A principal of a brokerage firm may use that firm to effect an ordinary "broker's transaction" for the principal's personal account under Rule 144(f).

83. \*\*\*\* Rule 144(f)(1) \*\*\*\*

The publication of a customer limit order in accordance with Exchange Act Rule 11Ac1-4 would not constitute the solicitation or arrangement for the solicitation of orders to buy securities within the meaning of Rule 144(f)(1). See Goldman, Sachs & Co. (Dec. 6, 1996).

84. \*\* Rule 144(h); Form 144 \*\*

A distributee from a partnership who is required to aggregate its sales with those of other distributees for a one-year period need not file a Form 144 if such distributee sells no more than 500 shares or shares with a market value not exceeding \$10,000 in any three-month period, notwithstanding sales made by other distributees.

85. Rule 144(h); Form 144

If a person who has filed a Form 144 does not sell the securities referred to therein, no amendment reflecting this fact need be filed.

86. Rule 144(h); Form 144

A subsidiary bank, acting in its fiduciary capacity, sells unrestricted shares of its holding company parent for an unaffiliated trust account. Form 144 need not be filed solely because of the bank's involvement, because the bank is not making a sale for its own account.

87. Rule 144(h); Form 144

A Form 144 need not be amended to reflect (1) a company's listing on the New York Stock Exchange or (2) a stock split.

88. Rule 144(h); Form 144

A Form 144, filed on behalf of a selling security holder by an attorney in fact, should be accompanied by a signed copy of the power of attorney.

89. Rule 144(h); Form 144

The holder of restricted securities proposes to make Rule 144 sales of both common stock and securities convertible into common stock. For purposes of determining whether the 500 unit or \$10,000 condition to filing Form 144 has been met, the convertible securities should be regarded as having been converted into the common stock in the same manner as provided by Rule 144(e)(3)(i).

90. Rule 144(h); Form 144

After a seller's filing on Form 144, the issuer declares a stock split. No new filing is required within the three-month period to sell the entire number of shares on a post-split basis the shares for which the seller had originally filed.

91. Rule 144(h); Form 144

Amending Form 144 to reflect a change in the broker does not require the calculation of a new volume limitation based on trading.

92. Rule 144(h); Form 144

A person who files a Form 144 indicating that it may sell shares through either of two brokers need not allocate a specific number of shares to each broker on the form.

93. Rule 144(h); Form 144

A holder of restricted securities files a notice on Form 144 reporting the proposed sale of less than the full amount of securities that could be sold under the volume tests of Rule 144(e). During the same three-month period, the holder determines to make further Rule 144 sales in an amount that, taken together with the original sales, would not exceed the maximum number of securities that could have been sold at the time of the notice. By filing an amendment to the Form 144, the holder can proceed with the additional sales.

94. Rule 144(h); Form 144

In a situation where sales under Rule 144 are required to be aggregated for purposes of Paragraph (e) of the rule, the de minimis exemption of Paragraph (h) (for filing Form 144) nonetheless applies to each individual seller.

95. Rule 144(h); Form 144

When Rule 144(h) requires a person to file Form 144, no waiting period is required between the time the person places an order with a broker and the broker executes so long as the person concurrently with giving the order transmits the form to the Commission and the principal exchange on which the securities are admitted.

96. Rule 144(i)

The fact that a sell order is placed with a broker at a price above the current market does not contravene Paragraph (i) or Rule 144, which requires a bona fide intention to sell within a reasonable time.

97. Rule 144(j)

Restricted securities may be tendered in connection with a tender offer without compliance with Rule 144. The rule is not the exclusive means for reselling restricted securities (See Paragraph (j) thereof) and, in any event, is directed to sales made to the general public rather than to sales made to a single person (the tender offeror in this case).

98. Rule 144(k)

Where a non-affiliate acquired securities in a private transaction under Rule 144(k), the fact that it mistakenly executed an investment letter for the acquired securities would not prevent it from reselling the securities without any restrictions.

99. \*\* Rule 144(k) \*\*

A donee to whom an affiliate gives securities which were acquired in the open market (and therefore are not restricted), may utilize Rule 144(k) for the resale of the securities, provided that at the time of resale they have been held for a combined period of two years by the donee and donor. The lack of a "sale" transaction between the donor and donee permits the holding periods of each to be tacked.

100. \*\* Rule 144(k) \*\*

An affiliate pledges restricted securities to a non-affiliate pledgee on a non-recourse basis. The non-affiliate pledgee receives those restricted securities after the affiliate pledgor defaults. The non-affiliate pledgee may utilize paragraph (k) of Rule 144 to sell the securities, provided two years have elapsed from the time of the pledge. If, however, the pledge had been made with recourse, the pledgee could tack the pledgor's holding period to its own for purposes of satisfying the two-year requirement of Rule 144(k).

101. \*\* Rule 144(k) \*\*

The unaffiliated decedent of an estate acquired restricted securities less than a year ago. While Rule 144(d)(3)(vii) will relieve the estate of a holding period, this relief does not mean that the estate will be deemed to have held for two years for purposes of eliminating all resale restrictions under Rule 144(k).

102. \*\* Rule 144(k) \*\*

Provided that the donor and donee have held the stock for a combined period of two years, a non-affiliate donee who receives stock from an affiliate donor may resell the stock under Rule 144(k) without a three-month waiting period because the donor and the donee are not the same "person" as defined in Rule 144(a)(2).

103. Rule 144(k)

A non-affiliate estate may utilize Rule 144(k), even though the decedent was an affiliate.

104. Rule 144(k)

A person who enters into a binding contract for the sale of restricted securities within three months after ceasing to be an affiliate of the issuer of such securities may not utilize Rule 144(k), even though the delivery of the securities takes place more than three months after such person loses affiliate status.

105. \*\* Rule 144(k) \*\*

The settlor of a trust for the benefit of the settlor's children (who are past the age of majority and do not live with the settlor) is an affiliate of the issuer, some of whose restricted securities are held by the trust. Neither the independent trustee nor the beneficiaries are affiliates. The trustee may sell restricted securities under Rule 144(k).

106. Rule 144(k)

A person owns 20% of a newly formed corporation. Such person effects a negotiated sale of restricted securities of another issuer to the new corporation, in accordance with all of the requirements of paragraph (k) of Rule 144. As a result, the new corporation now owns unrestricted securities of the other issuer.