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

Resales of Restricted and Other Securities

AGENCY: Securities and Exchange Commission.

ACTION: Interpretations of rules.

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

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

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 The prior release may therefore be considered superseded by this release.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

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

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

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

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

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

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

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

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

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

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

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I. INTERPRETATIONS APPLICABLE TO ALL FOUR RULES		(3) <i>Question:</i> Are the seller and all members of his family, including those who have established permanent homes of their own, considered to be one person for purposes of the rule?

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

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

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

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

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

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

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

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

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

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

Answer: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Conditions to be Met

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

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

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

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

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

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

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

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

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

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

C. Current Public Information

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁰See 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.

Illustration: 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

¹¹The 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.

¹²It 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.

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 restricted securities?

Answer: No. Rule 144(d)(4)(ii) permits tacking only if the consideration surrendered upon exercise 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.

(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
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Less shares traded by X during the 4 week period	<u>(20,000)</u>
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Total shares upon which revised volume limit may be computed	100,000
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Divided by the 4 weeks in the period	+ 4
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Average weekly volume during the preceding 4 weeks (excluding the shares traded by X)	25,000
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Less shares traded by X during the preceding 3 months	<u>(20,000)</u>
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Additional number of shares which X can sell on Sept. 15	<u>5,000</u>
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(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.

2. *Unlimited Resale Provision:* Rule 144(e)(2) permits holders of restricted securities to disregard the volume limitations (but not the other provisions) of the rule if: (1) the person is not an affiliate of the issuer and has not been an affiliate during the three months preceding the sale, and (2) the securities have been held either three years (in the case of securities which are listed on a national securities exchange or quoted in NASDAC) or four years (in the case of securities which, although not exchange-listed or NASDAQ-quoted, are issued by an entity which files periodic reports under Section 13 or 15(d) of the 1934 Act).

(42) *Question:* Can the unlimited resale provision of Rule 144 be utilized if the issuer of the securities does not file periodic reports with the Commission pursuant to Section 13 or 15(d) of the 1934 Act?

Answer: No. The provision is available only for the securities of issuers which file such reports in accordance with the requirements of paragraph (c)(1) of Rule 144. Paragraph (c)(1) states that the issuer must have been subject to the reporting requirements of Section 13 or 15(d) for at least 90 days and must have filed all reports required to have been filed within the preceding 12 months or such shorter period that the issuer was subject to the reporting requirements.

(43) *Question:* During the three-month period following the termination of his status as an affiliate, may a person sell restricted securities under the unlimited resale provision?

Answer: No. The provision is not available to the former affiliate during that period. However, he is not precluded from making sales during the period that are within the volume limitations of the rule.

(44) *Question:* May a person utilize the unlimited resale provision at the same time he is selling securities of the same class pursuant to the volume limitations of the rule?

Answer: Yes. If the securities have been held the requisite three or four years and all other conditions of the unlimited resale provision have been met at the time of sale, the securities are free of any volume restrictions under the rule. Thus, sales of them need not be taken into account in connection with sales under the rule of other securities of the same class held less than the requisite period.

Illustration: FACTS: X, who has never been an

affiliate of Y company, purchased 10,000 restricted shares of Y common stock on April 1, 1976 and an additional 15,000 restricted shares on April 1, 1977. Y common stock is listed on a national securities exchange. On April 1, 1979 Y wishes to sell the maximum number of shares allowable under Rule 144. The volume limitation on April 1, 1979 is 8,000 shares. INTERPRETATION: X may sell 18,000 shares, consisting of the 8,000 permitted by the volume limitation provision and the 10,000 permitted by the unlimited resale provision.

(45) *Question:* Will the unlimited resale provision be available in the following situations:

(a) The limited partners of a closely-held investment partnership wish to sell restricted securities of another issuer distributed to them on a pro-rata basis by the partnership?

(b) The shareholders of a closely-held corporation wish to sell restricted securities of another issuer distributed to them on a pro-rata basis by the corporation?

Answer: The provision will be available in both situations if all of its conditions are met. In determining whether the holding period requirement of the unlimited resale provision has been satisfied, the distributees may tack the holding period of the distributing entity to their own, as indicated in Item (34) herein. Even though the holding period requirement may be satisfied through the tacking of holding periods, however, the provision nevertheless may not be immediately available if the distributing entity was an affiliate of the issuer of the securities at the time of the distribution. This is due to the requirement in the unlimited resale provision that the securities must not have been held by an affiliate during the three months preceding their resale under the provision. Accordingly, if the partnership or corporation was an affiliate, then the unlimited resale provision will not be available to the distributees until three months have elapsed from the date of distribution. During the period that the unlimited resale provision is unavailable, and for a maximum of two years after the distribution, the individual distributees would have to aggregate their sales under the volume limitation provisions of Rule 144.

Illustration 1: FACTS: XYZ, a closely-held limited partnership, acquired shares of restricted common stock of Y company on April 1, 1976. Neither XYZ nor any of its general or limited partners have ever been affiliates of Y company, whose common stock is quoted in NASDAQ. On April 1, 1979, XYZ distributes to its limited partners on a pro rata basis

all of the common stock of Y held by it. **INTERPRETATION:** The unlimited resale provision is available, since (1) neither the limited partners, the general partners, nor XYZ are affiliates of Y company or have been during the preceding three months, and (2) the securities of Y company are NASDAQ-quoted and are deemed to have been held for the requisite three years through tacking the holding period of XYZ to that of the limited partners. Thus, each of the limited partners may sell the stock of Y company distributed to them by XYZ without regard to the volume limitations of Rule 144.

Illustration 2: **FACTS:** The facts are the same as in Illustration 1, except that one of the general partners of XYZ is an affiliate of Y company. **INTERPRETATION:** The unlimited resale provision may not be relied upon until July 1, 1979, three months after the date of distribution of Y company stock by XYZ. This is due to the fact that the partnership, through one of its general partners, was an affiliate of Y at the time of the distribution. Since the limited partners are deemed to stand in the shoes of the partnership (thus permitting them to tack the partnership's holding period to their own), they are considered to have assumed the partnership's affiliate status during the time the partnership held the shares. Accordingly, the limited partners must wait for three months after the distribution by the partnership before attempting to utilize the unlimited resale provision.

Illustration 3: **FACTS:** The facts are the same in Illustration 1, except that one of the limited partners of XYZ is an affiliate of Y company. **INTERPRETATION:** The interpretation in Illustration 1 applies to Illustration 3, except that the limited partner who is an affiliate of Y company may not under any circumstances utilize the unlimited resale provision during the period he is an affiliate. The fact, however, that he is an affiliate would not affect the availability of the provision for the other limited partners, assuming they do not act in concert with him in selling securities under the rule.

Illustration 4: **FACTS:** X, a closely-held corporation, acquired restricted shares of Y company on March 1, 1977. X is not affiliated with Y, whose shares are listed on a national stock exchange. On July 1, 1979, X distributes all of the shares of Y held by it to its shareholders on a pro-rata basis. **INTERPRETATION:** The unlimited resale provision will not be available to the shareholders of X until March 1, 1980, three years following the date of acquisition by X. During the interim between July 1, 1979 and March 1, 1980, the shareholders of X must

aggregate their sales under Rule 144 of the distributed stock.

Illustration 5: **FACTS:** X corporation acquired shares of Z company on April 1, 1975. The shares of Z are neither listed on a national securities exchange nor quoted in NASDAQ, and Z does not file periodic reports under Section 13 or 15(d) of the 1934 Act. On April 1, 1979, X distributes all of the shares of Z held by it to its security holders on a pro-rata basis. **INTERPRETATION:** The unlimited resale provision is not available because Z's shares are neither listed on a national securities exchange nor quoted in NASDAQ, and Z does not file periodic reports under the 1934 Act. Accordingly, the security holders of X must aggregate their sales under Rule 144 of the Z stock for a period of two years following the date the securities were distributed to them.

3. Rule 144(e)(3): This section describes how the volume limitations of the rule are to be applied in certain specific situations:

(46) Question: How is the volume limitation computed in the following situations:

(a) Convertible securities are sold during a single three-month period?

(b) Convertible securities and securities of the class into which they are convertible are sold during a single three-month period?

Answer: In situation (a), where convertible securities alone are sold, the seller would base the volume computation on Rule 144(e)(1). Thus, he could sell the greater of one percent of the outstanding securities of the class of convertible securities or the average weekly trading volume (if any) for that class during the four calendar weeks preceding the sale. In situation (b), however, where both convertible securities and securities of the class into which they are convertible are sold, the volume computation would be based on Rule 144(e)(3)(i). That provision states that the volume limits of Rule 144(e)(1) shall be applied as if the only securities sold during the period were the underlying securities in situation (b) would be treated as if it involved a sale of the underlying securities and the amount derived thereby would be aggregated with actual sales of the underlying securities to determine the volume limit of Rule 144(e)(1). Rule 144(e)(3)(i) is not applicable, however, where a person converts securities solely to circumvent the volume limitations of Rule 144(e)(1).

Illustrations: **FACTS:** X acquired restricted debentures of Y common stock. In computing the amount of securities that can be sold under Rule 144, X realizes that if the quantity limitations of Rule 144(e)(3)(i) were to apply he would be able to sell a greater quantity of debentures than if the limitations of Rule 144(e)(1) were applied. Accordingly, X devises a plan to convert one of his debentures and sell a few shares of the underlying common stock at the same time that he sells his debentures. **INTERPRETATION:** X's device to convert a debenture and sell a few of the underlying common shares concurrently with the debentures is a plan to circumvent the quantity limitations provided for in Rule 144(e)(1) and is not permissible under the rule.

(47) *Question:* If a gift of restricted securities is made, must the donor and donee aggregate their sales in order to comply with the volume limitation provisions of Rule 144?

Answer: The answer depends on whether the securities, if retained by the donor, could be resold by him pursuant to the unlimited resale provision of Rule 144(e)(2) during the two-year period following the gift. Rule 144(e)(3)(iii) states that the donor and donee shall aggregate their sales for a period of two years after the donation in accordance with the volume limitations of paragraphs (e)(1) and (e)(2) of Rule 144. If the donor is not an affiliate of the issuer of the securities, and the securities, if retained by him, could be sold under the unlimited resale provision, then sales of such securities by the donee need not be aggregated with sales by the donor. If, however, the securities could not be resold pursuant to the unlimited resale provision, either because the securities otherwise do not meet the requirements of the provision, then aggregation of sales by the donor and donee must continue for two years after the gift, or until the unlimited resale provision could be relied upon by the donor for the sale of the securities if he still retained them, which ever occurs first.

Illustration 1: **FACTS:** X, who has never been an affiliate of XYZ company, donates 2,000 restricted shares of XYZ stock to Y Foundation on April 1, 1979. The shares XYZ are quoted in NASDAQ and were acquired by X on April 1, 1976. **INTERPRETATION:** X and Y Foundation need not aggregate their sales under Rule 144 because the shares, if retained by X, could be resold by him pursuant to the unlimited resale provision.

Illustration 2: **FACTS:** A, an affiliate of XYZ company, gives 10,000 restricted shares of XYZ common stock to Z, his brother-in-law, on October 1, 1978. The shares of XYZ are quoted in NASDAQ

and were acquired by A on October 1, 1975. **INTERPRETATION:** A and Z must aggregate their sales under the volume limitation provisions of Rule 144 for two years following October 1, 1978. This result occurs because the unlimited resale provision would not be available to A, due to the fact that he is affiliate of XYZ. The donee, Z, can be in no better position than the donor, A, and therefore must aggregate his sales for two years with A.¹³

Illustration 3: **FACTS:** The facts are the same as in Illustration 2, except that A ceases to be an affiliate of XYZ on January 1, 1979. **INTERPRETATION:** A and Z must continue to aggregate their sales for the three-month period following the termination of A's status as an affiliate. As of April 1, 1979, however, A and Z no longer would have to aggregate their sales under the rule, since the shares of XYZ could, if they were still held by A, be sold by him pursuant to the unlimited resale provision.

(48) *Question:* Must all donees who receive securities from the same donor aggregate their sales under Rule 144 with each other, as well as the donor?

Answer: No. Rule 144(e)(3)(iii) does not require horizontal aggregation with other donees. Thus, each donee must aggregate only with the donor, who, in turn, must aggregate with all of his donees.

Illustration: **FACTS:** X, an affiliate of XYZ company, donates 2,000 shares each of restricted stock of XYZ to A, B, and C on April 1, 1979. The shares of XYZ were acquired by X on April 1, 1977. On June 1, 1979, at a time when the volume limitation for XYZ is 5,000 shares, A, B, and C each wish to sell the maximum amount permitted under Rule 144. X has sold 1,000 shares of XYZ stock during the preceding three months. **INTERPRETATION:** A, B, and C, assuming they are not acting in concert, each may sell 2,000 shares on June 1. Since each must aggregate with the donor only, their sales of 2,000 shares each, when combined with the donor's sale of 1,000 shares would amount to 3,000 shares per

¹³The same result would occur, of course, for more remote donees, such as universities, churches, and charitable organizations. The requirement in Rule 144(e)(3)(iii) that aggregation by the donor and donee occur for two years after the gift (absent the availability of the unlimited resale provision) was included in the rule for the purpose of preventing abuses (such as an unregistered distribution) that might be effected through the medium of a gift.

person, an amount not in excess of the 5,000 share volume limit. X, however, would not be able to make any sales of XYZ stock for the next three months (assuming the volume limit remains unchanged) because his sale of 1,000 shares, when aggregated with the sales of 6,000 shares by all of his donees, would result in his exceeding the volume limit if he made any further sales.

(49) *Question:* Must an estate which wishes to rely on Rule 144 for the sale of restricted securities comply with the volume limitation requirements of the rule if it is not an affiliate of the issuer of the securities but one of its beneficiaries is?

Answer: No. Paragraph (e)(3)(v) of the rule makes it clear that the volume limitations do not apply if the estate itself is not an affiliate of the issuer. Similarly, the holding period and manner of sale requirements of the rule likewise do not apply to a non-affiliated estate, by virtue of paragraphs (d)(4)(vii) and (f), respectively. In fact, the only provisions of Rule 144 applicable to non-affiliated estates who wish to sell restricted securities in reliance upon it are the current public information requirement of paragraph (c) (which must be satisfied by the issuer of the securities) and the notice requirement of paragraph (h) (which is applicable only if certain specified amounts of securities are sold).

F. Manner of Sale

Rule 144(f): This provision states that securities sold under the rule shall be sold either in brokers' transactions or in transactions directly with a market maker.

1. Transactions with a Market Maker

(50) *Question:* Are securities acquired by a market maker in a Rule 144 transaction thereafter subject, solely because it was a Rule 144 transaction, to any restrictions on the manner in which they may be resold?

Answer: No.¹⁴ Assuming that all applicable con-

¹⁴The response, of course, assumes that the market maker is not an "affiliate" of the issuer of the subject securities within the meaning of Rule 144(a)(1). See Item (1) *supra*.

ditions of Rule 144 are complied with, securities acquired by a market maker are not subject to any restrictions and may be treated as if they had been purchased in an open-market, non-Rule 144 transaction. Thus, e.g., a market maker may solicit buy orders subsequent to effecting his acquisition.¹⁵

(51) *Question:* Does Rule 144 permit a market maker which is acting as a broker in a Rule 144 transaction to avoid the restrictions applicable to a brokers' transaction?

Answer: No. The restrictions placed on a broker-dealer by Rule 144 are distinguished on the basis of the function of the broker-dealer during a Rule 144 transaction, not on the basis of its normal activities. Accordingly, in order to qualify as a market maker in a Rule 144 transaction, the broker-dealer must act

¹⁵Recently, in *Securities and Exchange Commission v. Aaron* [Current] Fed. Sec. L. Rep. (CCH) ¶96,800 (2d Cir. March 12, 1979), the court found that two transactions effected prior to the recent amendments to Rule 144 announced in Release No. 33-5979 violated Section 5 of the 1933 Act. That situation involved the solicitation by E.L. Aaron & Co. ("Aaron"), a market maker in Lawn-A-Mat Chemical & Equipment Corp. ("LAM") common stock, of two LAM affiliates to sell shares of their common stock to Aaron. In an effort to avoid the registration requirements under Section 5 by constructing a broker's transaction for purposes of Rule 144 (which at that time permitted only unsolicited brokers' transactions), Aaron arranged for J.W. Weller & Co., Inc., another broker-dealer, to act as "agent" on behalf of the two LAM affiliates, for the purpose of selling their common stock to Aaron, which in turn would solicit buyers for the shares. The court refused to sanction "this obvious sham transaction." In response to the assertion that Rule 144 had been amended to permit direct purchases by market makers because the broker's transaction restriction was more stringent than necessary, the court further indicated (*in dicta*) that Aaron's "actions in soliciting the [LAM affiliates'] to sell and in soliciting other customer buy orders in anticipation of the purchase of the [LAM affiliates'] shares" would not have been in compliance with the amended Rule 144. Although the court correctly pointed out that brokers and market makers may not solicit buy orders for Rule 144 securities, the staff notes that the solicitation either by a broker or by a market maker of affiliates to sell their securities is not proscribed by the Rule. See also Item (56) herein.

as principal in the transaction. If the broker-dealer acts as a broker in the transaction (even though it is a market maker for the subject class of securities), the brokers' transaction restrictions are applicable and, except as provided by Rule 144(g)(2), the broker-dealer is precluded from soliciting buy orders.

(52) *Question:* As provided by the rule, a market maker must qualify as one of the three classes of persons described in Section 3(a)(38) of the 1934 Act. Those three classes are:

1. "any specialist permitted to act as a dealer,"
2. "any dealer acting in the capacity of a block positioner," and
3. "any dealer who, with respect to a security, holds himself out (by entering quotations in an inter-dealer communications system or otherwise), as being willing to buy and sell such security for his own account on a regular or continuous basis."

Who may qualify as a block positioner under Section 3(a)(38) for purposes of Rule 144?

Answer: The term "block positioner" is not defined by the 1934 Act.¹⁶ For purposes of Rule 144, the staff would take the position that any person who qualifies as a block positioner within the meaning of Rule 17a-17(b)(1) and (3) [17 CFR §240.17a-17(b)(1) and (3)] as modified by the definition of

¹⁶In Release No. 34-15533 (January 29, 1979) [44 FR 6084], the Commission stated that for purposes of Section 11(a) of the 1934 Act:

The Commission believes that the term "block positioner" is generally used to describe a broker-dealer that facilitates the execution of a block transaction in an equity security by positioning at least some part of the block—that is, by purchasing securities for its own account to fill all or a part of a customer's block sale order

While this description related to the unique problems presented by Section 11(a), it nevertheless provides a general description of the type of activity that, in the context of a Rule 144 sale, would normally be engaged in by a block positioner. See Item (56).

"block" for purposes of Rule 144¹⁷ under the Act would qualify as a block positioner for purposes of Rule 144, provided that the Rule 144 transaction involves securities with the same type of trading characteristics as those of the securities the block positioner generally holds himself out as ready and able to purchase. For example, if a block positioner has traditionally limited its block activities to securities listed on the New York and American Stock Exchanges for which there is an interest among institutional purchasers, it may not claim that it is acting as a block positioner in a Rule 144 transaction when it purchases securities for which there is no bona fide institutional interest.

¹⁷For purposes of determining whether the purchaser qualifies as a "block positioner", the relevant portion of Rule 17a-17(b) would read

(b) For the purpose of this rule, a "Block Positioner" is a dealer who is registered with the Commission pursuant to section 15 of the Act, or is a member of a national securities exchange, and is subject to and in compliance with Rule 15c3-1 [17 CFR 240.15c3-1] (or is subject to and in compliance with the capital rules of an exchange of which he is a member if the members thereof are exempt from Rule 15c3-1 by subparagraph (b)(2) thereof), and who has and maintains net capital as defined in Rule 15c3-1 (or in such capital rules of such exchange) of \$1,000,000 and who, except when such activity is unlawful, meets all of the following conditions: (1) he engages in the activity of purchasing long or selling short as principal, from time to time, from or to a customer, (other than a partner or a joint venture or other entity in which a partner, the dealer, or a person associated with such dealer as defined in Section 3(a)(18) of the Act participates) a block of stock (other than a convertible security as described in section 3(a)(18) of Regulation U [12 CFR 221.3]) with a current market value as provided in paragraph (a)(10)(J) of Appendix C (see Item (54), *infra.*) in a single transaction, or in several transactions at approximately the same time from a single source; to facilitate a sale or purchase by such customer; . . . (3) he sells the shares comprising the block as rapidly as possible commensurate with the circumstances

(53) *Question:* Assuming that the purchaser qualifies as a block positioner (but not otherwise as a market maker), may the amount of securities purchased in a Rule 144 transaction aggregate less than a block size?

Answer: No. In order for the purchase by a block positioner to qualify as a Rule 144 transaction, a "block" of securities must be purchased. However, if a person sells both securities subject to Rule 144 and other securities of the same class not subject to the rule in a single transaction to a block positioner, the sale would qualify as a Rule 144 transaction if the aggregate of securities purchased by the block positioner constituted a "block."

(54) *Question:* What is a "block"?

Answer: There is no definition of the term "block" in the 1934 Act. The Commission has stated in the past that the term "block transaction" means a transaction in which a member firm, by reason of the size of the order in relation to conditions in the exchange market, reasonably concludes that it is in the interest of the customer to search and negotiate for a matching interest on the other side of the market (including, if necessary, negotiating as principal with the customer) rather than to attempt to execute the order directly in the ordinary course of the auction market.¹⁸

Block positioners may rely on the sliding scale definition of a "block" provided in paragraph (a)(10)(J)(i) of Appendix C which is appended to routine exemptions granted from Rule 10b-6 [17 CFR 240.10b-6] under the 1934 Act.¹⁹

¹⁸See Release No. 34-8791 (December 31, 1969).

¹⁹Appendix C is published at 2 CCH, Fed. Sec. L. Rep. ¶22, 797, at 16,613-4 to 16,614 (August 9, 1978). Paragraph (a)(10)(J) of Appendix C reads, in relevant part, as follows:

The term "block" shall mean a quantity of a security which (i) has an aggregate price of not less than \$50,000 if the market price per share of the security is less than \$10; an aggregate price of not less than \$75,000 if the market price per share of the security is at least \$10 but less than \$20; an aggregate price of not less than \$125,000 if the market price per share of the security is at least \$20 but less than \$35; an aggregate price of not

(55) *Question:* The third class of market makers included within Section 3(a)(38) of the 1934 Act is "any dealer who, with respect to a security, holds himself out . . . as willing to buy and sell such security . . ." Under that definition, may a broker-dealer initiate its market making with the Rule 144 transaction?

Answer: No. This is the so-called "instant" market maker problem. In order to qualify as a market maker for purposes of Rule 144, the broker-dealer must have previously held itself out and must currently be holding itself out as being willing to buy and sell the security being purchased in the Rule 144 transaction.²⁰ Paragraph (g)(2)(iii) of Rule 144 provides a useful guideline for determining who is a bona fide market maker for purposes of that rule. The paragraph, which describes the circumstances under which a broker acting as an agent in a Rule 144 transaction may publish quotations during the pendency of a broker's transaction within the meaning of the rule, suggests that a market maker should have published bid and asked quotations for the security

in an inter-dealer quotation system provided that such quotations are incident to the maintenance of a bona fide inter-dealer market for the security for the [market maker's] own account and that the [market maker] has published bona fide bid and ask quotations in an inter-dealer quotation system on each of at least twelve days within the preceding thirty calendar days [preceding the Rule 144 transaction] with no more than four business days in succession without such two-way quotations.

less than \$175,000 if the market price per share of the security is at least \$35 but less than \$50; or an aggregate price of not less than \$200,000 if the market price per share of the security is \$50 or more;

[The remaining portion of the definition is not relevant for purposes of Rule 144.]

²⁰The staff notes that any person effecting a Rule 144 transaction with a market maker should document in his files that the purchaser is a *bona fide* market maker.

In addition, if the subject security is covered by Rule 11Ac1-1²¹ under the 1934 Act, the market maker must be currently disseminating quotations pursuant to Rule 11Ac1-1 (or be excepted or exempted from the rule by the Commission).²²

(56) *Question:* May a market maker specifically solicit a buy order for the securities he proposes to purchase in a Rule 144 transaction?

Answer: No. The prior solicitation of buy orders would resemble a broker's transaction rather than a market maker purchase, and, except as provided in Rule 144(g)(2), a broker may not solicit the buy side of the Rule 144 transaction. But normal activities of a market maker should not be deemed to constitute a solicitation for purposes of Rule 144. Thus, for example, a market maker would not have to withdraw a buy recommendation or a favorable research report published prior to effecting a Rule 144 transaction, provided that those activities are consistent with the market maker's prior history and were not undertaken in direct anticipation of an effort to sell the securities to be purchased in the Rule 144 transaction. Similarly, the market maker would not be prohibited from engaging in its normal and customary activities associated with making a market in the particular securities (e.g., disclosing an interest in AUTEX or other media designed to advertise an interest in a security). But the rule does not permit a special effort to solicit buyers for stock to be acquired in a Rule 144 transaction prior to the time that the market maker purchases the stock. Any such activity would be comparable to the activity which is precluded by Rule 144(g)(2).

The staff recognizes that the no prior solicitation requirement may impose a special burden on block positioners. Due to the significant risks attendant to block positioning, block positioners, as a matter of course, attempt to solicit some or all of the buy side

²¹Rule 11Ac1-1 under the Act [17 CFR 240.11Ac1-1], which became effective August 1, 1978, requires each self-regulatory organization to collect, process and make available to securities information vendors quotations and quotation sizes for all securities as to which last sale information is included in the consolidated transaction reporting system contemplated by Rule 17a-15 under the Act [17 CFR 5240.17a-15]. Brokers and dealers are required to communicate their quotations to the appropriate self-regulatory organization. See Release No. 34-14415 (January 26, 1978) [43 FR 4342].

²²E.g., block positioners are not required to disseminate quotations pursuant to Rule 11Ac1-1.

of a block order, usually from institutional investors, prior to agreeing to purchase the block as principal. Indeed, to the degree that a block positioner can find a purchaser(s) for the entire block sale at a price satisfactory to both buyer and seller, it will have performed successfully its function. But Rule 144(g)(2) would preclude, except as provided by that subsection (i.e., soliciting a customer that had expressed an unsolicited bona fide interest in the securities within the preceding ten days), the solicitation of buy orders prior to the time that the block positioner commits itself to buy the block. With respect to securities which are listed or admitted to unlisted trading privileges on an exchange which has restrictions on the off-board trading of its members, a block positioner which is a member of that exchange must execute the block on an exchange. Although there is a formal requirement that the trade be executed on an exchange, the staff understands that the seller and the block positioner will consider that they have made a binding commitment at the time that the block positioner agrees to accept the order. Accordingly, in the case of a security which is listed or subject to unlisted trading privileges on an exchange, the block positioner may solicit buy orders subsequent to making a binding commitment to purchase the stock but prior to the actual execution of the transaction on an exchange.²³ Once a block positioner has made a binding commitment to purchase the block of securities, the purposes of Rule 144 are not furthered by requiring the block positioner to accept additional risks by prohibiting any solicitation by

²³The delay between the commitment to purchase and the execution of the purchase is relevant only to exchange traded securities, by reason of the requirement that all principal orders be brought to the floor of an exchange for execution. See, e.g., NYSE Rule 390.

At the time that the binding commitment is made, the block positioner must time stamp the order to sell the block. If the block positioner finds any buy orders prior to bringing the block to the floor, the block positioner must cross the orders as agent [see, e.g., NYSE Rule 92], as well as satisfy limit orders on the specialist's interest in accordance with the rules of the exchange where the transaction is taking place. See, e.g., NYSE Rule 127. The cross and the block positioner's purchase of the excess, if any and if at the same price, would be printed as one transaction on the tape. The confirmation of the transaction on should indicate the part of the block that was executed as principal and the part that was crossed as an agency order.

him of some or all of that block prior to the transaction being executed on an exchange.

(57) *Question:* At the time the Commission liberalized the volume limitation provisions of Rule 144 in September 1978, it stated that,

consideration should be given by persons who may be subject to Rule 10b-6 [17 CFR 240.10b-6] under the 1934 Act to whether the liberalized volume limitations of Rules 144 and 148, under certain circumstances, may involve distributions for purposes of Rule 10b-6.²⁴

What are the guidelines for determining when a sales transaction under Rule 144 constitutes a distribution for purposes of Rule 10b-6?²⁵

Answer: In 1975, the staff took the position that sales of securities pursuant to Rule 144 will not be treated as distributions for purposes of Rule 10b-6.²⁶ That position remains in effect with respect to sales within the pre-September 1978 volume limitations. With respect to sales of amounts in excess of those limitations, sellers should consider the following indicia, among others, to determine whether a distribution exists for purposes of Rule 10b-6: (i) magnitude of the offering, (ii) selling efforts, and (iii) selling methods used.²⁷

(58) *Question:* In reselling securities purchased in a Rule 144 transaction, is the market maker subject to Rule 10b-6?

Answer: Yes, if the sales are deemed to constitute a distribution for purposes of Rule 10b-6. In determining whether the sales constitute a distribution, market makers should refer to the criteria described in the response to Item (57) above. Specifically, market makers should be aware that addi-

tional compensation offered to registered representatives in a retail distribution may be considered to be an unusual selling effort. In addition, in determining the magnitude of the offering, market makers must aggregate all of the securities of the same class and series which are then being offered, including those securities which were not purchased in the Rule 144 transaction.

2. *Broker Transactions*

(59) *Question:* May a broker act on behalf of both the buyer and the seller in a Rule 144 transaction and receive a commission from both?

Answer: Yes. But the broker is precluded by Rule 144(g)(1) from receiving any more than the usual and customary broker's commission from either party.

(60) *Question:* May a broker who receives an order to sell securities under Rule 144 telephone his customers to determine whether they have any interest in purchasing the securities?

Answer: The broker may telephone only those customers who within the preceding 10 business days have indicated a bona fide, unsolicited interest in securities of the class being sold. The telephoning of customers under any other circumstances would be considered a solicitation by the broker of an order to buy the securities, an act which is expressly prohibited by Rule 144(g)(2). In order to establish the bona fide nature of prior indications of interest by his customers, the broker should maintain written records of all unsolicited indications of interest at the time they are received.

(61) *Question:* Will a broker's transaction under Rule 144(f) exist if securities are sold in a transaction executed by the trust department of a banking subsidiary of a bank holding company that acts as a clearinghouse for matching buy and sell orders of the holding company's securities?

Answer: No. Rule 144(f) requires that the transaction be executed by a broker. In the situation referred to above, the transaction would not be executed by a broker.²⁸

²⁴Release No. 33-5979 (September 9, 1978), n. 13.

²⁵Rule 10b-6 prohibits purchases of securities which are subject to a distribution for purposes of that rule by participants in such distribution.

²⁶See letter re *General Electric Company*, dated April 21, 1975.

²⁷See *Bruns, Nordeman & Co.*, 40 S.E.C. 652, 660 (1961).

²⁸See Section 3(a)(34) of the 1934 Act, which states that the term "broker" means "any person engaged in the business of effecting transactions in securities for the account of others but does not include a bank."

(62) *Question:* Will the issuance of research reports during the period a broker is acting as an agent for a client in a Rule 144 transaction violate the prohibition in Rule 144(f) against the solicitation of buy orders?

Answer: No, provided that (1) the reports are issued in the broker's regular course of business; (2) such reports concerning the issuer have been previously issued by the broker; (3) the broker receives no consideration from its client for the issuance of such reports; and (4) the reports are not issued for the purpose of facilitating any aspect of the client's transaction. The issuance of research reports under any other circumstances, however, will be deemed to involve a solicitation of buy orders.²⁹

G. Form 144

Rule 144(h): This paragraph requires the filing of a notice on Form 144 if the amount of securities to be sold in reliance upon the rule during any period of three months will exceed 500 shares or other units or will have an aggregate sale price in excess of \$10,000.

(63) *Question:* Is an estate which is not an affiliate of the issuer required to file Form 144?

Answer: Yes. Although such estates are exempt from the volume limitation, holding period, and manner of sale requirements of the rule, they are not exempt from the Form 144 filing requirement. Accordingly, if an unaffiliated estate expects to sell restricted securities during a three-month period that will exceed 500 shares or other units or have a

market value in excess of \$10,000, it must file Form 144.

(64) *Question:* Can Form 144 be signed by a pledgee who wishes to sell securities pledged to him as collateral for a defaulted loan?

Answer: Yes. To require the pledgor to sign the form would create practical difficulties, since he may be uncooperative because of his default on the loan. The pledgee should keep in mind, however, that pursuant to Rule 144(e)(3)(ii), sales by himself and the pledgor may have to be aggregated for up to two years after the default for purposes of determining the amount of securities that can be sold under the rule.³⁰

(65) *Question:* If a person decides to sell his securities through a broker other than the one listed on the Form 144 previously filed by him, must he file an amended form to reflect this change?

Answer: Yes.

(66) *Question:* If a person files a Form 144 but does not sell all of the securities listed thereon within a three-month period, must he again file a Form 144 with respect to the unsold securities when he seeks to sell them at a later date?

Answer: Yes, but only if the total number of securities to be sold during the subsequent three-month period exceeds the jurisdictional limits for filing the form (viz., more than 500 shares or other units or securities having a market value in excess of \$10,000).

(67) *Question:* With respect to securities received in a gift transaction, may the donee consider only his own proposed sales of those securities in determining whether the jurisdictional

²⁹As indicated in Item (57), under certain circumstances a Rule 144 transaction may constitute a distribution for purposes of Rule 10b-6. One of the indicia of a distribution is a special sales effort. Accordingly, the issuance of a favorable research report or buy recommendation by the broker may indicate that the Rule 144 transaction constitutes a distribution for purposes of Rule 10b-6. If the Rule 144 transaction constitutes a distribution, the broker would be prohibited from engaging in market making or other activities proscribed by Rule 10b-6.

³⁰The need for aggregation would depend, as in the situation involving gifts (see Item (47) herein), on whether the unlimited resale provision would have been available to the pledgor during the two-year period following the pledge. If it would have been available during that period, the need to aggregate under Rule 144(e)(3)(ii) would cease at that point.

limits for filing the form are met, or must he also consider the sales made by the donor as well?

Answer: Only the donee's proposed sales need be considered in determining whether the form must be filed, unless the donee and donor are acting in concert.

(68) *Question:* Must a person who receives securities as a result of a divorce settlement consider the sales of the former spouse in determining whether the jurisdictional limits for filing the form are met?

Answer: No. The determination is based solely on the sales of the person who received the securities, assuming the former spouses do not act in concert in selling securities under the rule.

H. *Miscellaneous*

1. *Call Options Traded on National Securities Exchanges*³¹

(69) *Question:* May an affiliate write call options?

Answer: Yes. The position previously expressed in Release No. 33-5890 (December 20, 1977) [43 FR 1415] has been revised, however, to require compliance with the conditions of Rule 144 or Rule 145(d) only at the time of writing the call option

³¹A "call option" is a contract giving the holder the right to buy a specified number of shares (usually 100) of the underlying stock at a specified price within a specified period of time. For purposes of this section, the term "call option" is limited to options traded on a national securities exchange ("standardized options"). Other types of options present special problems which are not addressed in this releases.

rather than both at the time of writing and at the time of exercise of the option.³²

(70) *Question:* May a non-affiliate owning restricted securities write call options?

Answer: Yes. The extent to which Rule 14 is applicable will depend upon the manner in which the option was written.

(a) If the non-affiliate does not use restricted secu-

³²The Division of Corporation Finance previously expressed the view that the writing of a call option should be considered as an offer to sell the underlying securities upon exercise of that option, and the delivery of the underlying securities upon the exercise of the option should be considered a sale of those securities. Therefore, Section 5 of the 1933 Act would require the filing of a registration statement prior to the writing of a call option and an effective registration statement at the time the securities were delivered upon exercise of the option. See Release No. 33-5890, at note 10. For that reason, the Division of Corporation Finance took the position that it was necessary that the conditions of Rule 144 be complied with both at the time the option was written and at the time the securities were delivered upon receipt of notice of exercise.

The Divisions of Market Regulation and Corporation Finance have since reconsidered the foregoing position. Unlike the usual offer and sale situation, in the case of standardized options, the securities underlying the options may be required to be delivered at any time prior to their expiration since notices of exercise are assigned at random by the Options Clearing Corporation. As a result, the writer of the option relinquishes control on the timing of delivery (and, therefore, the sale) at the time that the option is written, and, therefore, will be unable to know the volume limitations that would be applicable upon delivery. In order to avoid placing the option writer at the risk of a subsequent decrease in the trading volume for the securities underlying the option and except as indicated in the response to the next question, Rule 144 need be complied with only at the time that the option is written.

rities for purposes of covering³³ the option position or for purposes of meeting his margin obligations³⁴ (i.e., by placing the restricted securities in a margin account for the option position) and does not deliver restricted securities upon receipt of the notice of exercise, the option transaction is not subject to Rule 144.

(b) If the non-affiliate uses restricted securities for purposes of covering the option position, the non-affiliate must comply with the conditions of Rule 144 at the time that the options are covered by the restricted securities.

(c) If the non-affiliate uses restricted securities for purposes of meeting his margin obligations,³⁵ the nonaffiliate must comply with the conditions of Rule 144 at the time he places the restricted securities in a margin account. For purposes of determining compliance with the volume limitations, only the securities placed in the margin account, not the amount of securities underlying the options, are to be considered.

(d) If the non-affiliate uses only restricted securities for delivery, he must comply with the conditions of Rule 144 at the time of delivery.

As indicated, the writing of call options by affiliates and non-affiliates is treated differently for purposes of Rule 144. Because any securities that an affiliate would deliver upon receiving the notice of exercise of options that he has written are subject to Rule 144, he is deemed to have offered those securities for sale at the time the options were written and, therefore, to have engaged in a transaction contemplated by Rule 144 at that time. A non-affiliate, on the other hand, maybe engage in options writing

and not be subject to Rule 144 until he either segregates restricted securities to cover or meet his margin obligations for that option position or delivers restricted securities upon exercise of that call option.

Illustration 1: **FACTS:** X, a non-affiliate of Y Company, owns 10,000 shares of restricted securities of Y Company. On January 1, 1979, X writes call options for 10,000 shares of Y Company securities and meets his margin obligation for that position by placing cash in his margin account. **INTERPRETATION:** X has not engaged in a Rule 144 transaction because he has not used restricted securities to cover or meet his margin obligations for his option position.

Illustration 2: **FACTS:** The facts are the same in Illustration 1, except that after one month the options remain outstanding and X replaces the cash in the margin account with restricted securities. **INTERPRETATION:** X must comply with Rule 144 at the time that the restricted securities were placed in the margin account.

Illustration 3: **FACTS:** The facts are the same as in Illustration 1, but X delivers restricted securities upon receiving the notice of exercise. **INTERPRETATION:** X must comply with Rule 144 at the time of delivery.

(71) *Question:* How does the limitation on the amount of securities which may be sold under Rule 144(e) during any three-month period apply to transactions in call options?

Answer: (a) If the option writer is an affiliate, the amount of securities underlying the option must be aggregated at the time the option is written³⁶ with (i) the amount of securities of the same issuer sold by the writer within the preceding three months pursuant to Rule 144, and (ii) the amount of securities of the same issuer underlying options previously written and still outstanding. The total amount cannot exceed the volume limitation of Rule 144(e), as illustrated below.

Illustration 1: **FACTS:** X, an affiliate of Z Company, owns 20,000 shares of stock of Z company. The volume limitation of Rule 144(e) throughout

³³A call option is deemed to be covered when the writer of that option owns the securities against which the option is written and places those securities in his options account or provides the broker with an escrow receipt, depository receipt or bank guarantee letter for those securities.

³⁴If an option position is not covered, Regulation T of the Federal Reserve Board and exchange rules require the option writer to place in a margin account cash, securities underlying the option, or other marginable securities representing a specified percentage of the value of the underlying securities.

³⁵All exchanges impose certain restrictions on the extent to which Rule 144 securities will be considered for margin purposes. See e.g., Amex Rule 462(c)(9).

³⁶Because any securities that the affiliate may deliver upon exercise of those options are subject to Rule 144, it is irrelevant whether the option writer uses securities underlying the option position to cover or meet his margin obligations for that option position.

this illustration and the two which follow is 10,000 shares. On January 1, 1979 X sells 5,000 shares of Z Company stock pursuant to Rule 144. On February 1, 1979, X wishes to write options on his stock. INTERPRETATION: X can write options for no more than 5,000 shares of his securities on that date.

Illustration 2: **FACTS:** The facts are the same as in Illustration 1, except that on February 1, 1979, X writes options for 2,000 shares of Z stock. On March 1, 1979, while the options written in February are still outstanding, X wishes to write additional options on his stock. INTERPRETATION: X can write options for no more than 3,000 shares of his securities on that date.

Illustration 3: **FACTS:** The facts are the same as in Illustrations 1 and 2, except that on March 1, 1979, X does in fact write options for 3,000 shares of his stock. INTERPRETATION: Assuming the options written in February and March remain outstanding, X can make no further sales of his securities under Rule 144 or write options on such stock under the rule until April 1, 1979, at which time he would be able to sell or write options on an additional 5,000 shares under the rule.

(b) If the option writer is a non-affiliate owning restricted stock, he may write, without being subject to Rule 144, options which are neither covered nor margined by restricted securities. For purposes of writing options which are covered by margined or restricted securities, he must aggregate the amount of securities segregated (i.e., used for covering or margin purposes) at the time that the option is written with (i) the amount of restricted securities of the same issuer sold by the writer within the preceding three months pursuant to Rule 144 and (ii) the amount of restricted securities of the same issuer that remain segregated in connection with previously written and still outstanding options.

Illustration 1: **FACTS:** X, a non-affiliate of Y, owns 20,000 restricted shares of Y company stock. The volume limitation throughout this illustration is 10,000 shares. On January 1, 1979, X sells 5,000 restricted shares of Y company stock, writes call options for another 5,000 shares margined by cash, and writes covered options for another 5,000 shares. On April 1, 1979, (all options still outstanding) X wishes to write additional covered options on his stock. INTERPRETATION: X may write covered options for 5,000 shares on April 1, 1979. The options margined by cash written on January 1, 1979 are not included in the computation of the volume limitations of Rule 144.

Illustration 2: **FACTS:** X, a non-affiliate of Y

Company, writes options for 5,000 shares of Y Company stock. Y places 1,000 shares of restricted Y stock into his margin account as collateral against those options. INTERPRETATION: Assuming that the volume limitations during the period that those options are outstanding is 10,000 shares, X may sell up to 9,000 shares of restricted securities during any three-month period that restricted securities serve as margin for X's options position. X is deemed to have effected a Rule 144 transaction at the time that the options are written only to the extent that restricted Y company stock was placed in his margin account.

(72) *Question:* May a non-affiliate who has already sold the maximum amount of securities allowable under Rule 144(e) write an option covered or margined by additional restricted securities of the same issuer if it is unlikely that the option will be exercised during the current three-month measuring period?

Answer: No. The writing of a call option in such circumstances would cause the person to exceed the volume limitations requirement of Rule 144(e).

(73) *Question:* What effect does the expiration, repurchase or exercise of an option in a closing purchase transaction have in applying the volume limitation of Rule 144(e)?

Answer: As indicated in the answer to Item (70), the amount of underlying securities subject to Rule 144 which covers an outstanding option is included in computing the amount of securities which may be sold under that rule. Once the option has expired or has been exercised or repurchased without delivering such securities, they are no longer included in the computation.

(74) *Question:* Must the amount of restricted securities which are being used to cover or margin an outstanding call option position which was written more than three months previously be included in the computation of the amount of securities which may be sold under Rule 144?

Answer: Yes, assuming the securities underlying the option are subject to resale under Rule 144. The underlying restricted securities used to cover an outstanding option must always be included in calculating the volume limitation of Rule 144(e).

(75) *Question:* With respect to the writing of options by affiliates or non-affiliates, may the secu-

rities attributable to the writing of call options and/or their exercise be included in computing the trading volume for purposes of determining the volume limitation of Rule 144(e)?

Answer: No, neither the number of shares underlying the options nor the number of shares delivered upon exercise of the options should be included in the computation of trading volume. The seller should not subtract that number from the reported trading volume since neither the writing nor the delivery of those shares is reported in the consolidated transaction reporting system.

(76) **Question:** May a non-affiliate who has written an option covering restricted securities and filed a notice on Form 144 deliver non-restricted securities upon exercise of the option in lieu of the restricted securities? If so, will the transaction be treated as a Rule 144 sale?

Answer: A non-affiliate, upon receiving an exercise notice, may deliver non-restricted securities and, in that event, the transaction will not be treated as a Rule 144 transaction. It should be noted, however, that Rule 144(i) requires that the person filing the notice on Form 144 have a bona fide intention to sell the securities referred to therein.

(77) **Question:** What information should be provided in the Form 144 filed at the time the covered call option or restricted margined option is written?

Answer: The Form 144 should be completed as though it is covering the sale of underlying securities. Thus, the *Title of the Class of Securities*, *The Number of Shares to be Sold*, in the case of a covered option (or the number of restricted shares which margin the option position), *The Aggregate Market Value*, etc., would be related to the underlying securities and not the option. Under the *Approximate Date of Sale*, reference can be made to the *Remarks* section. Also, a similar reference should be made in response to the *Name of Each Securities Exchange*. The *Remarks* section is the only section of the Form 144 that should make reference to the option. A typical disclosure could read: "This Form 144 reflects the intention to write (number) of covered call options [or to place (number) of shares of securities in a margin account to meet the margin obligations resulting from the writing of standardized options] with an exercise price of \$_____ and expiration date of _____"

(78) **Question:** May a non-affiliate who initially wrote an option covered by restricted stock without filing a notice on Form 144 at the time of writing the option subsequently, upon exercise of the option, file a Form 144 and deliver restricted securities?

Answer: No. The notice requirement of Rule 144(h) for the sale of restricted securities must be satisfied at the time of the writing of the option.

(79) **Question:** May a non-affiliate who initially wrote an uncovered option which was margined with cash decide later to (1) deposit restricted securities to cover or margin that option (perhaps because of an increase in the applicable volume limitation) or (2) deliver restricted securities upon exercise?

Answer: Yes. In these circumstances the Form 144 would be filed at the time of deposit or delivery.

2. *Short Sales Against the Box*³⁷

(80) **Question:** May Rule 144 or Rule 145(d) be relied upon for short sales against the box?

Answer: Yes, assuming all applicable conditions of the rule being relied upon are satisfied at the time the short sale is made.³⁸ For purposes of the manner of sale requirement of Rule 144(f), a short sale against the box is deemed to involve a broker's transaction on the date the short sale is executed.

(81) **Question:** Must the securities held in the box actually be used to cover the short sale?

³⁷A "short sale against the box" is one in which the seller owns an amount of securities equivalent to the number he sells short but nevertheless asks his broker to borrow the necessary number of shares to deliver to the buying broker. The seller's securities are held by his broker and are used subsequently to replace the borrowed securities.

³⁸The answer assumes that the seller is not a beneficial owner of more than 10 percent of any class of the issuer's equity securities which is registered pursuant to Section 12 of the Act, or an officer or director of that issuer. If the seller is one of those persons, he must deliver his securities against the sale within twenty days of the sale. See Section 16(c) of the 1934 Act.

Answer: No. The short sale in such circumstances may be covered by the delivery of other securities of the same class.

(82) *Question:* Will a non-affiliate who sells securities short without placing his restricted securities "in a box" and later uses the restricted securities to cover the short position be able to rely on Rule 144 if he complies with its requirements only at the time the short position is covered?

Answer: No. It is necessary that the initial sales transaction comply with Rule 144. The purpose of this prohibition is to preclude a non-affiliate from avoiding the requirements of Rule 144(f) and (g) by effecting a short sale without complying with those sections and thereafter covering his short position with restricted securities.

3. Availability of Rule 144

(83) *Question:* May Rule 144 be relied upon by a subsidiary for the sale of restricted or other securities issued by its parent?

Answer: No, the parent-issuer could not directly sell its own securities pursuant to the rule. And the rule is not available to permit the parent-issuer to do indirectly through a subsidiary what it could not do directly. Both the parent and the subsidiary must be considered the same entity because the parent is in control of the subsidiary.

(84) *Question:* May Rule 144 be relied upon for the resale of securities in any of the following situations:

(a) The securities are included in a registration statement that has been withdrawn by the issuer?

(b) The securities are included in a registration statement that can no longer be used because of information therein is not current under the requirements of the 1933 Act?

(c) The securities are included in a registration statement that contains current information and can presently be used?

Answer: Rule 144 is immediately available in situations (a) and (b) because the registration statements in those instances cannot currently be used for the resale of securities. The rule also will be available in situation (c) if the registration statement expressly states that the securities may be

sold either pursuant to the registration statement or pursuant to Rule 144. If the registration statement does not so state, the rule will not be available unless the securities are deregistered from the registration statement or the registration statement is amended to state that the securities may be sold pursuant to Rule 144.

III. RULE 145(d)

Rule 145(d): This rule states that a former affiliate of an entity acquired in a Rule 145 transaction registered under the 1933 Act shall not be deemed an underwriter when he seeks to sell the securities received by him in the transaction if:

(1) the securities are sold pursuant to the requirements of paragraphs (c) [public information], (e) [volume limitation], (f) and (g) [manner of sale] of Rule 144, or

(2) the person is not an affiliate of the issuer and has held the securities for at least two years, and the issuer of the securities (i) is subject to the periodic reporting requirements of Sections 13 or 15(d) of the 1934 Act, (ii) has been so subject for at least the 12 preceding months, and (iii) has filed all the reports required to be filed under those sections during the 12 preceding months.

(85) *Question:* May a person who receives securities in a registered Rule 145 transaction immediately resell them?

Answer: If the person was not an affiliate of the acquired entity at the time of acquisition, he may immediately resell the securities without any restrictions. If the person was an affiliate at the time of the acquisition, he may either register the securities for resale or comply with the requirements of Rule 145(d). Under Rule 145(d)(1), the former affiliate could immediately resell the securities in amounts that are within the volume limitations of Rule 144(e), provided there also is compliance at the same time with the public information and manner of sale requirements of Rule 144. There is no need, however, for the former affiliate to comply with the holding period or notice of sale requirements of Rule 144, since those requirements are not applicable to sales made pursuant to Rule 145(d).

(86) *Question:* What requirements, if any, of Rule 144 must be complied with if a person seeks to sell registered Rule 145 securities under Rule 145(d)(2)?

Answer: Assuming all of the provisions of Rule 145(d)(2) are satisfied (viz., the seller is not an affiliate of the issuer and has held the securities for two years, and the issuer meets the reporting requirements of the rule), none of the requirements of Rule 144 would have to be complied with. Thus, there is no limit on either the amount of securities that may be sold under that provision or the manner in which they may be sold.

(87) *Question:* May the provisions of Rule 145(d) be relied upon for the resale of securities issued in transactions that are covered by Rule 145 but not registered under the 1933 Act because of the availability of an exemption, such as that provided by Sections 3(a)(9), 3(a)(10), 3(a)(11), or 4(2) of the 1933 Act, or Regulation A under the Act?

Answer: Rule 145(d) specifically states that it shall be applicable only to registered securities. Notwithstanding the language of the rule, the Division of Corporation Finance, as a matter of discretion, will not recommend any enforcement action to the Commission if the requirements of Rule 145(d) are followed with respect to resales of securities which are issued in a Rule 145 transaction but not registered because of the availability of either the Section 3(a)(9) or 3(a)(10) exemption, or the Regulation A exemption. This position of the staff, however, does not cover resales under any other exemption.

(88) *Question:* May call options be written on, or short sales made of, securities that may be resold under Rule 145(d)?

Answer: Yes. Call options and short sales involving Rule 145(d) securities are permitted, as noted in Items (69) and (80) herein.

IV. RULE 148

Rule 148: This rule provides a safe harbor for the resale of securities issued under a plan in bankruptcy proceedings, as well as securities held in the debtor's portfolio. As does Rule 144, it sets forth conditions which, if met, permit persons who hold such securities to sell them publicly without the need for registration and without being deemed underwriters under the 1933 Act. The conditions relate to the availability of adequate current public information about the issuer, the amount of securities that can be sold under the rule, and the manner of selling such securities.

(89) *Question:* Rule 144 states that it is applicable to the sale of "restricted and other" securities held by affiliates. (emphasis added). Rule 148, on the other hand, makes no mention of affiliates but simply states that it is applicable to the sale of certain securities relating to bankruptcy proceedings. Which of these two rules applies to the sale of affiliates of bankruptcy-related securities?

Answer: Rule 148 is applicable. Although the rule is silent on the matter, affiliates who hold securities subject to Rule 148 may rely on that rule, rather than Rule 144, for the resale of such securities. The major difference between Rule 144 and Rule 148 so far as affiliates are concerned is that Rule 148 does not have a two-year holding period requirement for securities sold in reliance upon it.

(90) *Question:* Rule 148(b)(2)(i) states that no sales may be made in reliance upon the rule unless the information specified in Item 3(b) of Form 8-K [17 CFR 249.308] has been filed by the debtor with the Commission.³⁹ If the debtor came out of bankruptcy prior to the effective date (May 1, 1978) of the Item 3(b) requirement, must the debtor nevertheless file the information specified in the Item with the Commission in order to satisfy the current public information requirement of Rule 148(b)(2)(i)?

Answer: If the information presently required by Item 3(b) can reasonably be ascertained by examining the reports and other documents already filed by the debtor, then a filing on Form 8-K setting forth the requisite information need not be made. If, however, the information cannot be so ascertained, an 8-K or similar filing should be made if the debtor wishes that Rule 148 be available for the sale of its securities. Any such filing, however, would not be considered a delinquent filing by the Commission, since it was not required to be filed by the debtor at the time it came out of bankruptcy.

³⁹Item 3(b) of Form 8-K requires that the following information be filed with the Commission if an order confirming a plan of reorganization, arrangement or liquidation has been entered by a court or governmental authority: (1) the identity of the court or governmental authority; (2) the date the order confirming the plan was entered; (3) a fair summarization of the material features of the plan; (4) the number of shares or other units of the debtor outstanding and reserved for future issuance in settlement of claims and interests; and (5) information as to the assets and liabilities of the debtor.

(91) *Question:* Section 1145 of the Bankruptcy Reform Act of 1978 [Pub. L. No. 95-598 dated November 6, 1978] deals in part with some of the matters covered by Rule 148. How will Rule 148 interact with Section 1145?

Answer: Section 1145 will not become effective until October 1, 1979. As indicated in Note 10 of Release No. 33-6032 (March 5, 1979), the Commission expects to consider prior to that date whether to modify or rescind Rule 148 in light of the existence of Section 1145. Rule 148, however, will continue in full force and effect until at least October 1, 1979.

V. RULE 237

Rule 237: This rule provides a safe harbor for the resale of securities by non-affiliates. It resembles Rule 144 in some respects in that it contains holding period, volume limitation, and manner of sale requirements.

(92) *Question:* Must there be current public information available about the issuer of securities that are sold in reliance upon Rule 237?

Answer: No. Rule 237 is designed to provide a safe harbor for the resale of securities that cannot qualify for resale under Rule 144 because the issuer of the securities does not publish information concerning itself in accordance with Rule 144(c). Rule 237 requires that the securities have been beneficially owned by the seller for at least five years (as opposed to two years under Rule 144) and that the securities be sold in bona fide negotiated transactions otherwise than through a broker or dealer (as opposed to brokers' transactions or transactions with a market maker under Rule 144). In addition, the amount of securities that can be sold under the rule cannot exceed \$50,000 during any period of one year.

By the Commission.

George A. Fitzsimmons
Secretary