WACHTELL, LIPTON, ROSEN & KATZ

March 11, 1974

TO OUR CLIENTS:

Since February 26, 1974 there have been several significant developments with respect to Rule 144 that warranted revising our memo of that date. The enclosed "revised" memo replaces the February 26, 1974 memo which should be discarded.

M. Lipton

WACHTELL, LIPTON, ROSEN & KATZ

March 8, 1974

TO OUR CLIENTS:

REVISED
RULE 144 UPDATED

Rule 144[1] under the Securities Act of 1933, as amended (the "1933 Act")[2] has now been in effect for almost two years. Most of the interpretative problems have been addressed. The relationship to former Rules 133[3] and 155,[4] Rule 145[5] and certain no sale distributions has been for the most part worked out. Rule 144 has eliminated much of the previous uncertainty with respect to public sales by control persons ("affiliates") and holders of privately placed securities ("restricted securities"). While there are still some annoying procedural problems in the day-to-day operation of Rule 144, there is general agreement that it has been a major success in administrative rule making. The following reviews in summary form the principal provisions and interpretations of Rule 144 as set forth in Release No. 5223[6] which promulgated Rule 144, Release No. 5306[7] which was the first general interpretative release by the SEC, the numerous interpretative letters that have been issued by the SEC and Release No. 5452 which promulgated amendments to the Rule effective March 15, 1974.[8]

Rule 144 applies to the sale of "control" securities or restricted securities if the following basic conditions are met:

(1) Adequate current public information with respect to the issuer is available;

(2) If the securities are restricted securities, a two-year holding period has been satisfied;

(3) The amount sold in each six-month period does not exceed 1% of the outstanding securities of that class and, in the case of listed securities, the lesser of such 1% or the average weekly reported exchange volume of trading during the four-week period prior to the date of the notice referred to in (5) below;

(4) The sales are made in ordinary brokerage transactions; and

(5) Except for small sales (not more than 500 shares and $10,000 aggregate sales price in the six-month period),

the seller files a notice of sale with the SEC and, in the case of listed securities, the principal stock exchange concurrently with placing the order to sell.[9]

Availability of Rule 144

Rule 144 may be availed of by the holder of restricted securities who (1) has contractual registration rights, (2) is discussing with the issuer registration of his restricted securities, (3) has restricted securities which were included in a pending registration statement, but which securities were withdrawn voluntarily from registration before the registration statement became effective, or (4) has restricted securities which were effectively registered, but which were withdrawn from registration after the registration statement, because of lapse of time or material changes in the condition of the issuer, ceased to be current, whether or not the registration statement included an undertaking to file a post-effective amendment and update the prospectus prior to any offering during the "stale" period.[10] Rule 144 is not available for shares which are covered by an effective registration statement or which are withdrawn from a current effective registration statement.[11]

Concurrent sales of registered securities pursuant to an effective registration statement and securities of the same class not included in the registration statement pursuant to Rule 144 are permitted.[12] This is consistent with the abandonment of fungibility for Rule 144 purposes.

A procedure for changing the character of portfolio securities from the status of restricted securities to the status of "free" stock by first selling under Rule 144 and shortly thereafter purchasing the same number of shares in the open market is permissible. However, the SEC staff has suggested "guidelines" to be followed in light of the anti-manipulative rules: (1) the prospective buyer should wait a period of at least thirty days after selling under Rule 144 before repurchasing such shares in the open market; and (2) the prospective seller should wait a period of at least thirty days from the last purchase in the open market before resuming sales under Rule 144.[13]

Rule 144 is not available for (1) underwriter's compensation securities, (2) securities issued to finders in connection with an underwriting, (3) sales by an issuer of its own securities, and (4) securities of an issuer held by a subsidiary of that issuer.[14] However, in cases

where a trust or estate is a controlling person of the parent of a bank or trust company or where such trust or estate holds restricted securities of the parent, the bank or trust company in its capacity as trustee or executor of such trust or estate may make sales of its parent's securities pursuant to Rule 144 for the account of such trust or estate. Rule 144 is not available for resales of any of the parent's securities purchased for the trust or estate by the subsidiary bank or trust company after March 28, 1973 pursuant to an exercise of its investment discretion, except where such purchases are made as an exercise of preemptive rights, pursuant to a rights offering, pursuant to the offer or sale of certain fractional interest under Rule 152A, or by the exercise of stock options held by the trust or estate, which were owned by the deceased at the time of death.[15]

Rule 144 is applicable to securities received under stock bonus and similar plans that are not registered.[16] Where such plans are registered, Rule 144 is not available for resales of securities received under such plans in that such securities are acquired in a registered offering and therefore are not "restricted securities".[17] However, in the case of stock option plans, Undertaking (C) currently required in registration statements on Form S-8 provides that if a person who may be deemed an underwriter, such as an officer or director, sells S-8 registered stock otherwise than on a national securities exchange, the S-8 must, in effect, be "upgraded" to an S-1.[18] Because Undertaking (C) effectively renders the existing Form S-8 registration statement unavailable to such persons, notwithstanding the effectiveness of the S-8, such persons may make use of Rule 144 for sales other than on a national securities exchange if the S-8 is not upgraded even though the shares are not de-registered.[19] This position has been extended to the treatment of employee monthly investment plans registered on Form S-8 as well.[20]

It is not clear whether Rule 144 applies to securities sold in purported private placements that do not comply with the private offering exemption and therefore were sold illegally.[21] Until the question is clarified, it should be assumed that Rule 144 does not apply and the question of resale determined on the basis of the application of the 1933 Act and the rules thereunder apart from Rule 144.

Current Public Information

The information requirement is met if the issuer has (1) securities registered under either the 1933 Act or the Securities Exchange Act of 1934, as amended (the "1934 Act")[22] and (2) been subject to the periodic reporting requirements for a period of at least 90 days prior to the sale and (3) filed all 1934 Act reports required to be filed during the 12 months (or such shorter period that the issuer was subject to the reporting requirements) preceding the sale.[23]

Where an issuer registers under the 1933 Act for the first time, the 90-day waiting period applies even though no 1934 Act reports are required during that period.[24] The SEC generally requires prospectus disclosure of the future availability of Rule 144 sales of securities of certain registrants, especially first-time registrants, and the present intention of insiders with respect thereto.[25] Where an issuer registers under the 1934 Act for the first time, the 90-day waiting period commences on the effective date of the 1934 Act registration statement which is normally 60 days after filing; therefore, in such cases Rule 144 will become available 150 days after the date on which the 1934 Act registration statement was filed.[26]

The 1934 Act report forms require issuers to state whether they have met the reporting requirements.[27] Unless he knows or has reason to believe that the issuer has not complied with the reporting requirements, the 144 seller is entitled to rely on the issuer's statement in the latest of such reports or on a written statement from the issuer that the reports have been filed.[28] An issuer that has received an extension of time to file a 1934 Act report has not filed all required reports for Rule 144 purposes, but will be deemed current when the filing is made.[29]

Small companies that are not subject to the Section 12(g) registration requirements of the 1934 Act (less than 500 shareholders or $1 million in assets) may voluntarily register and thus make Rule 144 available to their security holders.[30] Accordingly, in addition to the usual 1933 Act registration covenants, purchasers in private placements, in order to assure the availability of Rule 144, should consider obtaining the covenant of the issuer to register

and maintain registration under the 1934 Act and file timely the requisite periodic reports.[31] Rule 144 is not available for sales of securities of an issuer which has been required under Section 15(d) of the 1934 Act to file reports but is no longer so obligated because it has less than 300 shareholders of record as of the first day of its fiscal year,[32] even if the issuer voluntarily continues to make periodic filings under the 1934 Act.[33]

As an alternative to voluntarily registering under Section 12(g), the information requirement can be met by nonreporting companies if the information required by Rule 15c2-11[34] to permit a broker to quote an over-the-counter security is available publicly. This provision does not apply to a reporting company; therefore, it does not enable Rule 144 sales of securities of a delinquent reporting company.[35] If a 1933 Act registration statement is filed by a 15c2-11 issuer, the availability of 15c2-11 information can no longer be relied on and Rule 144 is not available until 90 days after the registration statement has become effective.[36]

Compliance with the publicly available information provision is a factual question to be decided on a case by case basis. The SEC has ruled that information about a nonreporting company is publicly available for Rule 144 purposes if the company has distributed reports containing the 15c2-11 information to its security holders and brokers and marketmakers and information about the company is published in a recognized financial reporting service.[37] It is not sufficient that the company has furnished the 15c2-11 information to the broker through which the 144 sale is to be made.[38]

With respect to nonreporting insurance companies, the information requirement is met if the company is regulated by and files reports with its state of domicile.[39]

Holding Period

A major policy predicate of Rule 144 is that the acquirer of restricted securities must take the full economic risk of a two-year holding period. Thus, restricted securities must be fully paid for and held for two years before they can be sold under Rule 144.[40]

If securities are purchased with notes or other obligations, they are not considered fully paid unless (1) the notes or other obligations are with full recourse and (2) the note or obligation is paid in full before the

sale and (3) there is adequate collateral, other than the purchased securities, the fair market value of which is throughout the two-year period equal to the unpaid portion of the purchase price.[41] The holding period is tolled for any periods during which the fair market value of the collateral falls below the unpaid portion of the purchase price.[42] Excess collateral may be withdrawn without affecting the holding period.[43]

The staff of the SEC has taken the position that where money is borrowed from a bank or other independent lender to purchase restricted securities, the loan is not guaranteed, directly or indirectly, by the issuer and the restricted securities are pledged as the only collateral for a normal full-recourse loan, the restricted securities are considered fully paid and the holding period is deemed to have commenced upon purchase of the restricted securities.[44]

The holding period for restricted securities issued under employee stock bonus plans commences when the employee has the right to such securities without possibility of forfeiture.[45] Provisions for forfeiture of bargain-purchase stock purchased by employees toll the holding period until the restrictions on disposition are lifted.[46]

Fungibility does not apply to Rule 144 situations.[47] The acquisition of restricted securities will not restart the holding period on previously acquired restricted securities.[48] The abandonment of fungibility for Rule 144 purposes has been carried to its logical extreme -- where a seller has made more than one purchase of restricted securities, the specific securities sold must satisfy the holding period requirement.[49]

The SEC has not publicly clarified its position as to fungibility in non-Rule 144 situations. Doubt remains as to whether acquisition of restricted securities taints unrestricted securities previously acquired, and if so, whether the period of taint is limited to two years. It would seem that the concept of Rule 144 is not consistent with subsequently acquired unrestricted securities being tainted by previously acquired restricted securities, if that ever was in fact the SEC position.[50] It is understood that the SEC has followed the Rule 144 concept in a non-Rule 144 situation -- taking the position that, just as under Rule 144, receipt of contingent shares does not taint restricted securities acquired a number of years previously in a private placement acquisition.

The two-year holding period is suspended for any period that the holder of the restricted securities has a short position in (including short sales against the box covered by later open market purchases), or an option to sell, securities of the same class (or convertible into the same class).[51] Short sales or acquisitions of puts after the two-year holding period has been satisfied do not affect the availability of Rule 144.[52] Customary close corporation put and buy-back arrangements do not constitute the type of sell option that tolls the holding period for Rule 144 purposes.[53]

Successive private placements each start a new two-year holding period.[54] The holding of the previous private placee cannot be tacked to the holding of the subsequent placee.[55]

Partners who receive restricted securities as distributions by their partnership may tack their holding periods to that of the partnership, but all of the partners receiving such securities must aggregate their sales for the purpose of the volume limitation discussed below if they tack the holding periods.[56] In the case of a private corporation, it appears that tacking is not permitted and aggregation is not required in the absence of a basis for aggregation other than the co-shareholder relationship.[57] The same interpretation has been applied to the distribution of restricted securities by a public corporation.[58]

Tacking is permitted for stock dividends and splits, recapitalizations (including recapitalizations resulting in changes in par values), reincorporations that do not result in changes in the business or management, conversions of convertible securities (does not include warrants and warrants exercisable with debentures and is limited to the same issuer of the convertible as of the underlying security) and securities acquired as contingent payments in business combinations.[59] In each of these situations, for Rule 144 purposes, the subsequently acquired securities are deemed to have been acquired at the time the related restricted securities were acquired.[60] Since tacking with respect to convertible securities is permitted, Rule 155 was rescinded effective April 15, 1972, and is obsolete, except for convertibles privately purchased prior to April 15, 1972 and not sold thereafter in accordance with all the provisions of Rule 144.[61]

Stock dividends on restricted securities are restricted securities for Rule 144 purposes, however, the holding period for securities acquired as a dividend is deemed to have commenced as of the date the securities on which the dividend was paid were acquired.[62]

Tacking is permitted for bona fide pledgees, donees of gifts and trusts.[63] Restricted securities are deemed to have been acquired when they were acquired by the pledgor, donor or settlor.[64] In each of these situations, the corollary of tacking is aggregation -- the two parties are treated as one for the purpose of determining the amount that can be sold under the volume limitations of the Rule.[65] Thus, pledgees who intend to rely on Rule 144 to provide salability of collateral in the case of default should restrict by contract and/or escrow the pledgor in order to be sure of the availability of Rule 144. The extent to which aggregation is required in multiple pledgee situations is unclear.[66]

Where an estate is an affiliate, tacking is permitted, and the volume limitations apply.[67] Where the estate is not an affiliate or the securities are sold by a beneficiary who is not an affiliate, no holding period is required and the volume limitations do not apply, but the other conditions of Rule 144 as to current information, manner of sale and notice of sale do apply.[68] The special provisions for an estate apply only to restricted securities acquired by the estate from the decedent -- not to restricted securities acquired otherwise such as by exercise of stock options owned by the decedent, as to which Rule 144 applies fully.[69]

Tacking of holding periods that have been broken by transfers of restricted securities from one entity to another within a "person", as defined in Rule 144, is not permitted unless the transfer is of a type included in the Rule 144(d)(4) tacking provisions for pledges, gifts, trusts and estates.[70]

Limitation on Amount of Securities Sold

For over-the-counter securities, the limitation is 1% of the outstanding securities of the class every six months.[71] For listed securities, the limitation is the lesser of 1% of the outstanding or the average weekly volume on all exchanges for the four weeks prior to the date of the notice of sale.[72] Sales pursuant to registered offerings and in private placements are not aggregated

with 144 sales in determining the amount permitted to be sold under the Rule.[73] Where a stock is traded on the National Stock Exchange and NASDAQ, the NASDAQ volume may be used in lieu of the National Stock Exchange volume, but the two may not be combined.[74]

There is no prohibition on sales in successive six-month periods, but carryforward and accumulation are not permitted.[75]

Both restricted and unrestricted securities are aggregated for determining the volume limitation for sales by affiliates.[76] Only restricted securities are considered in determining the limitation on sales by nonaffiliates.[77]

Private placees' resales of restricted securities are not aggregated.[78] As noted above, tacking is not permitted between private placees.[79]

Sales by persons acting in concert are aggregated.[80] The mere fact that several affiliates sell at the same time will not in and of itself be considered acting in concert, but it does give rise to a situation which must be considered carefully.[81] Where investors have agreed not to sell more than a specified percentage of their securities during a specified period, the SEC staff has taken the position that this constitutes an agreement to act in concert.[82] The treatment for aggregation purposes of several funds or other accounts under the same investment management is not covered specifically. Until clarified by the SEC, it will have to be considered on a case by case basis on the particular facts of each situation.[83] The SEC staff has indicated that in the case of two trusts managed by the same bank it would treat each trust as a separate person, notwithstanding common trustees so long as there is no commonality of decisions such as the securities being on the bank's "sell list".[84]

"Person" is defined in Rule 144 to include close relatives of the seller,[85] trusts and estates in which the seller and such relatives collectively own a 10% or greater beneficial interest or which any of them serve as trustee or executor, and corporations or other entities in which the seller, such relatives and such trusts and estates together have a 10% equity interest or own 10% of a class of equity securities.[86] Thus, sales by all those included in the definition of person are aggregated for the purpose of Rule 144. An institutional investor or other person who owns 10% or more of any class of equity securities of

a company is considered one person with such company for the purpose of Rule 144, and, therefore, the institutional investor would have to inquire of all companies in which it holds a 10% interest to determine if any of them had or plan transactions in a security the institution wishes to sell under Rule 144.[87] Directors of foundations organized as corporations are not deemed to be in the capacity of trustees of the foundation for the purpose of Rule 144.[88]

As stated above, in the pledge, gift and trust situations there is aggregation with sales by the pledgor, donor or settlor. Such aggregation terminates after two years after the original transfer to the pledgee, donee or trust.[89] The requirement of aggregation only applies to shares received from the pledgor, donor or settlor in the event that the pledgee, donee or trust makes sales of shares that were previously held.[90] For estates and beneficiaries which are affiliates, the aggregation period is six months.[91] There is no aggregation for estates and beneficiaries which are not affiliates.[92]

Where there is aggregation, particularly in the pledge situation as discussed above, the parties subject to aggregation may wish to provide for allocation of the sale privileges under Rule 144 by contract, escrow or delayed delivery.

Section (e)(3)(A) of the Rule is a rather confusingly drafted provision which provides that where both a convertible and the underlying security are being sold the amount of the underlying security for which the convertible being sold may be converted is aggregated with sales of the underlying security in determining the aggregate amount of both securities allowed to be sold. Thus, the volume limitations of Section (e)(1)(A) can not be circumvented by selling an amount of the underlying security in compliance with those limits, while at the same time selling an amount of the convertible security which would meet volume limitations for the convertible if it were looked at separately, but which would have resulted in an excessive sale of the underlying security if the convertible had first been converted and the sale of both blocks of securities had taken place.[93]

Manner of Sale

Sales under the Rule can only be made in brokers transactions within the meaning of Section 4(4) of the 1933 Act.[94] The seller cannot solicit or arrange for the solicitation of buy orders or make any payment in connection with the sale other than usual commissions to the broker who executes the order.[95]

Brokers' transactions are defined as those in which the broker (1) does no more than execute a sell order as agent for the usual commission and (2) does not solicit buy orders. The broker may inquire of other brokers who have indicated an interest within the preceding 60 days.[96] Such inquiry may also be made of clients, institutional and non-institutional, who bona fide and unsolicited indicated an interest in the preceding 10 days.[97] The SEC has cautioned brokers to maintain written records of such indications in order to substantiate the bona fide nature thereof.[98]

The recent amendment to Section (g)(2) of the Rule now permits brokers to continue making a two-way market in a security for which they have a Rule 144 sale order, if prior to receipt of the order they were making such market and published quotes 12 out of the preceding 30 calendar days with no more than 4 business days in succession without such two-way quotations.[99] Although contemplated when the amendment was originally proposed,[100] the amendment does not impose any volume limitation on market-makers in connection with the execution of Rule 144 sales.[101]

Where a broker effects a cross of securities sold in a 144 transaction, he may collect commissions from both buyer and seller provided such commissions are usual and customary.[102] Where negotiated commissions are applicable they are permitted under Rule 144 if "negotiated in the usual and customary manner".[103]

Notwithstanding the statement in the release accompanying Rule 144, the SEC does not take the position that all Rule 144 sales are automatically distributions to which Rule 10(b)-6 applies.[104] This is a factual issue to be decided on a case by case basis. With the adoption of the amendment to Section (g)(2) of the Rule, this issue is no longer of substantial significance. Ordinary 144 sales are not considered to be "distributions" and orders for such Rule 144 sales on the floors of the exchanges do not have to be marked as "distributions".[105]

Rule 144 provides that the broker should obtain and retain a copy of the notice of sale and make a reasonable inquiry to ascertain whether the seller is engaged in a distribution.[106] Reasonable inquiry should include the following:

(1) The length of time the securities have been held by the person for whose account they are to be sold. If practicable, the inquiry should include physical inspection of the securities;

(2) The nature of the transaction in which the securities were acquired by such person;

(3) The amount of securities of the same class sold during the past six months by all persons whose sales are required to be aggregated;

(4) Whether such person intends to sell additional securities of the same class through any other means;

(5) Whether such person has solicited or made any arrangement for the solicitation of buy orders in connection with the proposed sale of securities;

(6) Whether such person has made any payment to any other person in connection with the proposed sale of the securities; and

(7) The number of shares or other units of the class outstanding, or the relevant trading volume.[107]

In addition to the foregoing, the broker should also obtain and retain a copy of the 1934 Act filing or the written statement of the issuer on which the Rule 144 seller is predicating satisfaction of the availability of current information requirements and a representation letter from the seller.[108]

Short sales may be effected under Rule 144 provided the specific securities to be used to cover the short sale are eligible for sale under Rule 144 at the time of the short sale, the seller delivers such securities to the broker at the time of the short sale and those specific securities are eventually used to cover the short sale.[109]

Notice of Proposed Sale

Concurrently with the placing of the sell order with the broker, the seller must transmit (place in the mail) to the SEC in Washington three copies of a notice of sale on Form 144 signed by the seller and one copy to the principal exchange on which the security is listed.[110] The same notice requirements apply to all amended notices which may be filed.[111]

Form 144 cannot specify an amount of listed securities to be sold in excess of the volume limitation determined as of the date of filing the Form 144.[112] If thereafter the average trading increases, the seller may recompute the volume limitation (excluding sales by him during the new period) and file an amended Form 144 whereupon he can sell up to the new volume limitation, but in no event can sales in a six-month period exceed the 1% overall limit.[113] If the number of outstanding shares of over-the-counter securities of an issuer increases subsequent to the filing of a Form 144, an amended Form 144 may be filed to permit sales based on the increase in the number of outstanding shares provided the information regarding the increase has been published by the issuer.[114]

Where an over-the-counter company subsequently lists on an exchange the listed security volume limitation becomes applicable four weeks after listing and all sales in the preceding six months are considered in determining the volume limitation.[115]

The number of shares to be sold under Rule 144 may be adjusted for stock splits or major stock dividends paid after the Form 144 has been filed.[116]

Form 144 can be amended to change the designation of the broker who has been given the sale order.[117]

No notice on Form 144 is required if the amount of securities to be sold during any six months does not exceed 500 shares or units and the aggregate sales price does not exceed $10,000.[118] Brokers should obtain a representation to this effect from customers placing such small orders and while the possibility of liability or disciplinary proceedings if the customer later violates the representation seems remote, the better procedure is to

not rely on the small order exception where the customer owns more than the small order limit, but to insist that the Form 144 be filed.

If the sale referred to in a Form 144 is not completed within 90 days, an amended Form 144 must be filed before further sales can be made.[119]

Exclusivity and Operation of Rule 144

Rule 144 is exclusive with respect to affiliates, whether they are selling restricted or unrestricted securities.[120] It is the only way in which affiliates can sell absent registration, private placement or some other statutory exemption.

Rule 144 is not exclusive with respect to non-affiliates' sales of restricted stock.[121] However, the SEC has stated emphatically that persons selling restricted securities acquired after April 14, 1972 outside the Rule will have a strong burden of establishing exemption and that brokers participate in such sales at their risk.[122] The "change of circumstances" test no longer applies to such sales and the SEC will not issue no-action letters.[123] Length of holding continues to be a factor, but the two-year provision of Rule 144 is not relevant in determining what such holding period should be.[124]

Restricted securities acquired before April 15, 1972 may be sold pursuant to Rule 144 or outside the Rule.[125] Here, the change of circumstances test continues to apply and no-action letters will be issued on the basis of administrative interpretations in effect at the time of sale (not time of purchase).[126] The SEC staff recently withdrew its former position that a nonaffiliate holder of restricted securities who elects to sell a portion of such restricted securities under Rule 144 is bound as to the balance of such restricted securities which under the previous position could thereafter only be sold under Rule 144. However, the staff has again reversed its position in a situation involving concurrent sales under and outside of Rule 144.[127]

The staff of the SEC has evolved the "float doctrine" to limit sales of restricted securities acquired prior to April 15, 1972 outside of Rule 144. Essentially, the position of the staff in the context of the denial of a no-action request is that sales in excess of the volume limitations of Rule 144 are deemed to be distributions subject to registration. There is no statutory basis for this staff position and it is most unlikely that it would be accepted by a court in any normal situation.[128]

Restricted stock awards to non-controlling persons fully acquired prior to June 1, 1972 (the effective date of Rule 144 with respect to stock bonus plans and the like) need not be sold pursuant to the provisions of Rule 144 even though the shares remain subject to certain restrictions on transferability.[129]

Rule 144 is not available where there is technical compliance, but the 144 sales are part of a plan to effect a distribution.[130] Rule 144 does not exempt sales from the antifraud, civil liability or short-swing profits provisions of the securities laws.[131] The SEC position is that the Rule is to be strictly construed and persons selling under the Rule have the burden of proving its availability.[132]

In view of the strong policy statements of the SEC in Release No. 5223 that (1) availability of information, (2) holding period and (3) impact on the trading markets are the prime concerns in interpreting the 1933 Act, it would appear that counsel may render favorable opinions as to sales outside the Rule of post-144 restricted securities only in very limited situations -- those where the issuer is a major listed company, the amount can be sold readily without material effect on the market (but not the "float doctrine" with its arbitrary limit as to amount) and there has been a holding period substantially more than two years (probably in the area of three to five years). Substantially the same standards are applicable to pre-144 restricted securities, except that the current three-year holding period is generally considered adequate. Most lawyers will not give an opinion in either situation where the company is marginal or the amount of securities cannot be readily absorbed by the normal trading market, no matter what the holding period. Brokers are well advised to insist on at least these standards.

Relationship With Other Rules

Rule 133 Transactions. Rule 133 was repealed and replaced by Rule 145 effective January 1, 1973.[133] The following applies to securities issued in a 133 transaction while it was effective: Rule 144 is not available for resale of securities received in a 133 transaction except for securities received by persons who are or became controlling persons of the acquiring company.[134] Such controlling persons may sell only under Rule 144 or in a registered sale or private placement or pursuant to some other statutory exemption. Securityholders of the acquired company who (1)

receive securities in a 133 transaction, (2) are not and do not become controlling persons of the acquiring company and (3) were not controlling persons of the acquired company hold such newly acquired securities subject to any restrictions that attached to the previously owned shares of the acquired company. In order for these restrictions to be removed the individual shareholder must have held the previously owned shares for three years or have experienced an unforeseeable change of circumstances. For purposes of the holding period, such persons may tack their holding period for the acquired company shares to the holding period for the acquiring company shares. Once the prior restrictions are removed, such persons may sell their newly acquired shares of the acquiring company without limitation. Securityholders who were in control of the acquired company in the 133 transaction, but were not and are not in control of the acquiring company are subject to the same conditions with respect to restrictions that attached to the shares of the acquired company as the non-controlling shareholders of the acquired company, and in addition, may only make resales pursuant to the leakage provisions of Rule 133(d). Resales pursuant to Rule 133(d) may not be commenced until any of the aforementioned restrictions are no longer applicable. After two years from the date of the 133 transaction or at such time that all prior restrictions are removed, whichever is later, such persons who controlled the acquired company may sell the shares of the acquiring company, which they do not control, without limitation.[135]

Rule 145 Transactions. Securityholders who (1) acquire securities in a 145 transaction, (2) were not controlling persons of the acquired company, and (3) are not and do not become controlling persons of the acquiring company have "free" securities.[136] Securityholders of the acquired company in a 145 transaction who were controlling persons of the acquired company or were or become controlling persons of the acquiring company must comply with all requirements of the Rule except the holding period requirement and the Form 144 notice requirement.[137]

Private-Placement Business Combinations. Rule 144 is available for resale of securities received in business combinations where the acquired company has a small number of shareholders and the facts are such (all shareholders sophisticated or represented by a sophisticated negotiator, access to information, etc.) as to establish a non-public

offering by the acquiring company. However, tacking of the period of ownership of the securities of the acquired company is not permitted.[138] Thus, except in the case of death of a non-affiliate securityholder after the transaction -- Rule 144 does not prescribe a holding period in such cases -- the two-year holding period of Rule 144 must be satisfied before securities received in a private-placement business combination can be resold under Rule 144.[139]

Rule 155 securities. The availability of Rule 144 for the sale of Rule 155 securities (convertible securities privately purchased prior to April 15, 1972 and not sold thereafter in accordance with all of the provisions of Rule 144)[140] which are effected by a subsequent recapitalization or business combination is complicated and must be determined on an individual case basis. The question to be resolved is essentially whether the new or amended convertibles carry forward the dominance of old Rule 155, so that Rule 144 will be available for their sale or whether such securities, as a result of the recapitalization or business combination, have become "securities acquired in a transaction of the character described in Rule 133" so that Rule 144 is unavailable for their sale.[141]

Related Matters

Rule 237[142] provides that persons who are not affiliates and not brokers may sell limited amounts (not more than the lesser of 1% of the outstanding or $50,000) of restricted securities of domestic issuers with respect to which Rule 144 is not available if they satisfy a five-year holding period and sell in negotiated transactions not involving brokers.[143] The purchaser in such negotiated transaction has free securities which can be sold in any manner.[144]

At the time it adopted Rule 144, the SEC amended Regulation A[145] to broaden its availability. Affiliates can now sell up to $100,000 per year under Regulation A with a maximum of $500,000 per year for the issuer and affiliates combined. Nonaffiliates can sell up to $100,000 with a maximum of $300,000 for all nonaffiliates and with no effect on the amount available to issuer and affiliates.[146]

Rule 144 is of relatively little use to institutional investors. The need for carefully drawn registration covenants continues and the SEC release on Rule 144 emphasizes

this point. In Securities Act Release No. 5226 the SEC warned that detailed disclosure of the restrictions on resale of privately placed securities must be made to purchasers. Private placement agreements should contain provisions meeting this requirement.[147]

Securities held by brokers salable only under Rule 144 are not allowed for net capital purposes.[148]

Legended securities accompanied by Rule 144 documents are not deemed good delivery under the rules of the self-regulatory agencies.[149] This sometimes results in problems when an issuer or transfer agent insists that the broker certify the sale was made in compliance with Rule 144 and the broker insists on clean certificates before effecting any sales. In general, issuers and transfer agents have been accepting brokers' assurances that the sales will be made in compliance with Rule 144 and that unsold shares will be returned for relegending, thereby avoiding the problem.[150] The SEC is continuing to consider means to reduce the paperwork in connection with Rule 144 transactions.

M. Lipton

EXHIBIT A

Rule 144 Representation Letter

Date

Dear Sirs:

In connection with my order placed with you to sell for my account as broker _____ shares of the stock of _____, in the manner permitted by Rule 144 of the Securities and Exchange Commission, I represent to you as follows:

1. I have not made, and will not make, any payment in connection with the execution of the above order to any person other than the usual and customary broker's commissions payable to you for the performance of your usual and customary broker's function in the execution of this order.

2. I have not solicited or arranged for the solicitation of, and will not solicit or arrange for the solicitation of, orders to buy in anticipation of or in connection with my order to you.

3. I herewith deliver to you a signed copy of the Form 144 which has been placed in the mail to the Securities and Exchange Commission in Washington, D.C. and, if such securities are listed, to the _____ Stock Exchange. The Form 144 is accurate and complete. The Form 144 states and I reaffirm that I do not have any material adverse information about the issuer of such securities which has not been completely disclosed. If prior to the completion of the execution of this order, I obtain any such information, I will forthwith notify you so that you may terminate sales until after it has been publicly disclosed.

4. I herewith deliver to you a certification by the issuer of such securities that it has timely filed all reports required to be filed with the Securities and Exchange Commission or a copy of its most recent quarterly or annual report to the Securities and Exchange Commission which contains a certification to that effect. I do not know or have any reason to believe that such issuer has not so complied with such filing requirements.

5. I herewith deliver to you an opinion of counsel to the effect that Rule 144 is applicable to the above sale.

6. During the six-month period preceding this order and the six-month period following this order, no sale orders for shares of such security have been or will be placed with any other broker and no other dispositions, of any kind, of such security have been or are intended to be made,

(a) by me or any person closely related to me or acting jointly or in concert with me or by any company, trust or estate in which I, together with any close relatives, have a 10% equity interest;

(b) for my account by any pledgee of shares of such security; or

(c) by any donee or trust to which I have given shares of such security.

7. I am the beneficial owner of such securities. I am not aware of any facts or circumstances indicating that I am or might be deemed an underwriter within the meaning of the Securities Act of 1933 with respect to such securities. I am not individually or together with others engaged in making a distribution of a substantial amount of such securities, and I have no intention of making or participating in such a distribution.

I am familiar with Rule 144 of the Securities and Exchange Commission and agree that you may rely upon the above statements in executing the order that I have given you.

Very truly yours,

For broker's use only:

(1) Form 144 reviewed by _____.

(2) Information as to outstanding shares and trading volume checked by _____.

(3) Certificates for shares inspected by _____.

(4) Certification as to current status of company reports reviewed by _____.

(5) Opinion of counsel reviewed by _____.

(6) Order room notified as to 144 status of sale by _____.

FOOTNOTES

1. 17 C.F.R. §230.144 (1973) [hereinafter cited as Rule 144].

2. 15 U.S.C. §§77a-77aa (1970).

3. 17 C.F.R. §230.133 (1973) [hereinafter cited as Rule 133].

4. Reg. §230.155, 1 CCH Fed. Sec. L. Rep. ¶5726.

5. 17 C.F.R. §230.145 (1973) [hereinafter cited as Rule 145].

6. Securities Act Release No. 5223 (January 11, 1972), [1971-1972 Transfer Binder] CCH Fed. Sec. L. Rep. ¶78,487 [hereinafter cited as Release 5223].

7. Securities Act Release No. 5306 (September 26, 1972), [1972-1973 Transfer Binder] CCH Fed. Sec. L. Rep. ¶79,000 [hereinafter cited as Release 5306].

8. Securities Act Release No. 5452 (February 1, 1974), [Current] CCH Fed. Sec. L. Rep. ¶79,633 [hereinafter cited as Release 5452].

9. See Release 5223, Synopsis of the Rule.

10. See Release 5306, at I; Lilac Time, Inc., letter (available October 1, 1973).

11. See Release 5306, at I.

12. See Release 5306, at VIII D.

13. Bio-Medical Sciences, Inc., letter (available November 29, 1972), [1972-1973 Transfer Binder] CCH Fed. Sec. L. Rep. ¶79,133.

14. See Release 5306, at II-IV.

15. New York Clearing House, letter (available March 14, 1973), [1973 Transfer Binder] CCH Fed. Sec. L. Rep. ¶79,343.

16. Securities Act Release No. 5243 (April 12, 1972), [1971-1972 Transfer Binder] CCH Fed. Sec. L. Rep. ¶78,701.

17. See Rule 144(a)(3); Delta Air Lines, Inc., letter (available June 9, 1972), [1972-1973 Transfer Binder] CCH Fed. Sec. L. Rep. ¶78,847.

18. 1 CCH Fed. Sec. L. Rep. ¶7200.

19. Tracor, Inc., letter (available February 19, 1973), [1972-1973 Transfer Binder] CCH Fed. Sec. L. Rep. ¶79,276.

20. Newberry Energy Corp., letter (available August 1, 1973).

21. See Davis Water and Waste Industries, Inc., letter (available November 17, 1972) in which the SEC staff did not express an opinion on this issue.

22. 15 U.S.C. §§78a-78hh (1970).

23. See Rule 144(c)(1), as amended, effective March 15, 1974.

24. See Release 5306, at VI A.

25. See, e.g. General Growth Properties, Prospectus, dated December 14, 1972, at p. 11, where the following material relating to the availability of Rule 144 sales was presented:

> "...a substantial amount of securities of General Growth is owned by private investors in General Growth. In addition, persons who may be deemed to be affiliates of General Growth within the meaning of the Securities Act of 1933 own a substantial amount of shares. Under Rule 144 adopted by the Securities and Exchange Commission the securities owned by such private investors may under certain conditions be sold in unsolicited brokerage transactions in limited amounts. In addition, shares owned by such affiliates may be saleable in such a manner under Rule 144. General Growth cannot predict when any such securities or shares may be sold under Rule 144."

26. See Release 5306, at VI A.

27. See Release 5223, Synopsis of the Rule.

28. Id.

29. Tidal Marine International Corporation, letter (available July 17, 1972), [1972-1973 Transfer Binder] CCH Fed. Sec. L. Rep. ¶78,889; see Release 5306, at VI A.

30. See Release 5223, Synopsis of the Rule.

31. See K. Miller, Venture Capital: Techniques for Increasing Liquidity with a view toward Rule 144, 29 Bus. Law. 461 (Jan. 1974).

32. 15 U.S.C. §78 o.

33. Housing Systems, Inc., letter (available July 31, 1972), [1972-1973 Transfer Binder] CCH Fed. Sec. L. Rep. ¶78,943. The staff reply went on to say, "[s]hould the company desire to continue to file reports with the Commission, the company may elect to register its securities voluntarily under Section 12(g) of the 1934 Act and comply with the filing and reporting requirements of the 1934 Act resulting from such registration.

34. 17 C.F.R. §240.15c2-11 (1973) [hereinafter cited as 15c2-11].

35. See Rule 144(c)(2) and Release 5223, Synopsis of the Rule.

36. Id.

37. See Release 5306, at VI B.

38. Id.

39. See Release 5223, Synopsis of the Rule.

40. See Rule 144(d)(1) and Release 5223, Synopsis of the Rule.

41. See Rule 144(d)(2) and Release 5223, Synopsis of the Rule.

42. See Release 5306, at VII C.

43. Id.

44. Decorator Industries, Inc., letter (available September 1, 1972), [1972-1973 Transfer Binder] CCH Fed. Sec. L. Rep.

¶78,857. This interpretation exemplifies a literal application of Rule 144(d)(2) which is operative when the purchaser, who now desires to sell under the Rule, gave the issuer some type of note or obligation.

45. Forest Oil Corporation, letter (available June 23, 1972), [1972-1973 Transfer Binder] CCH Fed. Sec. L. Rep. ¶78,862.

46. Bourns, Inc., letter (available January 28, 1974), 238 BNA Sec. Reg. & L. Rep. at p.C-2.

47. See Release 5223, Synopsis of the Rule.

48. Id.

49. See Release 5306, at VII B.

50. See SEC, DISCLOSURE TO INVESTORS - A REAPPRAISAL OF ADMINISTRATIVE POLICIES UNDER THE '33 AND '34 ACTS [WHEAT REPORT], at 172-174 (March 1969), for a discussion of the SEC staff position on fungibility as of 1969.

51. See Rule 144(d)(3) and Release 5306, at VII D.

52. See Release 5306, at VII D.

53. Dean Witter & Co., Inc., letter (available August 30, 1972), [1972-1973 Transfer Binder] CCH Fed. Sec. L. Rep. ¶78,992.

54. See Release 5223, Synopsis of the Rule.

55. Id.

56. American Garden Products, Inc., letter (available April 14, 1972), [1971-1972 Transfer Binder] CCH Fed. Sec. L. Rep. ¶78,768; see Release 5306, at VII A.

57. Communications Consultants Inc., letter (available April 14, 1972), [1971-1972 Transfer Binder] CCH Fed. Sec. L. Rep. ¶78,764; Decision Data Computer Corp., letter (available September 27, 1972).

58. See General Growth Properties, letter (available January 8, 1973); Wytex Corp., letter (available January 18, 1973; Electronic Engineering Co. of California (available January 22, 1973). In these three interpretative responses, the SEC staff indicated that the spun-off securities would be restricted and that sales would have to be made in compliance with the provisions of Rule 144 including the two year holding requirement. The letters were silent on the subjects of tacking and aggregation.

59. See Rule 144(d)(4)(A) and (B), Release 5223, Synopsis of the Rule and Release 5306, at VII E-G.

60. Id.

61. See Release 5223, Synopsis of the Rule.

62. Teleflex Incorporated, letter (available May 31, 1972), [1972-1973 Transfer Binder] CCH Fed. Sec. L. Rep. ¶78,826.

63. See Rule 144(d)(4) (D), (E) and (F) and Release 5223, Synopsis of the Rule.

64. Id.

65. See Rule 144(e)(3)(B), (C) and (D) and Release 5223, Synopsis of the Rule.

66. See PLI FOURTH ANNUAL INSTITUTE ON SECURITIES REGULATION 148-150 (1973). Compare Kaye, Scholer, Fierman, Hayes & Handler, letter (available July 31, 1972), [1972-1973 Transfer Binder] CCH Fed. Sec. L. Rep. ¶78,944 with The Chase Manhattan Bank, N.A., letter (available December 14, 1972).

67. See Rule 144(d)(4)(G) and Rule 144(e)(3)(E).

68. See Rule 144(d)(4)(G).

69. Miller, Canfield, Paddock and Stone, letter (dated September 18, 1972 - availability date not indicated), [1972-1973 Transfer Binder] CCH Fed. Sec. L. Rep. ¶79,005.

70. Intertherm, Inc., letter (available October 5, 1972), [1972-1973 Transfer Binder] CCH Fed. Sec. L. Rep. ¶79,055. The staff's position was that "[t]he definition of 'person' in Rule 144(a)(2) serves to aggregate sales of securities by the persons therein described but does not serve to permit tacking of holding periods among such persons. The only tacking provisions contained in Rule 144 are those in part (d)(4) of the Rule." See text accompanying Note 63, supra.

71. See Rule 144(e)(1)(B).

72. See Rule 144(e)(1)(A).

73. See Release 5223, Synopsis of the Rule.

74. National Stock Exchange, letter (available October 19, 1972), [1972-1973 Transfer Binder] CCH Fed. Sec. L. Rep. ¶79,065.

75. See Release 5223, Synopsis of the Rule.

76. See Release 5223, Synopsis of the Rule and Rule 144(e)(1).

77. See Rule 144(e)(2).

78. See Release 5223, Synopsis of the Rule.

79. See text accompanying Note 54, supra.

80. See Rule 144(e)(3)(F).

81. E.g.,Goldfeld, Charak, Tolins & Lowenfels, letter (available May 31, 1972), [1972-1973 Transfer Binder] CCH Fed. Sec. L. Rep. ¶78,824. The staff stated that "[t]he mere fact that both persons are officers and directors of the issuer does not require the aggregation of the shares sold by each pursuant to Rule 144 (e)(3)(F) provided that these persons do not act in concert for the purpose of selling their securities. Whether the activities of such persons constitute actions in concert is a factual matter, the resolution of which must be the responsibility of the issuer and the parties involved."

82. Damson Oil Corp., letter (available April 13, 1972), [1971-1972 Transfer Binder] CCH Fed. Sec. L. Rep. ¶78,763; Optel Corporation, letter (available June 29, 1973), [1973 Transfer Binder] CCH Fed. Sec. L. Rep. ¶79,452.

83. Aggregation of sales made by an investment adviser for his own account with sales made for discretionary accounts handled by the adviser is required. Environmental Sciences Corp., letter (available July 30, 1973), 214 BNA Sec. Reg. L. Rep. at p. C-4. It should be noted that proposed Rule 146, [1973 Transfer Binder] CCH Fed. Sec. L. Rep. ¶79,529, with respect to private placements takes the position that each client of an investment adviser is a separate person regardless of whether the investment adviser has discretionary authority.

84. New York Clearing House, letter (available October 5, 1972), [1972-1973 Transfer Binder] CCH Fed. Sec. L. Rep. ¶79,054.

85. Duryea, Carpenter & Barnes, letter (available April 12, 1972), [1971-1972 Transfer Binder] CCH Fed. Sec. L. Rep. ¶78,750.

86. See Rule 144(a)(2). See Note 70, supra, and accompanying text for the limitation on tacking between entities within the definitive of "person".

87. Debevoise, Plimpton, Lyons & Gates, letter (available November 16, 1972), 179 BNA Sec. Reg. & L. Rep. at p. C-2.

88. See Release 5306, at V.

89. See Rule 144(e)(3)(B), (C) and (D) and Release 5223, Synopsis of the Rule.

90. Saga Administrative Corporation, letter (available September 25, 1972), [1972-1973 Transfer Binder] CCH Fed. Sec. L. Rep. ¶79,027.

91. See Rule 144(e)(3)(E).

92. Id.

93. See also PLI FOURTH ANNUAL INSTITUTE ON SECURITIES REGULATION 163-164 (1973) and Release 5306, at VIII C.

94. See Rule 144(f).

95. Id.

96. See Rule 144(g)(1) and (2).

97. See Release 5306, at IX B.

98. Id.

99. See Release 5452.

100. Securities Act Release No. 5307 (September 26, 1972), [1972-1973 Transfer Binder] CCH Fed. Sec. L. Rep. ¶79,001 [hereinafter cited as Release 5301].

101. See Release 5452.

102. See Release 5306, at IX A.

103. Id.

104. Shortly after the release, Commissioner Irving Pollack, then Director of the Division of Trading and Markets, stated at an informal gathering that this was not the

position of the staff in spite of the inference which could be drawn from footnote 6 to that release which said "[t]he '160 Series' and Rule 144, as initially proposed, would also have permitted the broker to insert quotations in an inter-dealer quotation service. However, such a provision would raise questions of conflict with the anti-manipulative provisions of Rule 10b-6 under the Exchange Act and accordingly has been deleted." Further, Robert Lewis, Special Counsel, Office of Market Structure, Division of Market Regulation of the SEC stated at a recent Practising Law Institute seminar -- "The SEC Speaks in 1974, March 1 and 2, 1974" -- that normally sales pursuant to Rule 144 would not raise a question under Rule 10b-6.

105. See American Stock Exchange, Information Circular No. 61-72, May 9, 1972, [1972-1973 Transfer Binder] CCH Fed. Sec. L. Rep. ¶78,808; see also Release 5223, Background and Purpose.

106. See Rule 144(g)(3).

107. Id.

108. There are a number of different forms in current use. Appendix A is a representation letter that is short and covers the main points of concern. See also footnote 2 at page 135 of PLI FOURTH ANNUAL INSTITUTE ON SECURITIES REGULATION (1970) for sources of additional checklists in this area.

109. See Release 5306, at XI.

110. See Rule 144(h) and Release 5307.

111. See Rule 144(h) and Release 5452.

112. See Rule 144(e).

113. See Release 5306, at VIII A.

114. Dynarad, Inc., letter (available January 8, 1973), [1972-1973 Transfer Binder] CCH Fed. Sec. L. Rep. ¶79,232.

115. Reynolds Securities, Inc., letter (available June 22, 1972), [1972-1973 Transfer Binder] CCH Fed. Sec. L. Rep. ¶78,867.

116. Hecht, Hadfield, Hays, Landsman & Head, letter (available November 1, 1972), 177 BNA Sec. Reg. & L. Rep. at p. C-1.

117. See Release 5306, at X.

118. Id.

119. See Rule 144(h).

120. See Release 5306, at III.

121. See Release 5223, Introductory Section.

122. Id.

123. Id.

124. Id.

125. See Release 5223, Operation of the Rule.

126. Id.

127. E.g. Intercontinental Trailsea Corporation, letter (available October 24, 1973), [1973 Transfer Binder] CCH Fed. Sec. L. Rep. ¶79,553; International Multi-Foods Corporation, letter (available August 13, 1973), 216 BNA Sec. Reg. & L. Rep. at p. C-1. The staff, in the Interncontinental Trailsea Corporation letter, stated that "[t]he present position of the Division is that the existence of a prior sale under Rule 144 would not in itself operate to preclude subsequent public sales of restricted securities without compliance with the registration requirements of the Act or Rule 144." However, at a recent Practising Law Institute seminar -- "The SEC Speaks in 1974, March 1 and 2, 1974" -- John J. Heneghan, Deputy Chief Counsel, Division of Corporation Finance of the SEC stated that concurrent sales of restricted securities pursuant to Rule 144 and outside of the Rule may not be made.

128. E.g. Intercontinental Trailsea Corporation, letter (available October 24, 1973), [1973 Transfer Binder] CCH Fed. Sec. L. Rep. ¶79,553; Twenty First Century Communications, Inc., letter (available October 8, 1973), 223 BNA Sec. Reg. & L. Rep. at p.C-1; International Multi-Foods Corporation, letter (available August 13, 1973), 216 BNA Sec. Reg. & L. Rep. at p.C-1. The staff, in the Intercontinental Trailsea Corporation letter, after noting that sales outside of Rule 144 were not precluded (see note 127 supra) refused to issue a no-action letter "because the number of shares which Vernitron proposes to sell represents a significant percentage of the shares of Intercontinental Trailsea Corporation which are eligible to be traded..," It is understood that the Commission has determined not to follow the float doctrine.

129. Atlantic Richfield Co., letter (available May 7, 1973).

130. See Release 5223, Operation of the Rule.

131. Id.

132. Id.

133. See Securities Act Release No. 5316 (October 6, 1972), [1972-1973 Transfer Binder] CCH Fed. Sec. L. Rep. ¶79,015 [hereinafter cited as Release 5316].

134. Id.

135. Wells, Rich, Greene, Inc., letter (available June 25, 1973), 210 BNA Sec. Reg. & L. Rep. at p. C-1.

136. See Release 5316.

137. See Release 5316 and American Commonwealth Financial Corp., letter (available January 4, 1974) 235 BNA Sec. Reg. & L. Rep. at p. C-2. The staff comments with regard to resales by persons receiving a substantial amount of non-Rule 144 securities in American Commonwealth Financial Corp. demonstrated another application of the "float doctrine". See note 128 and accompanying text.

138. See Release 5316. See also Proposed Rule 146 which would treat a business combination involving 35 or less shareholders as a private placement.

139. See Rule 144(d) and Release 5316.

140. See Release 5223, Related Rules and Other Amendments.

141. See Release 5316. Compare Emons Industries, Inc., letter (available November 12, 1973), 228 BNA Sec. Reg. & L. Rep. at p. C-1, with Walter E. Heller International Corporation, letter (available October 12, 1972), 174 BNA Sec. Reg. & L. Rep. at p. C-1. In Emons, a shareholder acquired convertible securities of Gromar Planning & Development Corp. in December 1970. In December 1972, the shareholder exercised the conversion right and shortly thereafter received shares of Emons as a result of a Rule 133 merger of Gromar and Emons. The question posed to the staff was whether or not the Emons shares could be sold pursuant to Rule 144. The position of the staff was that "Rule 144 is not available for the resale of securities received in Rule 133 transactions." In Heller International, an investor acquired in November, 1968 a note of Heller & Company convertible into common stock. In 1969, Heller & Company merged into Heller International. As a result Heller International assumed Heller & Company's obligation with respect to the convertible note. Heller

International inquired of the staff whether tacking would be allowed upon the conversion of the Note into shares of Heller International. The inquiry assumed the availability of Rule 144 for the future sale of the shares of Heller International to be acquired upon conversion. The staff's response implicitly accepted the assumed availability of Rule 144, but denied tacking because the Heller International stock was received solely in consideration "for securities of a different issuer."

142. 17 C.F.R. §230.237 (1973) [hereinafter cited as Rule 237].

143. See Rule 237(a) and (b) and Release 5223, Related Rules and Other Amendments.

144. Otterbourg, Steindler, Housten & Rosen, letter (available April 14, 1972), [1971-1972 Transfer Binder] CCH Fed. Sec. L. Rep. ¶78,754. The staff stated that [s]ecurities acquired in a Rule 237 transaction are unrestricted insofar as the purchaser is concerned, and accordingly, they may be immediately resold by the purchaser, if he so desires."

145. 17 C.F.R. §§230.251- 230.262 (1973).

146. See 17 C.F.R. §230.254 (1973) and Release 5223, Related Rules and Other Amendments.

147. In the view of the SEC Staff, a provision in a private placement agreement that the investors will give notice to the company prior to a public sale and that such sales will be through a broker selected by the investors and the company would make the investors subject to the aggregation requirement of Rule 144(e)(3)(F). Optel Corporation, letter (available June 29, 1973), [1973 Transfer Binder] CCH Fed. Sec. L. Rep. ¶79,452.

148. New York Stock Exchange, Education Circular No. 373, April 21, 1972, [1972-1973 Transfer Binder] CCH Fed. Sec. L. Rep. ¶78,808.

149. National Association of Securities Dealers, Inc., Release of May 25, 1972, [1972-1973 Transfer Binder] CCH Fed. Sec. L. Rep. ¶78,808.

150. See PLI FOURTH ANNUAL INSTITUTE ON SECURITIES REGULATION 137-140 (1973). See also B. Cedarbaum, Executing Rule 144 Sales, 5 Securities Regulation 851 (Oct. 1972).