Chapter 7

Resales of Securities
Under the Securities Act

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§ 7:1 Introduction

The Securities Act registration exemption that allows most security holders to sell securities without registration is section 4(1), which covers “transactions by any person other than an issuer, underwriter, or dealer.” It is easiest to determine the availability of that exemption when a preliminary question is answered first: Are the securities proposed to be sold control securities or restricted securities? (As noted in chapter 6, securities sold under the intrastate offering exemption have their own resale limitations, which are discussed in that chapter. Those securities can be control securities, and they can become restricted securities in the hands of new owners if purchased from an affiliate of the issuer under circumstances discussed in this chapter.)

1. The Commission has issued two releases on the application of the Securities Act to securities issued under certain employee benefit plans, including the resale of those securities. See Securities Act Rel. No. 6,188 (Feb. 1, 1980); Securities Act Rel. No. 6,281 (Jan. 15, 1981).
§ 7:2  Control and Restricted Securities

Control securities are securities owned by a person who is an affiliate of the issuer. To understand the concept of control securities, it is helpful first to look to Securities Act Rule 405, which contains definitions of terms. “Affiliate” and “control” are both defined:2

Affiliate. An “affiliate” of, or person “affiliated” with, a specified person, is a person that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person specified.

Control. The term “control” (including the terms “controlling,” “controlled by” and “under common control with”) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.

To understand the concept of “control,” one must understand what the Commission means by the “power to direct or cause the direction of . . . management and policies.” Familiarity with two theories concerning control aids in that understanding. One is the idea that the unexercised ability to control is control. When, for example, a shareholder owns sufficient stock in a corporation that management is likely to be responsive to the shareholder’s requests or demands, the Commission says the shareholder is an affiliate of the corporation. It is immaterial that the shareholder pays no attention to the management of the corporation. That leads to the question of how much stock is enough to control a corporation. There is no fixed answer, but 10% equity ownership is a rule of thumb. Obviously, many shareholders who own that percentage of stock, or even a much greater percentage, are not in control of a corporation. For example, a shareholder who owns

2. Technically, the definitions contained in Rule 405 relate to terms used in Securities Act Rules 400 through 494 or terms used in a Securities Act registration form. The definitions of “affiliate” and “control,” however, are reliable definitions for general Securities Act purposes. In connection with Securities Act Rule 144, discussed below in this chapter, note that the Rule 405 definition of “affiliate” is carried over into the definition of this term contained in Rule 144(a)(1).
a large minority interest may be excluded from power by a management that holds a majority interest. When a shareholder has a 10% interest, however, the Commission will probably consider the shareholder to be an affiliate, unless someone convinces it otherwise. Securities lawyers begin worrying about control when well below this percentage of stock is involved.

The other theory to understand is that of the control group. Under that theory, a person is in control if he or she is a member of a group that controls. That theory applies to shareholders who may be considered part of a control group. A family is a classic example. The theory also is used to bring corporate officers and directors under the concept of “control.”

The concept of “restricted securities” is simpler in a way than that of “control securities.” A definition is contained in Rule 144(a)(3):

The term “restricted securities” means:

(i) Securities acquired directly or indirectly from the issuer, or from an affiliate of the issuer, in a transaction or chain of transactions not involving any public offering;

(ii) Securities acquired from the issuer that are subject to the resale limitations of Regulation D or Rule 701(c);

(iii) Securities acquired in a transaction or chain of transactions meeting the requirements of Rule 144A;

(iv) Securities acquired from the issuer in a transaction subject to the conditions of Regulation CE;

(v) Equity securities of domestic issuers acquired in a transaction or chain of transactions subject to the conditions of Rule 901 or Rule 903 under Regulation S;

(vi) Securities acquired in a transaction made under Rule 801 to the same extent and proportion that the securities held by the security holder of the class with respect to which the rights offering was made

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3. For a helpful, further introduction to the concept of control, see A.A. Sommer, Jr., Who’s “in Control”?—S.E.C., 21 Bus. Law. 559 (1966). It is an old article, but so is the concept, and this is the landmark article on the subject.

4. Regulation S is an interpretive regulation, discussed above in section 6:6.4, that details the circumstances under which offers and sales of securities outside the United States will not be subject to U.S. securities laws, including resales of the securities in the United States.
were as of the record date for the rights offering “restricted securities” within the meaning of this paragraph (a)(3);

(vii) Securities acquired in a transaction made under Rule 802 to the same extent and proportion that the securities that were tendered or exchanged in the exchange offer or business combination were “restricted securities” within the meaning of this paragraph (a)(3); and

(viii) Securities acquired from the issuer in a transaction subject to an exemption under section 4(6) of the Act.

That definition is convoluted, but it is readily understandable with a little explanation. The best way to accomplish that explanation is to break the definition into eight parts, and then discuss each part in turn.

The first part of the definition relates to “Securities that are acquired directly or indirectly from the issuer, or from an affiliate of the issuer, in a transaction or chain of transactions not involving any public offering.” That part of the definition covers securities that: (1) at one point were sold by the issuer under a section 4(2) nonpublic offering exemption (either in a statutory private placement or in a sale under Securities Act Rule 506) or a section 4(6) limited offering exemption; or (2) at one point were sold by an affiliate of the issuer in a private resale using the section 4(1) exemption (which is discussed below). The current holder may have purchased the restricted securities directly from the issuer or an affiliate of the issuer, or there may have been a chain of transactions that separate the current holder from one of those sellers. When there is such a chain of transactions, each intervening sale must be a private resale that uses the section 4(1) exemption. Thus, the straightforward thrust of this part of the definition

5. See section 6:2, “Private Placements: Section 4(2).”
6. See section 6:1.2[C], “Section 4(6).” The 2007 amendments to Rule 144 codified the staff position that securities issued in a 4(6) offering are “restricted” securities. See Rule 144(a)(3)(viii).
7. See infra section 7:5, “Private Resales of Control and Restricted Securities.”
is that purchasers in transactions under section 4(2) or 4(6) buy restricted securities.8

The second part of the definition of restricted securities covers “Securities acquired from the issuer that are subject to the resale limitations of Rule 502(d) under Regulation D or Rule 701(c).” That phrase includes all securities purchased directly from an issuer in any transaction under Rule 701(c), or under Rule 505, 506, or proposed Rule 507 of Regulation D, because all securities sold under those rules have resale restrictions.9 There is some overlap between this part of the definition and the part discussed above, because securities purchased directly from an issuer under Rule 506 of Regulation D are included under both parts.

The third part of the definition covers “Securities acquired in a transaction or chain of transactions meeting the requirements of Rule 144A.” Rule 144A is discussed at the end of this chapter. It relates to resales of securities by security holders to “qualified institutional buyers.”

The fourth part of the definition covers “Securities acquired from the issuer in a transaction subject to the conditions of Regulation CE.” Regulation CE exempts offerings and sales of securities that satisfy the conditions of section 25102(n) of the California Corporations Code, up to a total of $5 million per offering. Regulation CE provides that all securities issued under the regulation are restricted securities.

The fifth part of the definitions covers “Equity securities of domestic issuers acquired in a transaction or chain of transactions subject to the conditions of Rule 901 or Rule 903 under

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8. Securities acquired by gift, directly or indirectly from the issuer or an affiliate of the issuer, also meet the criteria for restricted securities.
9. See chapter 6 for a discussion of Regulation D and Rule 701. Rule 502(d) of Regulation D states the resale restrictions of that regulation: “Except as provided in Rule 504(b)(1), securities acquired in a transaction under Regulation D shall have the status of securities acquired in a transaction under section 4(2).” Rule 701(c)(1) provides: “Securities issued pursuant to [Rule 701] are deemed to be ‘restricted securities’ as defined in [Rule 144]; under Rule 144, all restricted securities have restrictions on resale. (Under Rule 701(c)(3), however, most resale restrictions are lifted for non-affiliates ninety days after the issuer becomes subject to the reporting requirements of the Exchange Act.)
Regulation S.” As mentioned in a footnote accompanying the
definition of “restricted securities” above, and in chapter 6,
Regulation S relates to the offshore offer and sale of securities.

Like the fifth part of the definition of restricted securities, the
sixth and seventh parts of the definition exemplify the Commis-
sion’s initiative to facilitate international securities transactions.
The sixth part relates to cross-border rights offerings made in
accordance with Rule 801 by foreign private issuers. The seventh
part covers securities subject to cross-border exchange offers and
business combinations made under Rule 802 by such issuers.
Finally, as mentioned above, the 2007 amendments to Rule 144
added an eighth part that codified a staff position that securities
issued in a 4(6) offering are restricted securities.

Before leaving the discussion of restricted securities, it will be
helpful to introduce one further concept: fungibility. Under that
concept, if a person owns both restricted and nonrestricted
securities of the same class and from the same issuer, the
nonrestricted securities take on the taint of restricted status.
That occurs because, for some purposes, securities are considered
to be fungible. In the release in which it adopted Rule 144,
however, the Commission indicated that the concept of fungibility
will not apply for the purposes of the rule.

§ 7:3 Public Resales Outside Rule 144

Rule 144, which the Commission adopted in 1972, provides a
means for selling both control and restricted securities. However,
Rule 144 is not exclusive, and sellers sometimes wish to
sell outside the rule. Also, the rule often is of no use when
lawyers are called in after the fact, since it has requirements that
may demand advance planning. In addition, the rule is mechan-
istic rather than analytic, and it provides little help in under-
standing section 4(1) and its place in the regulatory scheme.
Without that understanding, some of the provisions of the rule
are quite opaque. For these reasons, public resales of control
and restricted securities outside Rule 144 are discussed at this
point.
§ 7:3.1 Sales of Control Securities

As indicated at the beginning of this chapter, section 4(1) provides the exemption that allows most security holders to sell securities without registration. To determine when that exemption is available, it is important to determine whether the proposed transaction is “by an issuer, underwriter or dealer.”

Here are the section 2 definitions of issuer and dealer:

The term “issuer” means every person who issues or proposes to issue any security.

The term “dealer” means any person who engages either for all or part of his time, directly or indirectly, as agent, broker, or principal, in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person.

Except in an unusual situation, then, an investor who wishes to sell securities under section 4(1) is neither an issuer nor a dealer.

The consequences of holding control securities are found in the definition of “underwriter.” In its most basic provision, section 2(a)(11) defines the term to mean “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.” For an affiliate who holds securities that are control securities and not also

11. Securities Act § 2(a)(4). That portion of the definition covers typical situations. The definition goes on to provide exceptions in the case of specialized securities, such as voting-trust certificates, collateral-trust certificates, and equipment-trust certificates.
12. Securities Act § 2(a)(12). In the usual situation, the Securities Act definition of “issuer” parallels the use of the term in corporate law generally, and means the company that originally sells the security. The term “dealer” refers to one type or other of securities professional, and not to an ordinary investor.
13. The basic provision also includes persons who “participate” in acts included within the definition.
restricted securities, there would be little problem if the definition stopped there. It does not, however. The last sentence of section 2(a)(11) adds: “As used in this [section 2(a)(11)] 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 common control with the issuer.” In other words, the basic definition of “underwriter” should be treated as if it read: “The term ‘underwriter’ means any person who has purchased from an issuer or an affiliate of the issuer with a view to, or offers or sells for an issuer or an affiliate of the issuer in connection with, the distribution of any security.” “Distribution” is not defined in the statute, but it is understood essentially to be synonymous with “public offering.” For example, in an early case the Commission established that a distribution comprises “the entire process by which in the course of a public offering a block of securities is dispersed and ultimately comes to rest in the hands of the investing public.”

Because of the way in which the term “underwriter” is defined, a securities firm that handles the sale of control securities in the public markets may be considered an underwriter. If it handles the sale as a dealer (as the term is used in the securities industry, that is, if it buys the securities itself with the idea of reselling them), it may be considered to have “purchased from an issuer with a view to . . . distribution.” If it handles the transaction as a broker (that is, if it merely sells the securities for the affiliate), it may be considered to have offered or sold “for an issuer in connection with . . . the distribution.” In either case, the series of transactions by which the securities pass from the affiliate to the public is considered to constitute one distribution that is partially “by” an

14. There is nothing to prevent securities from being both control and restricted securities. In fact, that is quite common, since officers, directors, and major shareholders often acquire restricted securities from their companies.

15. See section 7:2, “Control and Restricted Securities,” supra. As can be seen, an “affiliate” is someone in one of the control relationships specified in the last sentence of section 2(a)(11).

16. See section 6:2, “Private Placements: Section 4(2),” supra, for a discussion of the statutory opposite, the nonpublic offering.

underwriter.\textsuperscript{18} When that is the case, section 4(1) is not available, and the registration requirement of section 5 is violated.

The typical sale in the trading markets by an ordinary investor is a transaction partially by a dealer (as defined in section 2(a)(12), where brokers and real-world dealers are lumped together as “dealers”) in the same sense that a similar sale by an affiliate is by an underwriter. Since section 4(1) is not available when a transaction is by an issuer, underwriter, or dealer, it may seem that section 4(1) is not available when an ordinary investor sells through a dealer. That is not the case, however.

There is in the Securities Act no exemption available to underwriters in any circumstance. There are, on the other hand, exemptions provided for dealers, both when operating as dealers in the ordinary sense of the term (section 4(3)) and as brokers (section 4(4)). It is clear that it would make little sense for the Securities Act to provide those exemptions to dealers, while not at the same time providing an exemption to the investor selling to or through the dealer. And, of course, there is no question but that the section 4(1) exemption was designed to exempt most transactions by ordinary investors. Perhaps the way to think about such a transaction involving a dealer is that the investor is covered by section 4(1) and the dealer by section 4(3) or 4(4). It may be argued that in a transaction involving an underwriter, section 4(1) is not available because neither it nor any other exemption would cover the underwriter.\textsuperscript{19}

It may appear that securities would always have to be registered before an affiliate could sell them publicly, because it may seem that such a sale always would constitute a distribution. Considering the

\textsuperscript{18} See supra text accompanying note 13.
\textsuperscript{19} It should be noted that if a securities firm comes under the definition of “underwriter,” it cannot have the benefit of a dealers’ or brokers’ exemption even though its acts in a particular transaction are those of a traditional broker or dealer. The concept of “underwriter” can be thought of as overriding those of “broker” and “dealer.” See In re Ira Haupt & Co., 23 S.E.C. 589, 600–04 (1946). In at least one unusual case, however, a court was backed into treating a firm both as a broker and an underwriter so as to give the firm a section 4(4) brokers’ exemption (in accordance with now superseded Rule 154, with which the firm had complied) while denying a section 4(1) exemption to the selling shareholders. United States v. Wolfson, 405 F.2d 779 (2d Cir. 1968).
costs involved in registration, that would mean that it would not be economically feasible for an affiliate to sell control securities except in a transaction involving at least some hundreds of thousands of dollars. That result is not what was contemplated by the drafters of the Securities Act, and the Commission has never taken that extreme position. Rather, the Commission has built some flexibility into the Securities Act by manipulating the concept of distribution.

As discussed above, the Commission in its early years of operation established that a distribution comprises “the entire process by which in the course of a public offering a block of securities is dispersed and ultimately comes to rest in the hands of the investing public.”\(^\text{20}\) Notwithstanding the expansive nature of that conception, prior to the mid 1940s the Commission allowed affiliates publicly to sell unregistered control securities in limited circumstances. Under administrative interpretations of the Commission’s staff and the implication of its orders in at least one case,\(^\text{21}\) the Commission considered no distribution to be involved when an affiliate sold control securities, on a stock exchange, in a transaction in which the selling broker limited its activities to the usual brokerage functions—and, most important, when the broker did not solicit any orders for the securities.\(^\text{22}\) Under that rather generous interpretation of “distribution,” affiliates had a ready market for their securities, as long as the amount of securities involved in a particular sale was small enough to be salable, at a reasonable price, without one or more securities firms’ drumming up buyers.

The Commission’s generosity came to an end in a 1946 case heard by the Commission sitting in its quasijudicial capacity, \(\text{In re Ira Haupt \& Co.}\)\(^\text{23}\) In that case, affiliates sold during a five-and-one-half-month period of 1943, publicly, and through a broker, stock representing approximately 38% of their company’s common stock. The ability of the broker to accomplish that sale seems to have been related to two factors. First, the prosperity of the World War II years had created a hot stock market; one in which

\(^{20}\) \text{Oklahoma-Texas Trust, 2 S.E.C. at 769.}

\(^{21}\) \text{In re United Corp., 21 S.E.C. 619 (1945).}

\(^{22}\) \text{See Ira Haupt, 23 S.E.C. at 604–05.}

\(^{23}\) \text{Id. at 589.}
sales of large blocks were possible without any unusual sales effort. Second, the company announced that it was considering an unusual and apparently economically favorable plan under which it would sell its product, whiskey, at cost to its shareholders.24

By its finding that the Haupt facts constituted a distribution, the Commission made it clear that, although it was willing to allow control securities to trickle into the market, it would not allow a flood. That decision made the securities firm that handled the sales an underwriter, which caused the section 4(1) exemption to be unavailable. In reaching that result, the Commission disregarded the contention of the securities firm that the brokers’ exemption of section 4(4), which exempts from the registration requirements of section 5 “brokers’ transactions executed upon customers’ orders . . . but not the solicitation of such orders,” was available to protect its conduct. That exemption, said the Commission, is available only to brokers selling for ordinary investors and cannot be used by a firm that is an underwriter involved in a distribution.

The problem with that case was that its facts were too far from the garden variety sale of securities by an affiliate for securities firms to get much guidance from it. The firms knew they would be underwriters if they replicated the facts of Haupt, but they did not know where the Commission would draw its line separating allowable transactions from distributions. Particularly troubling was the fact that the Commission, while failing to give guidelines, overruled the prior staff interpretations that had allowed at least small-scale market sales by affiliates through brokers.25

It was not until 1954, when it adopted Rule 154, that the Commission took definitive action on the questions left open in Haupt. That rule, which was later superseded by Rule 144, used

24. The plan appeared to be unusually favorable because World War II had made whiskey scarce and, at least in the usual channels of commerce, whiskey was subject to price controls. Largely because of the hope that the whiskey, or rights to purchase it, could be sold without price constraints, the stock’s price rose from 57 ⅞ to 98 ¼. After the Office of Price Administration announced limitations on the negotiability of the whiskey purchase rights and maximum allowable profits, the stock’s price dropped precipitously to 30% within less than a month. Id. at 592–93.

25. Id. at 605–06.
the old Commission staff interpretations as a starting point and added a numbers test to determine the existence of a distribution. Under the rule, no distribution occurred when:

1. all sales were by a broker, who performed only ordinary brokers’ functions and who received only the usual commission;
2. neither the broker, nor to the broker’s knowledge the seller, solicited any orders;
3. the broker was not aware of circumstances indicating that the sales were part of a distribution; and
4. the amount of securities sold in six months did not exceed approximately one percent of the total outstanding securities of the same class.

That rule alleviated a good bit of the problem generated by Haupt. As discussed below, its concepts were carried over into Rule 144.

§ 7:3.2    Sales of Restricted Securities

Outside of Rule 144, there never has been a corollary to Rule 154 relating to the sale of restricted securities. There are, however, administrative interpretations that allow restricted securities to be sold publicly without the sale’s being treated as a distribution. Before the adoption of Rule 144 in 1972, those interpretations had a great deal of vitality, and securities lawyers spent substantial amounts of time struggling with them. In Securities Act Release No. 5,223,26 the release in which the Commission announced Rule 144, the Commission asserted that the rule is not exclusive. Subsequently, the Commission amended the rule to provide that explicitly.27 It must be remembered, however, that the Commission almost certainly lacked the power to adopt an exclusive resale rule, and so its failure to do so tells little about its real desires in the matter. The language the Commission used in Release No. 5,223 is the best gauge of those desires, and it clearly discourages reliance on the pre-existing interpretations for sales of

27. Securities Act Rule 144, Preliminary Note 2.
restricted securities, except for securities purchased before the effective date of the rule. The tone of the release accomplishes that discouragement, as do two statements in the release relating to restricted securities purchased after the effective date of the rule: (1) the change-of-circumstances doctrine (discussed below) would have no further effect and (2) the Commission's staff would no longer issue no-action letters in connection with resales. (The Commission later relented on the latter point and will give no-action letters on resale questions that are unusual.)

Still, Rule 144 is not exclusive for restricted securities purchased after its effective date, and there may be an occasion for a holder of such securities purposely to sell them publicly outside the rule. That rarely would be wise, however. The interpretations pre-existing Rule 144 are of much greater current importance for three other reasons:

(1) they foster an understanding of the workings and effect of the rule,

(2) they may be used freely in the case of securities purchased before the effective date of the rule, and

(3) they may have to be relied upon in cases in which a holder of restricted securities, without proper planning, sells those securities publicly without following the requirements of the rule.

One interpretation relates to how long restricted securities are held before resale. That factor is important because it is thought that the length of the holding period is objective evidence of the holder’s investment intent, or the lack thereof, at the time of original purchase. A purchaser’s investment intent is important because the opposite of investment intent is “view to distribution.” And, under section 2(a)(11), purchasing with a view to distribution makes the holder an underwriter.

Alternatively, a person who sells restricted securities too soon after their purchase may be considered an underwriter under the theory that the sale is “for an issuer in connection with [a] distribution.”

28. This is another test for determining underwriter status under Securities Act § 2(a)(11).

[Soderquist, Rel. #8, 4/10] 7–13
that a distribution is not complete until the securities have come to
rest in the hands of persons who are not “merely conduits for a
wider distribution.” 29 The argument may then proceed that:

(1) the issuer knows or should know that some purchasers of
restricted securities will want to resell fairly quickly after
their purchase;

(2) a purchaser is able to resell quickly only because the issuer
does not take effective steps to prevent it (such as con-
tractual provisions prohibiting the resale and legends on
the certificates representing the securities); 30 and

(3) since the issuer is responsible for the resale, the resale will
be considered as simply a part of a larger distribution of
the securities, by the issuer, to the public through an
underwriter.

Notice that from the point of view of the purchaser who has
resold, the alternative theory is the more dangerous theory. Under
the first theory, a purchaser may have a good chance of convinc-
ing a court that he or she did not purchase securities with a view to
distribution, notwithstanding the shortness of the holding period.
Under the second theory, however, the intent of the purchaser is
irrelevant, as is the intent of the issuer.

The obvious question, of course, is how long a holding period is
required to avoid these problems. It is clear that no holding period
removes the taint of underwriter status from someone who has
purchased with a distribution in mind. In the usual situation,
however, a sufficiently long holding period dispels any notion that
a reseller of restricted securities is an underwriter, and two years
came to be viewed by securities lawyers as the minimum safe
holding period of restricted securities before a public sale. United
States v. Sherwood 31 helped in that respect by declaring that the
passage of two years between the purchase and resale involved in
the case was an “insuperable obstacle” to a finding that the reseller

29. See section 6:2, “Private Placements: Section 4(2)”; see also text
accompanying note 17, supra.
30. See text accompanying note 34 in chapter 6.
was an underwriter. Before the passage of Rule 144, the Commission’s staff responded to a multitude of no-action letter requests in connection with potential resales of restricted securities. The staff freely granted no-action letters when restricted securities were held for three years, but was much less likely to do so in the case of a two-year holding period.

The other pre-Rule 144 interpretation that must be discussed is the change-in-circumstances doctrine. Since the Commission has asserted that the doctrine should no longer be relied upon in the case of securities purchased after the effective date of Rule 144, a change in circumstances is of much less help to a post-Rule 144 purchaser than is a sufficiently long holding period. In fact, it has always been of less importance than the holding period. The thrust of the change-in-circumstances doctrine is that the inference of underwriter status that may accompany a too-short holding period can be avoided when the holder of restricted securities proves that the desire to resell arose because of changed circumstances. The Commission made it clear in Securities Act Release No. 4,552 that factors such as an advance or decline in a stock’s price or in an issuer’s earnings “are normal investment risks and do not usually provide an acceptable basis for a claim of changed circumstances.” An examination of pre-Rule 144 no-action letter requests and responses shows little staff acceptance of change-in-circumstances arguments. Perhaps the usual effect of the doctrine in the pre-Rule 144 period was to give comfort to those involved in a transaction by a security holder who barely met a minimally acceptable holding period.

§ 7:4 Public Resales Under Rule 144

As indicated by the title of Rule 144, “Persons Deemed Not to Be Engaged in a Distribution and Therefore Not Underwriters,” the rule is designed to provide a mechanism for avoiding underwriter status. As is further discussed below, with Rule 144’s

32. A court, of course, is free to disagree with the Commission on this point. At least when the equities are clearly on the side of a purchaser who has resold, that is perhaps not unlikely.

focus on what constitutes a distribution, the basic elements of the rule include a holding period for restricted securities, a limitation on the amount of securities that can be sold by affiliates during a specified period, a requirement that sales be made by affiliates in “broker’s transactions” and an information requirement. Since its adoption in 1972, the Rule has been amended several times, primarily with respect to the holding period required prior to reselling restricted securities. The rule originally required a two-year holding period, which was subsequently reduced to one year. Additionally, over the years, special rules were added for non- affiliates who had held restricted securities for three and later, two, years, allowing them greater flexibility in reselling those securities.

In 2007, Rule 144 was further amended “to increase the liquidity of privately sold securities and decrease the cost of capital for all companies without compromising investor protection.”

The 2007 amendments further reduced the holding period for restricted securities and virtually eliminated the rule’s other requirements for sales by non-affiliates.

The best starting point for an examination of Rule 144 is section (b), which gives the effect of the rule:

(1) **Non-affiliates.** (i) If the issuer of the securities is, and has been for a period of at least ninety days immediately before the sale, [an Exchange Act reporting company], any person who is not an affiliate of the issuer at the time of the sale, and has not been an affiliate during the preceding three months, who sells restricted securities of the issuer for his or her own account shall be deemed not to be an underwriter of those securities within the meaning of section 2(a)(11) of the Act if all of the conditions of paragraphs (c)(1) (current public information) and (d) (holding period) of [the rule] are met. The requirements of paragraph (c)(1) of this section shall not apply to restricted securities sold for the account of a person who is not an affiliate of the issuer at the time of the sale and has not been an affiliate during the preceding three months, provided a period of one year has elapsed since the later of the date the securities were acquired from the issuer or from an affiliate of the issuer.

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34. Securities Act Rel. No. 8,869 (Dec. 6, 2007).
(ii) If the issuer of the securities is not, or has not been for a period of at least ninety days immediately before the sale, [an Exchange Act reporting company], any person who is not an affiliate of the issuer at the time of the sale, and has not been an affiliate during the preceding three months, who sells restricted securities of the issuer for his or her own account shall be deemed not to be an underwriter of those securities within the meaning of section 2(a)(11) of the Act if the condition of paragraph (d) of [the rule] is met.

(2) Affiliates or persons selling on behalf of affiliates. Any affiliate of the issuer, or any person who was an affiliate at any time during the ninety days immediately before the sale, who sells restricted securities, or any person who sells restricted or any other securities for the account of an affiliate of the issuer of such securities, or any person who sells restricted or any other securities for the account of a person who was an affiliate at any time during the ninety days immediately before the sale, shall be deemed not to be an underwriter of those securities within the meaning of section 2(a)(11) of the Act if all of the conditions of [the rule] are met.35

With an understanding of control and restricted securities, and the theories by which sellers and brokers may be tainted with underwriter status,36 that section of the rule should be decipherable. To the uninitiated, however, it is quite opaque.37

Subsection (b)(1) relates to non-affiliates. If the issuer is a reporting company, and the securities have been held for more than one year, the shares can be resold freely. If the securities have been held for more than six months but less than one year, they may be resold freely so long as there is current public information available about the issuer—that is, the company is current in its Exchange Act reports. If the issuer is not a reporting company, the securities may not be resold until they have been held for one year, after which time they may be freely resold by a non-affiliate.

35. Rule 144(b).
36. See sections 7:2 and 7:3.1, supra.
37. See Table 7-1 at the end of this chapter for a “decision tree” that one can use to navigate Rule 144’s requirements.
Subsection b(2) relates to affiliates. The first clause covers restricted securities and the second clause relates to control securities. Notice that the focus of the first clause is on the holder of securities, while in the second it is on the person who sells securities for the holder. That, of course, fits with the earlier discussions of how the taint of underwriter status arises differently in the case of restricted and control securities.

Notice also that neither section (b)(1) nor (b)(2) provides that when the rule is followed there will not be a distribution. Both sections provide that in that circumstance there will not be deemed to be a distribution. Through that technique, the Commission has structured a rule that, although accomplishing the Commission’s desired ends, does not necessarily have to fit within general securities law theory and interpretations.

Rule 144 begins with definitions, the most important of which is that of “restricted securities.” That definition is discussed above. The next most important definition is that of “person” when that term is used to refer to the seller of securities under the rule. Here the Commission has played a little drafting trick by including other people within the definition, such as certain relatives who share the same home. This has significant importance, including for the purpose of determining whether certain limitations in the rule are complied with.

Most of the rest of the rule sets forth the various categories of requirements:

1. current public information,
2. holding period for restricted securities,
3. limitation on amount of securities sold,
4. manner of sale, and
5. notice of sale.

38. See section 7:2, “Control and Restricted Securities,” supra.
The rule can be used by affiliates only when there is publicly available specified current information concerning the issuer.\(^39\) Under the rule, it is theoretically possible for an issuer to meet that requirement simply by making public the required information. As a practical matter, it rarely is met other than by companies who are required to file reports with the Commission, usually as a result of having securities registered under the Exchange Act.\(^40\) Because of that, some companies that have not been legally required to register securities under the Exchange Act have done so to make Rule 144 available for use by their security holders.

Rule 144’s holding period itself depends upon whether the issuer of the restricted securities is a reporting company (six months) or a non-reporting company (one year). The holding period begins to run when the securities are bought and fully paid for, with provisions for adjusting the holding period (or doing away with it) in special situations, such as the creation of a holding company structure, cashless exercise of options and warrants, when securities are purchased on creditor from a security holder who is not an affiliate of the issuer, or when they are held by a donee of a gift or a beneficiary of an estate.\(^41\)

The generally applicable amount limitation for all securities sold by an affiliate is the greater of one percent of the class of securities outstanding or of the average weekly trading volume of the class of securities during the preceding four weeks, again with a number of

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39. Securities Act Rule 144(c). Note, as mentioned above, once a non-affiliate has held restricted securities of an Exchange Act reporting issuer for more than six months or of any other issuer for more than one year, the non-affiliate may make resales free of any other requirements.

40. See chapter 9, infra, for a discussion of what this involves. In 2004, in conjunction with the amendment to the Form 8-K disclosure requirements, Rule 144(c)(1) was amended to clarify that satisfaction of the “current public information” condition does not require a company to have filed all Form 8-K reports during the twelve-month period preceding such a sale of securities.

41. Securities Act Rule 144(d). When restricted securities are resold in a private transaction, the holding period of the new owner generally begins when the securities were purchased from the issuer or an affiliate of the issuer. Id. Some changes were made in 2007 that codified prior staff positions on certain issues with respect to calculation of the holding period.
provisions for special situations. Generally, securities must be sold by an affiliate in a broker’s transaction or directly to a market maker and no solicitation of buyers or extraordinary commissions is allowed. Unless sales during a three-month period do not exceed 5,000 shares or other units of securities, or a total sales price of $50,000, an affiliate usually is required to file a notice of sale with the Commission. Form 144, which is a simple fill-in-the-blanks form, is used for that purpose.

Rule 144 is complex because it is detailed and covers a variety of circumstances, and also because it combines provisions relating to control and restricted securities. For those familiar with the rudiments of the section 4(1) exemption, which is what compliance with the rule secures, understanding the rule presents no problem. Actually using the rule requires something else: a knowledge of the practices that have developed to effect its compliance. The typical task for a lawyer representing a seller, in addition to being personally satisfied that the rule is available, is determining what is required by the issuer’s lawyers and by the securities firm that is to handle the sale. Many securities firms, transfer agents, and law firms have worked out a detailed set of requirements, sometimes even providing drafts of documents. Usual requirements, especially in the case of restricted securities, include letters or certificates attesting to the facts supporting Rule 144 compliance, along with an opinion of counsel that the requirements of the rule are met. Handling all the details often takes some days, and legal fees typically run at least some hundreds of dollars. For those reasons, the rule is not so useful as it may at first seem for the sale of a relatively small amount of securities.

42. Securities Act Rule 144(e). The volume limitations do not apply to resales of restricted securities by non-affiliates.

43. Securities Act Rule 144(f), (g). These “manner of sale” restrictions do not apply to debt securities sold or certain “riskless principal transactions” by affiliates or to any resale by non-affiliates.

44. Securities Act Rule 144(h)(1). The form may be, but is not required to be, filed electronically under the Commission’s EDGAR system.

The Commission, in its 2007 proposals to amend Rule 144, also solicited comment on how best to coordinate the filing of a Form 144 by affiliates with the filing responsibilities under section 16 of the Exchange Act, such as delaying the Form 144 filing deadline to coincide with the deadline for filing a Form 4 and/or permitting persons who are subject to section 16 to meet their Form 144 filing requirement by filing a Form 4. The Commission did not adopt these coordination proposals but indicated that it could issue a separate release dealing with this issue.

§ 7:5 Private Resales of Control and Restricted Securities

When certain conditions are satisfied, the section 4(1) exemption can be available for a private offering of control or restricted securities.\(^46\) Here the analysis proceeds in the same way that it does for the public resale of control and restricted securities. That analysis leads to the conclusion that, as in the case of a public sale, the troublesome question is whether an underwriter will be involved in a proposed transaction.\(^47\) Also as with public resales, that question is answered by answering a more basic question: Will the transaction involve a distribution?\(^48\) When there is no distribution, there is no underwriter, since the definition of “Underwriter” in section 2(a)(11) is tied exclusively to a distribution. When there is no underwriter involved in a sales transaction, the section 4(1) exemption is available to any security holder other than the issuer or a dealer.

Since “distribution” essentially is synonymous with “public offering,”\(^49\) the necessity for doing an exempt private resale of control or restricted securities is that the sale not involve a public offering. It is apparent that there is substantial learning available on the question of what constitutes a public offering and its

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46. Good starting points for work in the area are The Section “4(1½)” Phenomenon: Private Resales of “Restricted” Securities, 34 BUS. LAW. 1961 (1979), and Schneider, Section 44(1½)—Private Resales of Restricted or Control Securities, 49 OHIO ST. L.J. 501 (1988).
47. See section 7:3, “Public Resales Outside Rule 144” and section 7:3.2, “Sales of Restricted Securities,” supra.
49. Id.
statutory opposite, the section 4(2) private placement. What must be done, then, is an offering that, although technically under section 4(1), has some of the basic characteristics of a section 4(2) transaction. For those reasons, private resales of control or restricted securities often are referred to as section 4(1½) transactions.

In the case of restricted securities, the seller needs to avoid assuming the status of an underwriter. Rule 144A establishes a safe harbor for certain private resales of restricted securities, by providing that the seller in a transaction qualified under the rule will not be deemed to be an underwriter. If the seller is a dealer, Rule 144A(c) provides also that the dealer will be deemed not to be a participant in a distribution of the securities covered by the rule. The rule is available only if the proposed buyer is a “qualified institutional buyer” or an institution that the seller and any person acting on its behalf reasonably believe to be a “qualified institutional buyer.” The rule is not available, however, for the resale of securities (1) that, at the time of their issuance, were of the same class of securities listed on a national securities exchange or quoted in a U.S. automated inter-dealer quotation system or (2) that were issued by one of enumerated types of companies that are or are required to be registered under the Investment Company Act of 1940. For transactions to be covered by Rule 144A, the seller and any person acting on its behalf must take reasonable steps to ensure that the purchaser is aware that the seller may rely on the exemption from the registration requirements provided by the

50. See section 6:2, “Private Placements: Section 4(2),” supra.
51. Securities Act Rule 144A(b).
52. Securities Act Rule 144A(a)(1) basically provides that a “qualified institutional investor” is any of a list of institutions (such as certain insurance companies, investment companies, business development companies, employee benefit plans, trust funds, educational or charitable organizations, corporations, partnerships, business trusts, and investment advisers), “acting for its own account or the accounts of other qualified institutional buyers, that in the aggregate owns and invests on a discretionary basis at least $100 million in securities of issuers that are not affiliated with the entity, plus certain dealers.”
53. Securities Act Rule 144A(d)(3). This part of the rule details special requirements for determining when securities are of the “same class.”
54. Id.
rule.\textsuperscript{55} Also, in the case of securities issued by certain companies (basically those that are not subject to the reporting requirements of the Exchange Act), the rule provides that, upon request, the purchaser has a right to obtain from the seller, and the seller and the purchaser have a right to obtain from the issuer, certain basic information about the issuer.\textsuperscript{56} The specified information, which must be “reasonably current,” consists of “a very brief statement of the nature of the business of the issuer and the products and services it offers; and the issuer’s most recent balance sheet and profit and loss and retained earnings statements, and similar financial statements for such part of the two preceding fiscal years as the issuer has been in operation (the financial statements should be audited to the extent reasonably available).” The rule also provides that the requested information must be received by the purchaser at or prior to the time of sale.\textsuperscript{57}

For private resales of restricted securities that fall outside Rule 144A, the seller must structure the transaction so that the seller is (1) not an underwriter and (2) cannot be made an underwriter by actions of the purchaser.\textsuperscript{58} Analytically, that would seem to involve offering and selling only to persons who can meet the requirements for purchasing in a private placement.\textsuperscript{59} It further involves structuring the transaction in such a way that the new purchasers

\begin{footnotesize}
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\item \textsuperscript{55} Securities Act Rule 144A(d)(2).
\item \textsuperscript{56} Securities Act Rule 144A(d)(4).
\item \textsuperscript{57} Id.
\item \textsuperscript{58} Note that, under Rule 144 after a six-month/twelve-month (see section 7:4 above) holding period that depends upon whether the issuer is a reporting company, non-affiliates who have had that status for at least three months can sell restricted securities “publicly.” For example, the sale can be in a face-to-face transaction. An important consideration here is the fact that, upon such a sale, the securities cease to be restricted securities when they go into the hands of their new owner. See, e.g., Republic Resources Corp., SEC No-Action Letter, [1987–1988 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,669 (Jan. 13, 1988).
\item \textsuperscript{59} But see, as a starting point, no-action letters cited in The Section “4(1\(\frac{1}{2}\))” Phenomenon: Private Resales of “Restricted” Securities, supra, note 43, which show some flexibility in that respect. Those letters also disclose some ambiguity about the information that must be provided to purchasers in a section 4(1\(\frac{1}{2}\)) transaction.
\end{itemize}
\end{footnotesize}
cannot resell in a nonexempt transaction, since that will likely destroy the exemption or exemptions that supported sales earlier in the chain.\textsuperscript{60} That mainly involves having the new purchaser agree to contractual restrictions, of the type used in private placements,\textsuperscript{61} and ensuring that the certificates representing the securities that are sold are legended against resale without an exemption.

The situation is somewhat different in the case of control securities. In that case, the seller must ensure that the purchaser is not an underwriter. Theoretically, at least, it seems that the purchaser would not have to meet any requirements (such as investment sophistication), except those that go to the question of underwriter status. At a minimum, the seller would want to obtain a representation that the purchaser is not purchasing with a view to distribution and, in addition, would want to insist on the same type of contractual restrictions and legends on certificates that are needed in the case of restricted securities.

There are issues about what information must be provided by a seller of restricted or control securities in a private resale. A seller needs to insure that he or she does not violate Securities Act section 17(a) or Exchange Act Rule 10b-5 by selling while in possession of material inside information.\textsuperscript{62} If an affiliate sells securities of an Exchange Act reporting company, no information should have to be disclosed, unless there is material information that the issuer has not disclosed publicly, at least so long as the seller does not know that the purchaser lacks knowledge of disclosed information.\textsuperscript{63} If the issuer has not publicly disclosed material information, an affiliate could sell privately by disclosing the inside information to the purchaser. In that case, the purchaser

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\item See section 7:2, “Control and Restricted Securities,” supra.
\item It should be realized that because of restrictions contained in a contract between the issuer and the person who currently wishes to sell, the issuer typically will have to agree that there is an exemption available for a planned private resale.
\item Section 17(a) is covered in chapter 8 and Rule 10b-5 in chapter 12.
\item The issue here is that “fraud” may at least be alleged if the seller knows that the purchaser has failed to learn of disclosed information. An affiliate would not want to get before a jury on the issue of fraud if it appears that he or she took advantage of a purchaser’s lack of knowledge.
\end{enumerate}
\end{footnotesize}
would want to obtain a nondisclosure agreement. If an affiliate sells securities in a privately held company, the seller needs to provide enough information so that the purchaser is in possession of all material information about the issuer, so as to avoid section 17(a) and Rule 10b-5 questions. If the purchaser is also an affiliate, of course, the seller usually would have to provide no or very little information. If the purchaser is not an affiliate, the only safe way to avoid liability is to make sure the purchaser has the kind of information that the purchaser would receive in a section 4(2) private placement (or, in the case of institutional buyers, that they have access to the information). In any case where information is provided, care dictates that it be provided in writing.

There is still at least one important question to be answered here: what restrictions, other than contractual ones, are there on the further resale of securities involved in a private resale transaction? The answer to that question leads back to the beginning of this chapter. The first inquiry is whether the securities are, in the hands of their new owner, either control or restricted securities. They are control securities when the new owner is an affiliate of the issuer. If the securities are control securities, they are subject to the resale limitations discussed elsewhere in this chapter. To determine when the securities are restricted securities, the definition in Rule 144(a) must be examined. Under the explicit language of that definition all securities purchased in a Rule 144A transaction are restricted securities.

Many restricted securities sold in a private resale transaction outside Rule 144A are restricted securities in the hands of their new owner, since often these securities are acquired in a transaction that fits them within the definition of restricted securities in Rule 144(a). For example, they may be securities that are acquired directly or indirectly from the issuer, or from an affiliate of the issuer, in a transaction or chain of transactions not involving any public offering.
Table 7-1 RULE 144 DECISION TREE

Is the seller an "affiliate" of the issuer?

- Yes
  - Are the securities "restricted"?
    - Yes
      - Issuer a current '34 Act reporting company?
        - Yes
          - Unlimited resales
        - No
          - How long have securities been held?
            - Less than 6 months
              - "Dribble" sales* permitted
            - 6 months or more
              - 1 year or more
              - Issuer a current '34 Act reporting company?
              - Yes
                - "Dribble" sales* permitted
              - No
                - No sales
    - No
      - How long have securities been held?
        - Less than 1 year
          - 1 year or more
          - Issuer a current '34 Act reporting company?
          - Yes
            - "Dribble" sales* permitted
          - No
            - No sales
        - 6 months to 1 year
          - Less than 6 months
          - No sales
          - Issuer a current '34 Act reporting company?
          - No
            - No sales

- No
  - Has the seller been an "affiliate" of the issuer during the preceding 3 months?
    - Yes
      - Are the securities "restricted"?
        - Yes
          - Unlimited resales
        - No
          - How long have securities been held?
            - Less than 6 months
              - "Dribble" sales* permitted
            - 6 months or more
              - 1 year or more
              - Issuer a current '34 Act reporting company?
              - Yes
                - "Dribble" sales* permitted
              - No
                - No sales
    - No
      - Are the securities "restricted"?
        - Yes
          - Unlimited resales
        - No
          - How long have securities been held?
            - Less than 6 months
              - "Dribble" sales* permitted
            - 6 months or more
              - 1 year or more
              - Issuer a current '34 Act reporting company?
              - Yes
                - "Dribble" sales* permitted
              - No
                - No sales

* "Dribble" sales refers to the ability to sell within the limits of Rule 144—e.g., volume limitations, manner of sale ("broker's transaction") limitations when required, filing of a Form 144, and the requirement that there be "current public information."