

**SECURITIES AND EXCHANGE
COMMISSION****17 CFR Part 230**

[Release No. 33-7390; File No. S7-17-95]

RIN 3235-AG53

**Revision of Holding Period
Requirements in Rules 144 and 145**AGENCY: Securities and Exchange
Commission.

ACTION: Final rules.

SUMMARY: The Commission is amending the holding period requirements contained in Rule 144 to permit the resale of limited amounts of restricted securities by any person after a one-year, rather than a two-year, holding period. Also, the amendments permit unlimited resales of restricted securities held by non-affiliates of the issuer after a holding period of two years, rather than three years. These changes should reduce the cost of capital, particularly for small business issuers. Parallel changes to Rule 145 also are being adopted.

EFFECTIVE DATE: The changes to §§ 230.144 and 230.145 will be effective April 29, 1997.

FOR FURTHER INFORMATION CONTACT: Elizabeth M. Murphy, Office of Chief Counsel, Division of Corporation Finance at (202) 942-2900, 450 Fifth Street, N.W., Washington, D.C. 20549.

SUPPLEMENTARY INFORMATION: On June 27, 1995, the Commission published for comment a release proposing amendments to Rule 144,¹ the non-exclusive safe harbor from registration for resales of restricted securities and securities held by affiliates of the issuer, under the Securities Act of 1933 (the "Securities Act").² These proposals are being adopted today. As amended, the holding period for resales of limited amounts of restricted securities by any person has been reduced from two years to one year. The holding period for resales by non-affiliates without compliance with the provisions of the rule has been reduced from three years to two years.³ The Commission also is adopting parallel changes to Securities

Act Rule 145.⁴ The revised holding periods are applicable to all securities, whether acquired before or after the effective date of the changes announced today. The Commission today also is publishing a companion release soliciting comment on additional changes to Rule 144 that would simplify the rule's operation and further modify the Rule 144 holding periods.⁵

I. Discussion

Today, for the first time since the adoption of Rule 144 in 1972,⁶ the Commission is adopting amendments to shorten the holding period that must be satisfied before limited resales of restricted securities may be made by affiliates and non-affiliates in reliance upon the rule. As had been proposed, the amendments reduce that holding period from two years to one year. Also as proposed, the amendments reduce the length of the holding period that non-affiliates must hold restricted securities before making unlimited resales of such securities from three years to two years.

The Commission is adopting the shortened holding periods based on its more than 20 years of experience with Rule 144 and the favorable public comments received on the 1995 Release. Shorter holding periods should reduce the cost of capital. This particularly should benefit smaller companies, which often sell securities in private placements. A shorter holding period should lower the illiquidity discount given by companies raising capital in private placements and increase the usefulness of the Rule 144 safe harbor.

Shorter Rule 144 holding periods have been recommended by participants in the SEC Government-Business Forum on Small Business Capital Formation.⁷ The Commission believes that the shorter holding periods will not diminish investor protection, since they are sufficiently long to ensure that resales under Rule 144 will not facilitate indirect public distributions of unregistered securities by issuers or affiliates.

Rule 144 provides an objective safe harbor for resales of restricted securities and control securities. Restricted

securities generally are securities issued in private placements;⁸ control securities are securities owned by affiliates of the issuer, however acquired. The rule provides that a person complying with its terms and conditions will not be engaged in a distribution of securities and, thus, not be an "underwriter"⁹ for purposes of the Section 4(1)¹⁰ exemption from Securities Act registration for ordinary trading transactions.¹¹

The rule includes holding periods for restricted securities to establish that the holder did not purchase with a view to an unregistered public distribution. Pursuant to the amendments adopted today, all restricted securities must be held at least one year before resale, measured from the date the securities are acquired from the issuer or an affiliate. For restricted securities held between one and two years, other provisions of the rule require that current public information be available about the issuer, that limited amounts of securities be resold, that the resales be effected in ordinary brokerage transactions or directly with a market-maker, and that a notification of the resale be filed with the Commission. Under the amendments, after a two-year holding period, restricted securities may be resold by non-affiliates without compliance with any of these provisions.

At the suggestion of commenters, the Commission also is adopting parallel changes to the holding period provisions included in Securities Act Rule 145(d),¹² which governs the resale of securities received in connection with reclassifications, mergers,

⁸The term "restricted securities" is defined in Rule 144(a)(3) [17 CFR 230.144(a)(3)] and includes: securities acquired from the issuer or an affiliate in a transaction or chain of transactions not involving a public offering; securities acquired from the issuer and subject to resale limitations under Regulation D [17 CFR 230.501-508] or Rule 701 [17 CFR 230.701]; securities subject to the Regulation D resale limitations and acquired in a transaction or chain of transactions not involving a public offering; securities acquired in a transaction or chain of transactions meeting the requirements of Rule 144A [17 CFR 230.144A]; and securities acquired from the issuer that are subject to the resale limitations of Regulation CE (§ 230.1001). Separate releases being issued today propose to amend the term to also include securities issued pursuant to an exemption under Securities Act Section 4(6) [15 U.S.C. 77(d)(6)] as well as equity securities of domestic issuers, and of foreign issuers where the primary market for such securities is in the United States, sold under Regulation S [17 CFR 230.901-230.904 and Preliminary Notes]. Release Nos. 33-7391 and 33-7392 (February 20, 1997).

⁹ See Section 2(11) of the Securities Act [15 U.S.C. 77b(11)].

¹⁰ 15 U.S.C. 77(d)(1).

¹¹ Section 4(1) exempts transactions by persons who are not issuers, underwriters or dealers.

¹² 17 CFR 230.145(d).

¹ 17 CFR 230.144. Release No. 33-7187 (June 27, 1995) [60 FR 35645] ("1995 Release"). Comment letters are available for inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, N.W., Washington, D.C. 20549. Interested persons should refer to File No. S7-17-95.

² 15 U.S.C. 77a *et seq.*

³ Conforming changes also have been made in paragraph (e)(3) of Rule 144 relating to determination of the limits on amounts resalable by pledgees, donees and trusts, reducing the period from two years to one year after the event of pledge, default, donation, or trust acquisition.

⁴ 17 CFR 230.145.

⁵ Release No. 33-7391 (February 20, 1997).

⁶ Release No. 33-5223 (January 11, 1972) [37 FR 591].

⁷ See, e.g., Final Reports of the SEC Government-Business Forum On Small Business Capital Formation (June 1992, 1993, 1994 and February 1995). The Small Business Incentive Act of 1980 directs the Commission to host this annual meeting for the purpose of reviewing the "current status of problems and programs relating to small business capital formation." Pub. L. No. 96-477, Section 503, 94 Stat. 2275, 2292-93 (1980).

consolidations and asset transfers. Rule 145(c)¹³ provides that any party to a transaction covered by Rule 145 (other than the issuer), or any person who is an affiliate of such party at the time the transaction is submitted for vote or consent, who publicly resells securities of the issuer acquired in connection with that transaction will be deemed to be engaged in a distribution, and therefore to be an underwriter of those securities, except where the securities are resold in accordance with Rule 145(d). The holding period requirements of Rule 145(d) correspond to the holding periods for resales in Rule 144.

The 1995 Release also requested comment on whether the holding period or other requirements in Rule 144 should be revised to address the concern that holders utilizing certain new hedging strategies may not be economically "at risk" during the holding period. This issue is addressed further by the Commission in the companion release soliciting comment on additional changes to Rule 144.¹⁴

II. Cost-Benefit Analysis

The Commission believes, and the public comments support the view, that reduction in the Rule 144 holding periods will reduce compliance burdens and costs without significant impact on investor protection. The Commission also believes that the action being taken will promote market efficiency, investment and capital formation by reducing the liquidity costs of holding restricted securities and reducing issuers' cost of raising capital through the sale of restricted securities.

Issuers typically must offer restricted shares at a discount relative to prices at which their unrestricted shares trade in the public markets. In recent years, this discount has generally ranged from 20–50%. The discount compensates the purchasers of the restricted shares for their inability to resell the securities before completion of the requisite holding period. Since the amendments shorten the holding period, the purchasers will demand a smaller liquidity premium and issuers will be able to sell their restricted securities at higher prices.

The actual amount by which the annual volume of restricted shares privately placed and resales of restricted securities will increase cannot be reliably predicted. The actual size of these increases will depend on the response of investors and issuers to the shortened holding period requirements.

III. Final Regulatory Flexibility Analysis

This Final Regulatory Flexibility Analysis has been prepared in accordance with Section 604 of the Regulatory Flexibility Act,¹⁵ and relates to the adoption of amendments to Rules 144 and 145 under the Securities Act.

Reasons for, and Objectives of, Proposed Action

Rule 144 provides a safe harbor for the resale of restricted and control securities. It sets forth conditions which, if satisfied, permit persons who hold such securities to sell them publicly without registration and without being deemed underwriters. One of the conditions is that the securities must be held for a specified period of time before any sales may be made.

Rule 145 governs the offer or sale of securities received in connection with reclassifications, mergers, consolidations and asset transfers. It provides that any party to a transaction covered by the rule (other than the issuer), or any person who is an affiliate of such party at the time the transaction is submitted for vote or consent, who publicly offers or sells securities of the issuer acquired in connection with such a transaction will be deemed to be engaged in a distribution, and therefore to be an underwriter of the securities, except where the securities are resold in accordance with Rule 145(d). Rule 145(d) imposes holding periods that correspond to the holding periods for resales in Rule 144.

The Commission has determined to adopt amendments to Rules 144 and 145 to shorten the holding period requirements. The amendments to Rule 144 permit the limited resale of restricted securities after a one-year, rather than a two-year, holding period. They also permit unlimited resales of restricted securities held by non-affiliates of the issuer after a holding period of two, rather than three years.

The Commission believes that shorter holding periods should reduce the costs of capital formation, particularly for smaller companies, by reducing the illiquidity discount companies must give when raising capital in private placements. Investors will also be able to recoup their capital more quickly.

The Commission believes that the shorter holding periods will not diminish investor protection, since they are sufficiently long to ensure that resales under Rule 144 will not facilitate indirect public distributions of

unregistered securities by issuers or affiliates. The amendments were recommended by small business representatives participating in the SEC Government-Business Forum on Small Business Capital Formation.

Significant Issues Raised by the Public Comments

The Commission received five requests for the Initial Regulatory Flexibility Analysis prepared in connection with the 1995 Release, and no public comments specifically addressed that analysis. The Commission received public comment, however, on the amendments to the Rule 144 and 145 holding periods. The commenters agreed that shorter holding periods should reduce the costs of capital formation and be of particular benefit to small companies, which often sell securities in private placements. At the suggestion of commenters, the Commission is soliciting comment on further changes to the holding periods in the companion proposing release.

Small Entities Subject to Requirements

The reduced holding periods will affect both small entities that issue restricted or control securities and small entities that hold such securities. The term "small business," when used with reference to an issuer, other than an investment company, is defined by Securities Act Rule 157 as an issuer whose total assets on the last day of its most recent fiscal year were \$5 million or less and is engaged or proposing to engage in small business financing. An issuer is considered to be engaged in small business financing if it is conducting or proposes to conduct an offering of securities that does not exceed the dollar limitation prescribed by Section 3(b) of the Securities Act. Exchange Act Rule 0–10¹⁶ defines small entity when used with reference to an issuer or person, other than an investment company, to mean an issuer or person that, on the last day of its most recent fiscal year, had total assets of \$5,000,000 or less.¹⁷

The Commission is aware of approximately 1,019 Exchange Act reporting companies that currently satisfy the definition of "small business" under Rule 157 and may be affected by the reduced holding periods. The reduced holding periods also may affect small businesses that are not subject to Exchange Act reporting requirements. The Commission is unable to determine the number of such

¹³ 17 CFR 230.145(c).

¹⁴ Release No. 33–7391 (February 20, 1997).

¹⁵ 5 U.S.C. § 604.

¹⁶ 17 CFR 240.0–10.

¹⁷ There is no comparable definition of "person" under the Securities Act.

small businesses due to the absence of filings with the Commission by such companies.

An estimated 3,800 entities, excluding natural persons, annually file Form 144 based upon a staff review of a sample of Form 144 filings. The Commission has no basis for estimating the number of these entities that are small entities under the definition of person in Exchange Act Rule 0-10, because Form 144 does not require that such information be provided and such information is not otherwise available to the Commission.

The amendments are expected to affect favorably businesses of all sizes, but particularly small businesses, by reducing the cost of capital formation through private placements of unregistered securities and allowing investors to recoup their capital more quickly. Issuers generally must sell unregistered stock at a discount; the amount of the discount should be reduced as a result of the shortening of the holding periods.

Reporting, Recordkeeping and Other Compliance Requirements

Because of the nature of the amendments, the Commission does not expect that reporting, recordkeeping and compliance burdens will increase materially as a result of the changes. Indeed, the Commission expects that compliance burdens will decrease as a result of the reduced holding periods because sellers will not have to wait as long to resell securities in reliance on Rule 144.

Nevertheless, the Commission expects the annual volume of Form 144 filings to increase as a result of the reductions in the required holding periods and the increased incentive for issuers to raise capital through sales of unregistered securities subject to Rule 144. The Commission has no basis for reliably estimating this increased volume of filings. The average cost associated with filing a Form 144 is approximately \$200 based on a compensation rate of \$100 per hour and a task time of two hours per filing.

Steps Taken To Minimize Significant Economic Impact on Small Entities

The amendments adopted today will benefit issuers of all sizes since a reduction in the length of the Rule 144 and 145 holding periods will reduce issuers' cost of capital. The amendments will also benefit all holders of restricted securities, who will be able to recoup their capital more quickly pursuant to the reduced holding periods. Specific consideration was given to small businesses in the formulation of these

amendments; as stated above, the amendments were recommended by small business representatives.

The Commission considered a number of significant alternatives to the amendments being adopted that might minimize the significant economic impact on small entities. One alternative was to shorten the holding periods even further. Comment is being solicited on that alternative in a release proposing changes to Rules 144, 145 and Form 144.¹⁸ The Commission intends to give further consideration to the treatment of small entities in connection with the Rule 144 proposing release.

The Commission also considered the types of alternatives set forth in section 603 of the Regulatory Flexibility Act to minimize the economic impact of the amendments on small entities: (1) the establishment of differing reporting compliance or reporting timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the amendments, or any part thereof, for small entities. Because the amendments benefit all issuers and holders of restricted securities, differing compliance timetables for small entities would not be appropriate. Neither could the compliance requirements of the amendments be clarified or simplified further for small entities. Finally, the amendments being adopted do not use design standards, and an exemption from the amendments for small entities would not be desirable or consistent with the stated objectives of the applicable statutes.

IV. Statutory Basis

The amendments to Rule 144 and 145 are being adopted pursuant to sections 2(11), 4(1) and 19(a) of the Securities Act.

List of Subjects in 17 CFR Part 230

Reporting and recordkeeping, Securities.

Text of the Amendments

For the reasons set out above, title 17, chapter II of the Code of Federal Regulations is amended as follows:

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

1. The authority citation for Part 230 continues to read in part, as follows:

Authority: 15 U.S.C. 77b, 77f, 77g, 77h, 77j, 77s, 77sss, 78c, 78d, 78l, 78m, 78n, 78o, 78w, 78ll(d), 79t, 80a-8, 80a-29, 80a-30, and 80a-37, unless otherwise noted.

* * * * *

2. Section 230.144 is amended by revising paragraphs (d)(1), (e)(3)(ii), (e)(3)(iii), (e)(3)(iv) and (k) to read as follows:

§ 230.144 Persons deemed not to be engaged in a distribution and therefore not underwriters.

* * * * *

(d) * * *

(1) *General rule.* A minimum of one year must elapse between the later of the date of the acquisition of the securities from the issuer or from an affiliate of the issuer, and any resale of such securities in reliance on this section for the account of either the acquiror or any subsequent holder of those securities. If the acquiror takes the securities by purchase, the one-year period shall not begin until the full purchase price or other consideration is paid or given by the person acquiring the securities from the issuer or from an affiliate of the issuer.

* * * * *

(e) * * *

(3) * * *

(ii) The amount of securities sold for the account of a pledgee thereof, or for the account of a purchaser of the pledged securities, during any period of three months within one year after a default in the obligation secured by the pledge, and the amount of securities sold during the same three-month period for the account of the pledgor shall not exceed, in the aggregate, the amount specified in paragraph (e) (1) or (2) of this section, whichever is applicable;

(iii) The amount of securities sold for the account of a donee thereof during any period of three months within one year after the donation, and the amount of securities sold during the same three-month period for the account of the donor, shall not exceed, in the aggregate, the amount specified in paragraph (e) (1) or (2) of this section, whichever is applicable;

(iv) Where securities were acquired by a trust from the settlor of the trust, the amount of such securities sold for the account of the trust during any period of three months within one year after the acquisition of the securities by the trust, and the amount of securities sold during the same three-month period for the account of the settlor, shall not exceed, in the aggregate, the amount specified in paragraph (e) (1) or (2) of this section, whichever is applicable;

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¹⁸Release No. 33-7391 (February 20, 1997).

(k) *Termination of certain restrictions on sales of restricted securities by persons other than affiliates.* The requirements of paragraphs (c), (e), (f) and (h) 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 at least two years has elapsed since the later of the date the securities were acquired from the issuer or from an affiliate of the issuer. The two-year period shall be calculated as described in paragraph (d) of this section.

3. By amending § 230.145 by revising paragraphs (d)(2) and (d)(3) to read as follows:

§ 230.145 Reclassification of securities, mergers, consolidations and acquisitions of assets.

* * * * *

(d) * * *

(2) Such person or party is not an affiliate of the issuer, and a period of at least one year, as determined in accordance with paragraph (d) of § 230.144, has elapsed since the date the securities were acquired from the issuer in such transaction, and the issuer meets the requirements of paragraph (c) of § 230.144; or

(3) Such person or party is not, and has not been for at least three months, an affiliate of the issuer, and a period of at least two years, as determined in accordance with paragraph (d) of § 230.144, has elapsed since the date the securities were acquired from the issuer in such transaction.

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By the Commission.

Dated: February 20, 1997.

Margaret H. McFarland,

Deputy Secretary.

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