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## Selling stock in the U.S. under Rule 144

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Say you own shares of a company traded on the Nasdaq, the NYSE or some other U.S.-based exchange. You bought these shares from the company, through a private placement, or got them for services rendered to the company. Your shares have not been registered with the U.S. Securities and Exchange Commission, yet, you are interested in selling them in the U.S.

Are you allowed to do it? and how?

The United States Federal Securities Act of 1933 generally requires that securities must be registered with the SEC before being offered or sold in the U.S. This requirement is designed to facilitate the flow of information to the public for the sake of making informed investment decisions.

In order to resell shares, the shareholder must register the shares under the Act. Alternatively, the sale must be exempt from registration, as provided by the Act.

The following does not apply to the resale of shares of a foreign private issuer originally sold outside the U.S. It does apply to any resale of shares where the original sale was made either by a foreign company inside the U.S., or a U.S. company - whether the original sale was made inside or outside the U.S.

### **Applicable exemptions**

When registration of the shares for resale is not feasible, due to the high costs involved in filing a registration statement or for some other reason, sellers should look for exemptions.

There are several possibilities, which are generally not available to anyone acting as an underwriter of securities.

The term underwriter is broadly defined in the Act 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, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking”.

While interpreting this definition, the SEC has usually focused on the phrase "...with a view to...distribution", to read: Anyone who purchase securities with a view to future distributions cannot enjoy the exemptions provided under the act.

For example, an investment bank that arranges to sell the issuer's securities to the public is clearly an underwriter. But individuals who are not professional brokers may also be considered underwriters for the purposes of the Act if they act as links in a chain of transactions through which securities move from an issuer to the public.

### **The safe harbor of Rule 144**

Perhaps the most famous exemption is what is commonly known as the Rule 144 safe harbor.

Rule 144 is designed to implement the fundamental purposes of the Act: "to provide full and fair disclosure of the securities sold in interstate commerce and through the mail, and to prevent fraud in the sale thereof". The Rule is designed to prohibit the creation of public markets in securities where adequate current information is not available to the public.

Yet when the public does have access to information about the issuing company, the Rule permits the public sale of limited amounts of securities owned by affiliates of the company, and by people who obtained the securities through private placements.

### **Restricted securities**

The rule defines restricted securities as "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, or securities acquired from the issuer that are subject to the resale limitation of Regulation D and are acquired in a transaction or chain of transactions not involving any public sale".

Restricted securities usually bear a restrictive legend which usually states that they are not registered and cannot be offered or sold, unless they are registered with the SEC or exempt from such registration.

The restrictive legend serves to ensure that the unregistered sale is not a part of a scheme to avoid registration while achieving a broader distribution than the initial sale of the securities.

### **Conditions to be met**

Generally, under the rule, restricted securities may be sold to the public without registration, if the following requirements are met:

**1. A minimum holding period** of one year must elapse between buying the shares and their resale in the U.S. The holding period may vary for different types of securities and depending upon how they were acquired. It should be noted, that holding the securities is not enough for determining the

beginning of such period. The full purchase price of the securities must be paid, and thereafter, the securities must have been held for at least one year.

**2. Current financial information** with respect to the company must be made available to the public.

Companies with securities registered under the Act, and which have timely filed required reports with the SEC, usually satisfy this requirement.

**3. Filing of a Form 144:** For sales of more than 500 shares or valued in excess of \$10,000, the seller must file a Form 144, "Notice of Proposed Sale of Securities", with the SEC no later than the first day of the sale.

A copy of the Form 144 should also be filed with the exchange on which the company's securities are traded. The filing is effective for 90 days. If the seller wishes to extend the selling period or sell additional securities, a new Form 144 is required.

**4. No solicitation; no commission:** Unless held for at least two years, the shares must be sold through a broker.

The selling shareholder may not solicit or arrange for solicitation in connection with the sale - for example, he cannot advertise the sale.

The seller is prohibited from making any payment in connection with the offer or sale of the securities to any person other than the broker who executes the order.

**5. Amount to be sold:** If the securities were owned for a period which is between one and two years, then the volume of securities to be sold, in any 3-month period, may not exceed the greater of: (i) 1% of all outstanding shares of the company, or (ii) the average weekly trading volume for the preceding four weeks.

If the shares were owned for two years or more, the volume restrictions do not apply to non-affiliates. Affiliates are always subject to these volume restrictions.

## **Conclusion**

Securities sold in the United States should usually be registered under the 1933 Act or the 1934 Act, or fall under one of the applicable exemptions from registration.

One of these exemptions is Rule 144, which can in certain cases provide a safe harbor for the resale of shares to the public by affiliates or non-affiliates of the issuer.

Rule 144 has eliminated much of the previous uncertainty about public sales of privately placed securities. But it involves many technical requirements, the application of which depends on the particular facts and circumstances of a proposed sale.

This summary does not purport to be a full and exhaustive description of the requirements under Rule 144 or the Act. Shareholders are encouraged to seek the advice of a legal counsel when relying on Rule 144 for re-sale of securities.

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