Foreword

2025 Developments in SEC Regulation. Under the 2025 Trump Administration's deregulation policies, which are aimed at dramatically reducing federal agency regulation and reducing the federal workforce, the Securities and Exchange Commission or "SEC" has focused its regulatory mission on the traditional protection of retail investors and rescinded, not enforced or revised many pre-2025 regulations and policies deemed to be beyond the SEC's statutory authority, unreasonably burdensome on business or unnecessary. This deregulation policy includes reducing the federal workforce and scaling back enforcement efforts. By May 2025, the SEC had reduced its personnel by an estimated 15%. The SEC in 2025 has targeted regulations and enforcement policies of the SEC adopted in the Biden Administration era, especially cryptocurrency regulation.

In its proposed regulatory actions for Spring 2025, the SEC has stated that it will review possible changes to Rule 144 under the Securities Act of 1933: "The [Corporation Finance] Division is considering recommending that the Commission repropose amendments to Rule 144, a non-exclusive safe harbor that permits the public resale of restricted or control securities if the conditions of the rule are met, to increase instances in which the safe harbor would be available."[1] As stated by SEC Chair Paul Atkins: "This regulatory agenda reflects that it is a new day at the Securities and Exchange Commission. The items on the agenda represent the Commission's renewed focus on supporting innovation, capital formation, market efficiency, and investor protection.…The agenda covers potential rule proposals related to the offer and sale of crypto assets to help clarify the regulatory framework for crypto assets and provide greater certainty to the market. A key priority of my Chairmanship is clear rules of the road for the issuance, custody, and trading of crypto assets while continuing to discourage bad actors from violating the law.…It also covers a number of envisioned deregulatory rule proposals to reduce compliance burdens and facilitate capital formation, including by simplifying pathways for raising capital and investor access to private businesses. It discusses amending existing rules to improve and modernize them as well as address disclosure burdens.…In addition, it considers recommending that the Commission invite public comment regarding rethinking the Consolidated Audit Trail (CAT), especially in the wake of a recent decision by the U.S. Court of Appeals for the Eleventh Circuit. Market participants and Congress have rightly pushed back on CAT's seemingly endless cost increases and the risks of storing so much sensitive data together.…Importantly, the agenda reflects our withdrawal of a host of items from the last Administration that do not align with the goal that regulation should be smart, effective, and appropriately tailored within the confines of our statutory authority."[2]

Like the SEC under Republican-nominee Chair Jay Clayton, the SEC under the 2025 Trump Administration will likely seek to expand private placement safe harbor exemptions' utility by reducing regulatory burdens and expanding scope of the safe harbor, which may dovetail with any changes in Rule 144 or Rule 144A. The SEC has included consideration of an expansion of Rule 144 safe harbor in its 2025 regulatory agenda of possible new rulemaking.

Rule 144 and Rule 144A Safe Harbors. It is axiomatic that the protection of investors justifies the imposition of certain restrictions on the transfer of securities by the holder. Thus,

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[1] The Rule 144 Safe Harbor – Agency Rule List Spring 2025, Office of Information and Regulatory Affairs, Office of Management and Budget, Sept. 4, 2025, view at URL: https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202504&RIN=3235-AM78.

[2] Statement of the Spring 2025 Regulatory Agenda, by SEC Chair Paul Atkins, Sept. 4, 2025, view at URL: https://www.sec.gov/newsroom/speeches-statements/atkins-2025-regulatory-agenda-090425.

persons who want to sell unregistered securities may be faced with a variety of resale limitations predicated upon either the nature of the person attempting to resell, the nature of the issuer, or the nature of the transaction in which the holder acquired the securities. For instance, affiliates or control persons of an issuer, and holders of shares issued by SPACs and public shell companies securities face restrictions on resale of securities.

Some resale limitations are the result of statutory or regulatory obligations imposed on the issuer or other transferor. In addition, administrative interpretations by the SEC and case law account for other limitations on resale that security holders encounter. The most important of the SEC staff restrictions are found in Rule 144, which was adopted in 1972 and replaced (as well as expanded) Rule 154. Designed to assist holders of restricted securities, and to assist control persons/affiliates of the issuer holding restricted and certain unrestricted securities, to resell publicly in reliance upon the Section 4(a)(1) trading exemption, Rule 144 is generally thought to have achieved its purpose of creating objective standards for the resale of restricted securities by non-affiliates of the issuer and sale of restricted and unrestricted securities by control persons/affiliates of the issuer. Rule 144 does not apply to securities issued by foreign private issuers (Rule 3a12-3).

Rule 144 provides a non-exclusive safe harbor exemption from being regarded as an underwriter under of the Securities Act of 1933 under Section 2(a)(3), subject to meeting all of the requirements of Rule 144, and the registration requirements of the Securities Act of 1933.

Rule 145 and Resale of Securities. Rule 145 of the Securities Act of 1933 governs securities issued in mergers, certain acquisitions, certain reorganizations and exchange offers. As noted by the SEC: "Except when a shell company is involved, the Commission eliminated the provision that previously deemed parties (other than the issuer) to a reclassification, merger, or asset transfer, or any affiliate of such party, underwriters in any sale of the securities received in the transaction. Under the amendments, this "presumptive underwriter" provision now only applies to any party, other than an issuer, to a Rule 145 transaction involving a shell company (other than a business combination related shell company), and any affiliates of such party."[3]

New SPAC/Public Company Shell Rules and Rule 144. The SEC's SPAC and public shell company rules, effective July 1, 2024,[4] made Rule 144 unavailable to the post de-SPAC merger's surviving company for at least 12 months. The de-SPAC merger's surviving company would also have to meet the requirements of Rule 144(i) (as applied to former shell companies).

One aspect of Rule 144 that can be complex is the ability to "tack" prior ownership on the holding period of the securities (See: Rule 144(d)(3)). "Tacking" generally allows "an investor that obtains securities from an issuer ("underlying securities") in exchange solely for other securities of the issuer ("overlying securities") can include the period during which that investor held the overlying securities when determining its holding period with respect to the underlying securities. That tacking rule is widely relied on in connection with, for example, convertible notes and cashless exercises of warrants."[5]

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[3] Revisions to Rules 144 and 145: A Small Entity Compliance Guide, SEC Division of Corporation Finance, Feb. 15, 2008, view at URL: https://www.sec.gov/resources-small-businesses/small-business-compliance-guides/revisions-rules-144-145.

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[4] SEC Release Nos. 33-11265; 34-99418; IC-35096; File No. S7-13-22, Jan. 24, 2024, view at URL: https://www.federalregister.gov/documents/2024/02/26/2024-01853/special-purpose-acquisition-companies-shell-companies-and-projections.

[5] Proposed SEC Rule 144 Amendments, posted by Jeff Karpf, Michael Dayan, and Marc Rotter, Cleary Gottlieb

Rule 144A. Rule 144A provides a nonexclusive safe harbor from the registration requirements of the Securities Act and allows certain large institutional investors to trade private placement securities among themselves without having to register those transactions with the SEC. The amendments to Rules 144 define the required holding period for restricted securities, whether acquired pursuant to Rule 144A or otherwise, as commencing at the time of the sale by the issuer or its affiliate. The amendment of the definition of "accredited investor" and "qualified institutional buyer" (approved on August 26, 2020 and effective 60 days after publication in Federal Register), which amendment could facilitate resales under Rule 144A by expanding pool of potential purchasers and could increase demand and transactions for Rule 144A securities.

Lastly, Regulation S under the Securities Act sets forth nonexclusive safe harbors for certain extraterritorial sales and resales of securities.

See Section 4:256, infra, for discussion of SEC's new EDGAR Next online filing system and need to register with EDGAR Next to avoid interruptions in making SEC filings.

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Steen & Hamilton LLP, The Harvard Law School Forum on Corporate Governance, January 23, 2021, view at URL: An "affiliate" of an issuer is a person controlling, controlled by or under common control with such issuer. An individual who controls an issuer is also an affiliate of such issuer (also known as a "control person").