Foreword

It is axiomatic that the protection of investors justifies the imposition of certain restrictions on the transfer of securities. Thus, 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 or the nature of the transaction in which the holder acquired the 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 account for other limitations on resale that security holders encounter. The most important of the SEC staff restrictions are found in Rule 144. Designed to assist holders of restricted securities to resell publicly in reliance upon the Section 4(a)(1) trading exemption, Rule 144 has been in effect for nearly forty years and generally is thought to have achieved its purpose of creating objective standards for the resale of restricted securities.

A significant development in resale of securities is 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 for Rule 144A securities and have an impact on the price and liquidity of securities in Rule 144A offerings and in subsequent resale transactions.

Other significant developments in the regulation of the resale of restricted securities are the result of the SEC's amendments to Rules 144 and 145 and the addition of Rule 144A. Rule 144A provides a nonexclusive safe harbor from the registration requirements of the Securities Act that allows certain large institutional investors to trade private placement securities among themselves without having to register them with the SEC. The amendments to Rules 144 and 145 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. Also, Regulation S sets forth nonexclusive safe harbors for certain extraterritorial sales and resales of securities. This update addresses the aforementioned topics, but also specifically addresses: The solicitation of interest prior to registered offerings: new Rule 163B of 1933 Act, the overall assessment of Rule 144A and potential abuses of Regulation S.

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