

Worldwide Stock Transfer, LLC – Summer Newsletter

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Irony 144

According to Wikipedia, "irony is an incongruity or discordance between what a speaker/writer says, and what he or she means, or is generally understood". Key words being generally understood. So why all the confusion amongst many banks, brokers, company counsels and some stock transfer agents in regards to the new SEC Rule 144. The new rules are clearly defined by the SEC and have no gray area's. Yet, why is it when restricted stock is presented for sale and/or transfer, why does the question of "do you require a legal opinion" always arise? Correct me if I am wrong, where does it state in the new rules (and even in the old rules dating back to the 1970's) that a legal opinion is required to remove a restrictive legend? It doesn't. And not to steal the thunder from Mr. Morris' article below, it seems there is



this misconception that if a legal opinion is rendered by a "qualified securities attorney", the seller and transferor automatically have indemnity if Rule 144 requirements are violated. It is amazing how most brokers and especially transfer agents feel more comfortable relying on any old legal opinion, rather than looking at there own records to see if the restrictive transfer meets the SEC's protocol. Do not get me wrong, legal opinions presented by the issuers counsel or a "qualified securities attorney" acts better than no opinion at all; but only if they are up to speed on the transaction in question. In fact, an issuers counsel will often ask the transfer agent for copies of the original transaction to verify the information presented in the opinion. All in all, it will only be a matter of time before Rule 144 is revisited; then again according to Wikipedia, the rule can be edited & interpreted by anyone at any time.

A Brief Examination of Restrictive Stock Legends

If you are the CEO of a publicly traded company, or a company with a public market in its future, and your company has issued "restricted stock" I'll bet you that, when you hired your transfer agent, you never bothered to read the "restrictive legend" to be placed on your company's stock certificates. If you are a winner, see the "fine print" at the end of this article to learn how to collect your winnings. I can be pretty sure most of you are losers. Furthermore, I believe it is unlikely that your securities counsel bothered to review the legend either.

The prevailing attitude seems to be that whatever legend the transfer agent uses must be okay because it is either approved by the SEC, approved by the transfer agent's counsel or the transfer agent "knows best". In fact, the SEC does not approve these legends and does not care how they are worded - it only cares that a

**By Jackson L. Morris, ESQ
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legend is there and generally covers the relevant information. In fact, all legends are pretty much the same. In the early days of securities regulation, a lot of energy was put into crafting the proper legend. More recently - not so much. More recent arrivals to the transfer agency business, in my experience, seem to have simply picked up the legend they use from somewhere they don't quite remember. This source could be as simple as the legend on the certificates of the first client they took over from another agency. And, often a transfer agent is surprised at what its legend actually says. Recently, I discovered a transfer agent who was still using a legend from before the SEC adopted Rule 144. As I frequent-

ly say, securities law does not make a good cocktail party conversation. But, please keep reading. This information may save you a lot of aggravation and even money. If you are a lucky one, you will want to learn what you have won and how to collect. Restrictive legends serve a critically important function. The purpose of the legend is to prevent a violation of the registration requirements of the Securities Act of 1933, when securities are sold without registration. Without getting too deep into the technicalities of the Act, it is sufficient to understand that every sale of securities by an issuer or by a stockholder that takes place in the United States, either in interstate commerce or by use of the mail (the jurisdictional means), must be registered with the SEC. Of course, some types of securities (rarely, if ever,

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WST Welcomes the Following New Clients

*Americana Dist., Inc.	*Lite King Corporation	*Sun Opportunity 1, Inc.
*Global Energy, Inc.	*Nanoscience Tech, Inc.	*Turnaround Partners, Inc.
*Future IT Inc.	*PSI Corporation	*Renewal Fuels, Inc.
*Dobi Medical International, Inc.		

Restrictive Legends (continue from page 1)

issued by entrepreneurial companies) are exempt from registration. The purpose of the restrictive legend on a company's stock certificates for shares sold without registration is to provide assurance that the sale is not part of an underwriting or a distribution to the public. The legend is designed to prevent the immediate resale of the securities into the public market. Without (1) registration or (2) a restrictive legend, there is a possibility that the company, its officers and directors directly involved in the sale, the reselling purchaser of the securities and the transfer agent may violate the Securities Act, either directly or as an aider and abettor. The critical function of the legend on the certificate, then, is that it enables a company in raising money in private transactions without the delays and expenses of registration - raising seed money, sales to friends and family, sales to accredited and non-accredited investors, investment by venture capitalists, etc.

All legends have three basic elements. The first announces that the securities are not registered under the Securities Act of 1933. The second dictates that the securities cannot be resold unless and until they are registered under the Securities Act or an exemption from registration is available. These two elements are straightforward. The third (and this is where the trouble begins) sets the standard for demonstrating that an exemption is available. The really old legend I mentioned above included as a fourth element of obtaining a "no-action" letter from the SEC, a letter the Commission stopped providing not many years after it promulgated Rule 144 in 1972. The troubling third element is where most of the operative variation comes into play. This element requires an opinion of counsel to support an assertion that registration is not required. Most frequently, but not always, and usually of most importance, the claim rests on Rule 144 and the legal opinion confirms that the proposed sale will satisfy the requirements and limitations of the Rule. The problem arises because of what attorney the legend permits or requires to give the opinion. The variations are (1) an opinion of [any old] counsel, (2) an opinion of qualified securities counsel (my personal favorite), (3) an opinion of counsel acceptable to the company

[and its counsel] and (4) an opinion of company or issuer's counsel. The trouble, if there is any, starts with a failure to know what attorney this third part of the legend specifies and a failure to understand what the ramifications of the identified attorney may be in a particular circumstance.

It is now time for a little know fact. A legal opinion does not provide a defense, any defense at all to an issuing company or to a selling stockholder against a charge of violating the registration requirements of the Securities Act. In other words, good faith reliance on an opinion of counsel is not a defense against a violation. A legal opinion may provide some level of defense, however, to a transfer agent or other non-sellers against a charge of aiding and abetting a violation. For this reason it would seem to be prudent for both the issuing company and a selling stockholder to skip any old counsel and go with option (2), (3) or (4).



Everyone involved should want an opinion that is deemed to be accurate. In every case, the selling stockholder should provide the relevant, accurate facts to counsel as a basis for the opinion. I am sure your company securities attorney is a qualified securities counsel, so you are asking yourself what the problem could possibly be with the fourth option and sticking to it. Since I like to number things, there are four potential problems. I frequently hear from transfer agents that the company's attorney takes "forever" to deliver an opinion. I know how the company's attorney feels, I used to feel the same way - an opinion request is a damned interruption of more profitable work. It usually goes to the proverbial back burner, which is already over-crowded. Furthermore, there is no compelling reason to restrict

the opinion giver to company counsel. The reason for this is because the vast majority of opinions turn on Rule 144, which sets out requirements and limitations that can be mechanically applied and objectively demonstrated. Furthermore, the company usually ends up paying the bill for an opinion issued by company counsel, while the selling stockholder gets the benefit. Requiring that company counsel give the opinion ignores the implicit conflict of interest shouldered the attorney has in representing the company and its stockholder. Although the interest of the issuing company and the selling stock.

Holder are generally aligned, they are not entirely the same. When the stockholder pays company counsel for his or her own opinion, the attorney really is trying to wear two hats that are in some ways not compatible. Finally, there is a temptation for the issuer's management to believe that it can dictate to company counsel when not to provide an opinion without regard to relevant facts. Holding this belief seems to provide some comfort to management that it can stay in control of resales, even though it has not legal right to do so. Exercise of this illusory power usually comes into play when (a) management has a justified or unjustified grudge against the stockholder or (b) it believes, perhaps correctly, that sales by the stockholder will bomb the market.

In my experience, management's demand that company counsel refuse to issue an opinion because of an unjustified grudge or concern about the effect of sales on the market always ends up with the company covering any loss of profits the stockholder experiences from delay in selling. This assumes that the stakes are high enough and the parties flush enough to afford litigation. Typically, the justified grudge, as I characterize it, is based on a failure of the stockholder to deliver promised services with which he paid for the stock. In my experience, company counsel usually handles the matter badly, with a simple letter to the transfer agent denying the stockholder has a right to sell. Most often, a refusal to issue (or permit the issue of) an approving opinion under these circumstances cannot be justified on failure to comply with Rule 144. The consequence of this course of action often is "dueling opinions" which put the transfer agent in the middle of the dispute

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Restrictive Legends (continue from page 2)

(possibly as a defendant), a position in which it should not be placed. It always results in higher legal fees for the issuing company. I am not aware of company counsel being liable for a stockholder's loss as a result of acquiescence to a wrongful, management demanded refusal or delay in issuing an opinion, although it seems like an interesting question waiting for the right facts. This is not to say that the issuing company is without a remedy for the stockholder's failure to deliver the agreed upon services. A refusal to remove a restrictive legend, however, is simply not the right strategy and an effective means of seeking redress. In summary, it is my view that issuing companies

management, with the advice of it securities counsel, should specify the legend that goes on its restricted stock certificates - not just accept the transfer agent's standard legend. A new rubber stamp is not that expensive. And, I recommend (you may say for the obvious reason that I give such opinions independently) that an opinion from any qualified securities attorney should be acceptable to the issuing company, its counsel and the transfer agent. Even when the existing legend specifies that company counsel must give the opinion, for the reason I have expressed above, I recommend that the parties waive this requirement, as long as the opinion is received from a securities attorney with demonstrable

qualification. Accepting the opinion of qualified and independent securities counsel should save the company money in legal fees, put the onus of any delays in issuance of the opinion on the selling stockholder, eliminate a real or theoretical conflict for company counsel and get management out of the business of making inappropriate value judgments as to whether a stockholder should be "allowed to sell when the stockholder is entitled to sell under Rule 144. On the other hand, I have seen some downright ho key opinions provided by a few attorneys who hold themselves out as being qualified.

www.rule144solution.com

Summary Chart of the New SEC Rule 144—Amended February 15, 2008

Restricted Securities of Reporting Issuers

Affiliate or Person Selling on Behalf of an Affiliate

- During six-month holding period no re-sales under Rule 144 permitted.
- After six-month holding period, may resell in accordance with all Rule 144 requirements, including: current public information, volume limitations, manner of sale requirements for equity securities, and filing of Form 144.

Non-Affiliate (and has not been an affiliate during the prior three months)

- During six-month holding period no re-sales under Rule 144 permitted.
- After six-month holding period but before one year, unlimited public re-sales under Rule 144 except that the current public information requirement still applies.
- After one-year holding period, unlimited public re-sales under Rule 144; need not comply with any other Rule 144 requirements.

Restricted Securities of Non-Reporting Issuers

Affiliate or Person Selling on Behalf of an Affiliate

- During one year holding period no re-sales under Rule 144 permitted.
- After one-year holding period, may resell in accordance with all Rule 144 requirements, including: current public information, volume limitations, manner of sale requirements for equity securities, and filing of Form 144.

Non-Affiliate (and has not been an affiliate during the prior three months)

- During one year holding period no re-sales under Rule 144 permitted.
- Unlimited public re-sales under Rule 144; need not comply with any other Rule 144 requirement

***please note this is general public information only; not legal advice, nor represents any form of a legal opinion.**

****source - <http://www.sec.gov/rules/final/2007/33-8869.pdf>**

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433 Hackensack Ave; Level L – Hackensack, NJ 07601 | Phone: (201) 820-2008 | Fax: (201) 820-2010 | www.wwstr.com

Contact Yonah Kopstick, Senior Vice President or email us at info@wwstr.com for further details

Our Services

Our business philosophy is deeply rooted in our conviction to keep the client satisfied by providing them with only the highest quality of stock transfer services. We stand side-by-side with our customers to get the job done to their complete satisfaction. WST offers a wide array of stock transfer services, using state of the art technology. Our highly experienced staff and networking affiliates have an unlimited amount of resources that will not only fulfill your every stock transfer need, but also walk you through the process every step of the way. Here are some of the many stock transfer services we provide.

- Complete Securities Transfer Services
- Accurate Record Keeping & Account Maintenance
- Annual/Special Meeting Coordination
- Inspector of Election Services
- Corporate Actions
- Cash & Stock Dividends
- Restricted Stock
- Shareholder Relations
- Cost Savings
- Compliance & Security

The Daily Double

Current Clients – Refer our business and receive 1 month free off your composite fee once a client is officially signed on.

All Third Parties – Refer our business and receive up to \$500 as a marketing fee once a client is officially signed on.

.....And not to mention all of our clients no matter how large or small, always receive the following services for **FREE!**

-Unlimited Shareholder Reports -Unlimited Stock Issuances

-Online Services for Clients & Shareholders -Maintenance of Related Classes of Stock Accounts

- Maintenance of Previously Un-Exchanged Reorganization Files

*WST is registered to conduct stock transfer transactions with the U.S. Securities & Exchange Commission (SEC), the Depository Trust Company (DTC) & is a member of the Securities Transfer Association (STA).