KIRKLANDPEN

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KIRKLAND & ELLIS LLP

Private Equity Newsletter

New Rule 144 Amendments Relax Rules for Selling Restricted Securities

PENpoints

The Rule 144 amendments attempt to facilitate capital raising by increasing the liquidity of restricted securities.

On November 15, 2007, the SEC adopted amendments to Rule 144 of the Securities Act of 1933. The Rule 144 amendments are intended, among other things, to increase the liquidity of restricted securities.

Rule 144 currently provides a "safe harbor" exemption from Securities Act registration for sales of restricted securities if the following conditions are met:

(1) adequate current public information about the issuer is available;

(2) the seller of the securities has held them for one year;

(3) certain volume limitations are met;

(4) the securities are sold through a "broker transaction;" and

(5) a form is filed with the SEC if 500 or more shares are sold or the aggregate sale price is $10,000 or more.

Sellers who are unaffiliated with the issuer and who have held securities for at least two years can currently sell them under Rule 144 without complying with the volume, manner of sale and other restrictions.

The principal Rule 144 amendments relax the current requirements as follows[1]:

- shorten to six months the holding period applicable to restricted securities of reporting companies[2];
- allow non-affiliates to resell freely (i) after a six-month holding period, restricted securities of reporting companies that comply with the current public information requirement, and (ii) after a one-year holding period, restricted securities of non-reporting companies and reporting companies that fail to comply with the current public information requirement;
- eliminate broker transaction requirement and volume limitations for sales by non-affiliates; and
- increase the Form 144 filing threshold for affiliates to sales of either 5,000 shares or $50,000 within a three-month period.

Other than shortening the holding period for reporting companies' securities and increasing the Form 144 threshold, the amendments do not relax the other Rule 144 requirements as they affect "affiliates" of an issuer, so private equity and other funds who own more than 10 percent of the issuer, have a seat on the board or otherwise control the issuer will remain subject to the more stringent Rule 144 requirements.

[1] The amendments also make a number of other changes to Rule 144 and codify certain SEC staff interpretations relating to Rule 144. The amendments will become effective 60 days after publication in the Federal Register.

[2] A "reporting company" is an issuer that is, and has been for at least 90 days prior to the Rule 144 sale, subject to the reporting requirements of the Securities Exchange Act of 1934. Restricted securities of a non-reporting company may be sold under Rule 144 only after they have been held for one year.

If you have any questions about the matters addressed in this Kirkland PEN article, please contact the following Kirkland author or your regular Kirkland contact.

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New Restrictions on Investments in Sudan by Illinois Retirement Systems

PENpoints

Recent Illinois legislation restricts the ability of Illinois state retirement systems to invest in Sudan.

In August 2007, Illinois enacted legislation restricting the ability of Illinois state retirement systems[1] to invest in Sudan. This new law replaces a similar law struck down by a federal district court in February 2007 as an unconstitutional interference by Illinois into the federal government's authority over foreign commerce.[2]

The new law requires each manager of an Illinois retirement system's assets to certify annually that the retirement system's assets for which the manager is responsible are not (and have not since December 28, 2007, been) invested in an entity established in, doing business in or owning assets in Sudan.

A private fund is, in turn, required to provide either an affidavit, a certificate or an agreement regarding Sudan investments to the relevant asset manager. While the statutory language describing each of the three alternatives — an affidavit, certificate or agreement — contains subtle and illogical differences, in general the fund must report in such document on whether it has invested (or will invest) in a portfolio company established in, doing business in and/or owning assets in Sudan.[3]

Absent such a document from the private fund, the retirement system must divest from the fund within 90 days if the retirement system's board determines that such divestment would not materially and adversely impact the retirement system.

It is unclear whether a constitutional challenge will be mounted against the August 2007 law and whether such a challenge will succeed.

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[1] Illinois retirement systems covered by this legislation are the State Employees' Retirement System, the State Universities Retirement System, the Teachers' Retirement System, the General Assembly Retirement System and the Judges Retirement System.

[2] See *Kirkland PEN*, Federal Court Rejects Illinois' Restrictions on Investment in Sudan, March 7, 2007.

[3] The statute uses the phrase "direct or indirect" in some but not all contexts, thus creating some ambiguity as to the extent these tests are applied to a portfolio company's subsidiaries as well as to the portfolio company itself.

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PENbriefs

Guidelines for Disclosure and Transparency in Private Equity: Q&A for Private Equity Firms

London-based Kirkland associate Stephanie Biggs authored this Q&A, which is designed to answer some of the key questions that private equity firms may have in relation to the Guidelines for Disclosure and Transparency in Private Equity published by the Walker Working Group on November 20, 2007. The full alert is available at the following link:

http://www.kirkland.com/siteFiles/Publications/6C6577703BFB96E01057E3AEC81A9613.pdf

Shareholder Resolutions and Meetings: A Guide for Private Companies

This guide, authored by Kirkland associate Stephanie Biggs, explains the simplified regime for shareholder resolutions under the United Kingdom's Companies Act of 2006. The full guide is available at:

http://www.kirkland.com/siteFiles/Publications/24875EF9C7010A4C2510BC1336332EF6.pdf

Mesa Air Ordered to Pay $80 Million for Misusing Confidential Information

On October 30, 2007, U.S. Bankruptcy Judge Robert J. Faris ordered Mesa Air Group, the parent company of the inter-island airline, "go!," to pay Hawaiian Airlines $80 million in damages for breach of a confidentiality agreement based on information received in a bankruptcy case as a potential investor. Kirkland attorneys David A. Agay, David R. Seligman and Soham D. Naik discuss this outcome in a recent Kirkland alert, available at the following link:

http://www.kirkland.com/siteFiles/Publications/F75F4E56E80D6D4DBBEBE6EE5F729ED7.pdf

Bankruptcy Court Denies Chapter 15 Protection for Hedge Fund

In 2005, Congress added Chapter 15 to the Bankruptcy Code to provide effective mechanisms for the implementation of cross-border restructurings. Kirkland partners David A. Agay and David R. Seligman examine a recent interpretation of Chapter 15 in the following Kirkland alert:

http://www.kirkland.com/siteFiles/Publications/FB41A87BC266FE9E2B64283AFB214A5A.pdf

PENnotes

Harvard Business School Venture Capital & Private Equity Conference
Boston, MA
February 2, 2008

Kirkland will sponsor this business school conference featuring keynote addresses by industry leaders and numerous topic-specific panel discussions. The conference will touch on key issues and trends relevant to venture capitalists, private equity investors, entrepreneurs and those who support the venture capital and private equity communities. For more information, please contact Courtney Hudson at +1 (312) 649-3837 or chudson@kirkland.com.

American Securitization Forum 2008
Las Vegas, NV
February 3 - 6, 2008

Kirkland partner Kenneth P. Morrison will speak at this annual forum, which draws securitization market professionals from all asset classes and product sectors. For more information, please contact Courtney Hudson at +1 (312) 649-3837 or chudson@kirkland.com.

NYU Journal of Law and Business Annual Symposium
New York City, NY
February 26, 2008

Kirkland partner Geoffrey W. Levin will speak on "Buyouts Gone Bad" at this symposium put on by the NYU School of Law. For more information, or to register, please contact Beth Wiener at +1 (212) 446-4752 or bwiener@kirkland.com.

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Kirkland & Ellis LLP's Private Equity Practice

Kirkland & Ellis LLP's private equity attorneys handle leveraged buyouts, growth equity transactions, recapitalizations, going-private transactions and the formation of private equity, venture capital and hedge funds on behalf of more than 200 private equity firms in every major market around the world.

Kirkland has been widely recognized for its preeminent private equity practice. In 2007, Kirkland received prestigious first-tier rankings in private equity from Chambers & Partners and the International Financial Law Review, and was named the "International Law Firm of the Year" by *The Lawyer* magazine. In 2006, Chambers & Partners ranked Kirkland as first overall in private equity fund formation.

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