

SEC Rule 144 and TRACE Eligibility

Guidance on Transactions in TRACE-Eligible Securities Under SEC Rule 144

Executive Summary

The SEC recently adopted changes to SEC Rule 144 that shorten the holding period requirements for privately placed securities before they can be sold into the secondary market, subject to the conditions of the rule, and that may change industry conventions in the resale of privately placed debt securities.

FINRA reminds firms that, unless exempt under NASD Rule 6230(e), once a security is eligible under NASD Rule 6210 as a TRACE-eligible security, all secondary market transactions in the security are “reportable TRACE transactions,” as defined in NASD Rule 6210(c). This includes securities that are eligible because they were initially issued pursuant to Section 4(2) of the Securities Act of 1933 and subsequently purchased or sold pursuant to SEC Rule 144A.

Questions regarding this *Notice* may be directed to Elliot R. Levine, Associate Vice President and Counsel, Transparency Services, at (202) 278-8405; or Sharon Zackula, Associate Vice President and Associate General Counsel, Office of General Counsel, at (202) 728-8985.

Background and Discussion

The Securities and Exchange Commission (SEC) recently adopted changes to Rule 144 under the Securities Act of 1933 (Securities Act) (SEC Rule 144) that shorten the holding period for privately placed securities before they can be sold into the secondary market, subject to the conditions as enumerated in the federal rule.¹ As the changes to SEC Rule 144 have

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Notice Type

- Guidance

Suggested Routing

- Compliance
- Executive Representatives
- Fixed Income
- Legal
- Operations
- Systems
- Trading
- Training

Key Topic(s)

- Freely Tradable Securities
- Rule 144 Holding Period
- Restricted Securities
- TRACE-Eligible Securities

Referenced Rules & Notices

- NASD Rule 6200 Series
- SEC Rule 144
- SEC Rule 144A

begun to impact certain debt market practices, FINRA has received questions regarding transactions in TRACE-eligible securities that were issued pursuant to Section 4(2) of the Securities Act and, thereafter, purchased or sold pursuant to Rule 144A under the Securities Act (SEC Rule 144A).²

There are different conventions by which privately placed securities become freely traded in the secondary market when all the requirements of SEC Rule 144 have been met, but none are relevant for the purposes of determining whether the subsequent secondary market transactions are reportable to TRACE. Therefore, securities acquired under SEC Rule 144A that are resold by simply meeting the holding period of SEC Rule 144, registered for subsequent sale by the issuer or swapped by the issuer for freely tradable securities are all subject to TRACE reporting upon resale.

In sum, a TRACE-eligible security generally is either: (1) registered under the Securities Act or (2) issued pursuant to Section 4(2) of the Securities Act and purchased or sold pursuant to SEC Rule 144A. Unless exempt pursuant to NASD Rule 6230(e), once a security meets the definition of "TRACE-eligible security," all secondary market transactions in such securities are "reportable TRACE transactions," as defined in NASD Rule 6210(c). Accordingly, secondary market transactions either pursuant to SEC Rule 144A, SEC Rule 144 or some other exemption from registration, in a security initially issued pursuant to Section 4(2) and purchased or sold pursuant to SEC Rule 144A are TRACE reportable. In addition, if at the time of the transaction the security is freely tradable, the transaction is subject to TRACE dissemination.

Endnotes

- 1 See SEC Rule 144 (17 CFR 230.144). See SEC Rule 144(d) (holding periods). See SEC Release No. 33-8869 (December 6, 2007), 72 FR 71546 (December 17, 2007) (order approving changes to SEC Rule 144).
- 2 In addition to being issued under Section 4(2) of the Securities Act and traded under SEC Rule 144A (or registered under the Securities Act), a TRACE-eligible security must be U.S.-dollar denominated, depository-eligible under NASD Rule 11310(d), and issued by the United States and/or a foreign private issuer. Certain types of securities are specifically excluded: securities issued by a government-sponsored entity, mortgage- or asset-backed securities, collateralized mortgage obligations and money market instruments having a maturity of less than one year at issuance. See NASD Rule 6210(a).

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