

Herbert Smith

in the pension plan to U.S. residents other than employees on temporary assignment in the United States, pursuant to Rule 903(a)(2) and Rule 903(b)(1)(iv)(C), respectively. If kept, Rule 905 would more likely breed market confusion than prevent unfair distribution.

Rule 905's elimination is sensible in theory as well. If the New Release's provisions are adopted, Rule 905 will no longer serve the purpose for which it was designed. The SEC adopted Rule 905 in 1998 in order to curb abusive practices that had emerged since the adoption of Regulation S in 1990. The adopting release, number 33-7505, rightly faulted some non-affiliates for acting as though the distribution compliance period washed their domestic equity securities of all restriction—when those securities if they had been sold within the United States would have been "restricted" under Rule 144 and subject to a one-year (and until 1997 amendments, three-year) holding period as well as volume and manner of sale limitations for another year. The SEC adopted Rule 905 to end such abuse. Rule 905 had at least the following rationale: because the holding period under Rule 144 could outlast the distribution compliance period, additional protections were in place to prevent the distribution of "restricted" securities in the U.S. (leaving aside the question of whether in practice Rule 905 has fulfilled that function). But if the distribution compliance period circumscribed the holding period under Rule 144, Rule 905 would lose its purpose. Nothing inherent to the theory of offshore placement under Regulation S requires securities to be restricted under Rule 144.

VI. Conclusion

If the distribution compliance period remains at one year we hope the SEC will eliminate Rule 905 along with its corollary, Rule 144(a)(3)(v). Once the New Release's provisions are adopted, Rule 905 would appear much broader than it will in fact be. Its narrowness of scope, and triviality in the few cases to which it applies, makes us question whether even its shell should remain. We doubt Rule 905 would have been introduced had the distribution compliance period circumscribed the holding period all along.

While we would support shortening the distribution compliance period to six months if Rule 905 is also eliminated, we would prefer to have the distribution compliance period remain at one year if this would result in the elimination of Rule 905.

If Rule 905 remains in place then we would very much appreciate clear guidance as to the circumstances in which it will apply especially after the lapse of the distribution compliance period. Without such guidance market uncertainty will continue. This uncertainty would undermine the policy goals behind the New Release.

We welcome your comments. Thank you for proposing constructive changes to Rule 144, and thank you for your consideration.

Sincerely,

/s/ Allen Hanen
Allen Hanen
Managing Partner, Moscow
Herbert Smith CIS LLP

