

Control Persons And Underwriter Status

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Yesterday's post concerned someone who allegedly bragged about being in control of an issuer, but not taking a formal position with the issuer so as to avoid the volume limitations under Rule 144. Despite this alleged admission, the SEC was not able to win partial summary judgment because Rule 144 is a non-exclusive safe harbor. *SEC v. Hemp, Inc.*, 2018 U.S. Dist. LEXIS 38396.

Because Rule 144 establishes different rules for affiliates, the assumption may be that the concern is with the affiliate being an underwriter. Sometimes an affiliate may be an underwriter. But what of the person who buys from an affiliate? Section 2(a)(11) of the Securities Act of 1933 defines an "underwriter" to mean, among other things, any person who has purchased *from an issuer* with a view to, or offers or sells for an issuer in connection with, the distribution of any security. This would suggest that someone who acquires a security from an affiliate or sells for an affiliate could not be an underwriter. Section 2(a)(11), however defines "issuer" to include any person "directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer". Rule 144(a)(1) employs the same control concept to define "affiliate". Thus, in some cases the underwriter may not be the affiliate, but someone who sells for the affiliate.

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National Law Review, Volume VIII, Number 75

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