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Form 144 Must Be Filed Electronically: Now What?

The SEC recently published the [updated version of its EDGAR Filer Manual](#) that includes updates related to filing Forms 144 electronically on EDGAR, as required by the SEC's final rules adopted back in June. This means the clock on the 6-month transition period from paper to electronic filings of Forms 144 is ticking—all Forms 144 must be filed electronically on EDGAR starting on April 13, 2023.

Now that the forms will be electronic, some have suggested brokers will stop making these filings on behalf of their customers, and that in-house counsel will end up having to make these filings on behalf of all the company's insiders. This likely sounds daunting for those that have never had to handle Forms 144 before.

If you're in this camp, you're probably wondering how to make these filings. You should be asking questions like:

- Who outside of Section 16 filers (who already have filing codes) will need to make this filing?
- Should in-house counsel proactively reach out to all their insiders' brokers and get filing codes for everyone?
- Are there any other implications of Form 144 now being easily accessible on EDGAR that in-house counsel should be thinking about and explaining to insiders?

Here are five things you should be considering now to prepare:

1. **Have conversations with your "affiliates" (and be sure you know who they are).** As a quick refresher, Rule 144 of the Securities Act governs the conditions an affiliate of a reporting company must meet in order to sell company securities, one of which includes filing a notice on Form 144 in connection with any sale of company securities. More specifically, all of your company's affiliates must file Form 144 at the time they place a sell order with a broker, and they must be prepared to file Form 144 electronically on EDGAR when this e-filing becomes required.

Rule 144(a)(1) defines an "affiliate" as a person "that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with" the company. This mirrors the definition in Rule 405 of the Securities Act. For purposes of this definition Rule 405 defines "control" as "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies" of the company. Whether an individual or entity is an affiliate of your company is a fact-specific question. However, the SEC Staff is on record as stating that there is a rebuttable presumption that every director, officer and 10% shareholder is an affiliate. And more generally, any person or entity who has the ability to influence management or the Board is likely an affiliate.

An affiliate's Form 144 filing requirement also applies to any sales of securities by (1) any relative or spouse who is living in the same household as the affiliate, (2) certain trusts or estates of the affiliate or their spouse or other household member, and (3) any entity in which the affiliate, or their spouse or other household member, is, individually or collectively, a beneficial owner of at least 10% of any class of such entity's equity securities. Sales by these related persons can be reported on Form 144 filed by the affiliate but, depending on the specific facts and circumstances, may instead be reported on Form 144 filed by the related person.

You should plan to provide refresher training for your company's affiliates on Rule 144 compliance to

ensure they understand how the Rule 144 requirements apply to their sales of company securities (and sales by their related persons as described above), especially given the new electronic filing mandate. Be sure to explain that all contemplated sale information included in a Form 144 that is filed on EDGAR will be available for the world to see immediately after filing.

2. **Obtain any necessary EDGAR filing codes.** Rule 144 may cover more than just your Section 16 officers and directors. While your Section 16 filers should already have EDGAR filing codes, they may prefer to have their related persons make their own Form 144 filings, instead of reporting such person's transactions as being made on behalf of the insider.

Because the SEC's turnaround time for obtaining EDGAR filing codes is at least two business days, you should be confirming whether each company affiliate, including members of the affiliate's household who may be making a separate Form 144 filing, has EDGAR filing codes in the near term.

If not, consider submitting a Form ID for each person who does not yet have EDGAR filing codes as soon as possible. Keep in mind that it is possible that some affiliates may have a CIK, but not the rest of their EDGAR filing codes, if the person has only ever made paper filings. Also consider including an executed power of attorney with the Form ID that allows the company to make Form 144 filings on the filing person's behalf, as well as an attestation document authorizing electronic signatures on EDGAR filings. And make sure you keep a copy of all such documents, as well as your affiliates' EDGAR filing codes, in order to satisfy applicable document retention requirements.

3. **Consider discussing filing responsibilities with your affiliates' brokers.** Brokers have an incentive to ensure Forms 144 are filed, too—if the requirements under Rule 144 are not met, the broker could be deemed to be engaged in an unregistered distribution of securities and have liability as a statutory "underwriter".

This means that brokers may want to continue the long-standing practice of filing these forms themselves on behalf of their customers. If your company requires insiders to use a designated broker, you should reach out to that broker to discuss this issue. If your company allows insiders to use their own brokers, you should get contact information for those brokers from your insiders, reach out to each of them about this issue and their planned processes moving forward, and maintain an open line of communication. And if you prefer to make these filings, make that preference known to the brokers.

4. **Familiarize yourself with the new fillable electronic form.** As promised in the final rules, the SEC has developed a fillable form to be used in filing the new electronic Form 144, a copy of which is included in the updated EDGAR Filer Manual. We expect the SEC to replace the existing pdf version of the Form 144 that is currently still posted on the rest of the SEC website before the deadline for mandatory EDGAR filing.

Take a look and make sure you are familiar with the information required by the updated Form 144. The SEC has stated this form can be filed in the same manner as you file Section 16 reports, so be sure you are familiar with that process too.

5. **Develop filing procedures for your company, your affiliates and their brokers.** Come up with a plan for how to handle Form 144 filings so they don't slip through the cracks:

- Will you try to mandate that your insiders' brokers continue to make the Form 144 filings on behalf of your insiders?

- Do you want to take on the responsibility for filing these forms to ensure they get filed on time and correctly?
- Consider whether your existing insider trading policy currently requires your insiders to pre-clear all transactions, and if not, whether you should recommend adding that feature as a way to help your insiders remember to provide you with advance notice of any contemplated sales so that you can prepare and timely file the Form 144.

Whatever your plan is, communicate it to all relevant parties so everyone is on the same page before this new requirement kicks in six months from now.

Authors

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