

Clients & Friends Memo

Preparing for the New SEC Electronic Filing Requirements for Form 144 – What Public Companies and Their Affiliates Need to Do to Be Prepared

April 11, 2023

The U.S. Securities and Exchange Commission (the “SEC”) has adopted new rules that will require the affiliates of public companies to electronically submit their Form 144 filings (as opposed to filing those forms manually), effective April 13, 2023.¹ Specifically, whenever an affiliate of a company that files periodic reports (a “Reporting Company”) with the SEC pursuant to Sections 13 or 15(d) of the Securities Exchange Act of 1934 (the “Exchange Act”) effects the sale of securities in reliance upon Rule 144, a Form 144 must be electronically filed with the SEC, providing notice of the proposed sale if the amount to be sold under Rule 144 during any three-month period exceeds (a) 5,000 shares, or (b) has an aggregate sales price greater than \$50,000. Pursuant to Rule 144(h)(3), the Form 144 must be transmitted for filing concurrently with either placing the order with a broker or the execution of the sale directly with a market maker. Executive officers, directors and large shareholders are typically affiliates of a Reporting Company because of their relationship of control with the issuer. Below are some practical tips on how companies can prepare for the new Rule 144 electronic filing requirements.

1. Obtaining EDGAR Codes

Affiliates relying on Rule 144 should obtain EDGAR codes as soon as possible if they do not already have such codes. These codes are required to effect the electronic Form 144 filings and should be obtained far ahead of the date of any anticipated Rule 144 sales. Directors, executive officers and large shareholders of domestic Reporting Companies will already have EDGAR codes that they use for making filings required by Section 16 of the Exchange Act. However, directors,

¹ On June 2, 2022, the SEC adopted rule and form amendments that mandate the electronic filing or submission of documents, including Form 144 with respect to securities issued by issuers subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act, on the EDGAR system. On October 13, 2022, the SEC updated the EDGAR Filer Manual to set forth instructions for electronic submissions of Form 144, which triggered the six-month transition period, ending on April 13, 2022, after which the SEC will require electronic submission.

executive officers and large shareholders of foreign private issuers (“FPIs”) that are Public Companies are not required to make Section 16 filings, so they likely do not have EDGAR codes.

If an affiliate is unsure whether they have an existing EDGAR account, they can search the EDGAR Company Database to determine if an account exists. If an affiliate has an account but has forgotten their access information, they can request a new access code and passphrase through the EDGAR Filer Management system.

Affiliates requiring new EDGAR codes should apply for access to EDGAR as soon as possible. Applicants should follow the Form ID application instructions and complete the Form ID application online through the EDGAR Filer Management system. The application must be signed and notarized and then uploaded to EDGAR for submission. Every application takes time to complete and requires SEC staff review. Because the SEC staff does not automatically grant applications and may have questions about an application, the turnaround time for obtaining new EDGAR filing codes is generally at least two business days.

If an affiliate plans to have an authorized agent (*e.g.*, a broker-dealer, lawyer or filing agent) submit the Form 144 on EDGAR on their behalf, the affiliate will need to authorize their agent(s) to do so and provide their EDGAR account number and Confirmation Code to the authorized agents.

Public Companies should consider submitting a Form ID application for each person who does not have an EDGAR filing code. Further, if a Public Company plans to file Form 144 on an affiliate's behalf, the Form ID application should include an executed power of attorney that allows the company to do so, and an attestation document authorizing electronic signatures on EDGAR filings. A copy of these documents should be retained with the affiliate's EDGAR codes for document retention compliance purposes.

2. Engage with Your Broker to Understand the Change in Process

Prior to adoption of the electronic filing requirement, broker-dealers have typically been handling the paper filing of Form 144 notices on behalf of their customers. Broker-dealers are incentivized to ensure Form 144 filings are made because otherwise they could be held liable as a statutory underwriter for engaging in an unregistered distribution of securities.

Therefore, brokers may choose to continue the established practice of filing Forms 144 on behalf of their customers. Affiliates should reach out to their brokers to ensure the brokers are aware of the new electronic filing requirement and to determine which party will file Forms 144 moving forward. If a broker plans to continue filing on behalf of an affiliate, the parties should discuss what the new process will be, and the affiliate will need to provide the broker with their EDGAR codes.

3. Review the SEC Website for Tips on Filings Support

The SEC has created a very helpful “Form 144—Resources for Filing Electronically” resource page to assist filers and filing agents through both the EDGAR application process and the electronic Form 144 submission process. Affiliates should review these resources and contact EDGAR Filer Support with any questions.

Additionally, the SEC has extended the EDGAR filing deadline for Form 144 filings from 5:30 p.m. to 10:00 p.m., Eastern time. Forms 144 submitted on or before that filing cut-off will be deemed filed the same business day, in line with the current rules governing Forms 3, 4 and 5. Filings submitted after that cut-off will be deemed to have been filed on the next business day.

4. Communicate to Executive Officers and Directors the New Filing Method

Public Companies should reach out to their directors and executive officers to ensure they are aware of the new electronic filing requirements, and to provide them with any necessary assistance through the EDGAR application and electronic Form 144 submission process. If desired, Public Companies and their affiliates should discuss whether the company will file on behalf of the affiliate. If so, this should be well documented in the Form ID application, as discussed above. If the affiliate plans to utilize their broker for filings, the company should encourage the affiliate to contact their broker to discuss that process and provide their EDGAR codes.

5. Inform Stakeholders of Possibility for Increased Attention to Insider Sales

Under the previous rules – which allowed Forms 144 to be filed in paper form – the public could only access the forms at the SEC’s public reference room or via a third-party commercial database. The new electronic filing requirement means that electronic Forms 144 will be immediately available to the public on EDGAR, which could generate increased attention to insider sales.

This is especially true for FPIs, which are not subject to Form 4 filings under Section 16 of the Exchange Act. Previously, the Form 144 paper filings prevented the market from learning about sales by affiliates of FPIs for an extended period of time. Under the new rules, the market will become aware of sales made by affiliates of FPIs very shortly after the transaction is executed.

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If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

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