

THOUGHT LEADERSHIP

LEGAL UPDATES

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SEC to Mandate Electronic Filing of Form 144 via EDGAR

On June 2, 2022 the Securities and Exchange Commission (SEC) adopted rule amendments that will require all Forms 144 to be filed electronically on EDGAR, rather than mailing a traditional paper filing or utilizing the option first offered in April 2020 (due to the COVID-19 pandemic) of filing a PDF copy via email. Following this rule amendment, on September 23, 2022 the SEC released an electronic version of Form 144, with the mandatory electronic filing requirement to take effect six months after that release.

Under SEC Rule 144(h), a Form 144 is required to be filed with the SEC by an affiliate of a reporting company relying on the Rule 144 “safe harbor” exemption from registration of a resale transaction under the Securities Act of 1933 (Securities Act), to serve as notice of a proposed sale of the issuer’s stock if the amount intended to be sold during a three-month period exceeds 5,000 shares or will have an aggregate sales price exceeding \$50,000. Prior to this rule amendment, Form 144s were permitted to be submitted either electronically via EDGAR or in paper (or PDF) form; however, they have been almost exclusively submitted in paper form rather than electronically.

According to SEC Chair Gary Gensler, in “fiscal year 2021, more than half of all filed Form 144 forms—30,000 in total—were filed on paper.” In adopting this rule amendment, the SEC emphasized the importance of providing investors with easy, online access to material information rather than needing to visit SEC facilities to access that information, or incur the expense of obtaining scanned copies of the paper filings through third-party providers. The SEC believes these amendments will reduce costs and drive more efficiencies for investors, filers, and the SEC.

In connection with the April 13, 2023 move to mandated electronic filing, Form 144 will become an online fillable document, similar to the “fillable form” option the SEC already provides for Form D filings for private offerings

under the Securities Act, and for filing Forms 3, 4 and 5 under Section 16 of the Securities Exchange Act of 1934. This electronic Form 144 will be machine-readable and will be available for automated analysis. Concurrent with the increased visibility for these filings, the SEC also amended Form 144 to exclude certain personally identifiable information, such as the filing person's home address and the issuer's taxpayer identification number – which was redundant, since it already appears on the cover of each issuer's periodic reports – and to remove the requirement to send a copy of the Form 144 to the principal exchange upon which the issuer's stock is traded. Detailed requirements for completing the fillable electronic Form 144 are available in Section 8.1.5 of the EDGAR Filer Manual, Volume II. Under this rule amendment, filers must access, complete and submit a Form 144 for online filing using the EDGAR Online Forms Management Website or, alternatively, submit a filer-constructed XML Form 144 on EDGAR, *concurrently* with either the placing of an order with a broker to execute the sale or the execution of a sale directly with a market maker (consistent with the mailing/emailing deadline for paper and PDF filings). As a result, the Form 144 information regarding sales (or potential sales) by directors, officers and 10% beneficial owners may become publicly available sooner than it otherwise would have through the post-transaction Form 4 reporting of such sales under Section 16 (which must be done within two business days following each executed trade).

To prepare for the new compliance requirement, affiliates required to file Forms 144 should obtain and/or confirm their EDGAR codes needed to make the required electronic filings well ahead of the April 13, 2023 compliance date. Potential sellers under Rule 144 who do not have EDGAR accounts should apply for access to EDGAR by following the Form ID application instructions as soon as possible, as each application requires staff review and will take time to complete. The Form ID application for EDGAR access must be completed online through the EDGAR Filer Management system, signed and notarized; then, the signed, notarized document must be uploaded to EDGAR for submission to the SEC in support of the Form ID application. The EDGAR Company Database can be used to determine if a reporting person has an existing EDGAR account. If a potential Form 144 filer already has an EDGAR account, but has forgotten their EDGAR access codes, the EDGAR Filer Management system can be used to receive new access codes and passphrases.

Further, even if persons responsible for filing Form 144 plan to have an authorized agent such as a broker-dealer, lawyer or filing agent submit the electronic Form 144 on EDGAR on their behalf, the filing persons will need to authorize their agents to file on their behalf and provide their EDGAR account numbers and Confirmation Codes to their authorized agents to file Form 144 electronically.

For additional information regarding this rule amendment and the electronic Form 144, the SEC has created a Form 144 – Resources for Filing Electronically webpage.

What this means to you

To prepare for the new electronic filing requirement, affiliates required to file Forms 144 should obtain and/or confirm the EDGAR codes needed to make the required electronic filings well ahead of the April 13, 2023 compliance date. Potential Form 144 filers who do not have EDGAR accounts should apply for access to EDGAR by following the Form ID application instructions as soon as possible, and well before the compliance deadline of April 13, 2023. Applications are not automatically granted and the SEC staff may have questions about your application.

Contact us

Husch Blackwell's Securities & Corporate Governance team will continue to monitor these changes and their implications. Should you have any questions, please do not hesitate to contact Steve Barrett, Rebecca Taylor, Brian Wetzstein or your Husch Blackwell attorney.