Cooley

Form 144 Goes Digital

April 12, 2023

Venture capital and private equity funds with public companies in their portfolios – or whose principals sit on public company boards – are likely to be impacted by the new electronic filing requirements adopted by the Securities and Exchange Commission (SEC) for Form 144.

Securities Act Rule 144

Rule 144 provides an exemption from SEC registration for resales of securities acquired directly from an issuer in a private offering (restricted securities) and resales of securities held by affiliates of an issuer (control securities).

Restricted securities

Restricted securities are securities acquired in unregistered, private transactions from the issuer or an affiliate of the issuer. Examples of restricted securities include securities received in venture financings and private placements, including private investment in public equity (PIPE) transactions.

Control securities

Control securities are securities held by an affiliate of the issuer, regardless of how the shares were acquired. An **affiliate** is a person, such as a director or large shareholder, in a relationship of control with the issuer. **Control** means the power to direct the management and policies of the company, whether through the ownership of voting securities, board representation or otherwise. **A fund will generally be considered to be an affiliate if it – alone or with related funds – beneficially owns more than 10% of the company's stock, or if the fund has an associated individual serving as a director of the company.**

The conditions of Rule 144 that apply to a particular sale of restricted or control securities vary depending on the circumstances and are beyond the scope of this alert. If you have questions regarding whether Rule 144 applies and about particular requirements of the rule, please reach out to your Cooley contacts.

Form 144

Among the conditions that apply to Rule 144 sales by affiliates is the requirement to file a Form 144 (notice of proposed sale) with the SEC, if aggregate sales over a three-month period involve more than 5,000 shares or greater than $50,000. Forms 144 have historically been paper filings to be deposited in the mail to the SEC on the date of first sale, and most full-service brokers have customarily prepared and submitted these Form 144 filings on behalf of their clients.

However, the SEC recently adopted rule amendments that will require all Forms 144 to be filed electronically on the EDGAR (Electronic Data Gathering, Analysis and Retrieval) system beginning on April 13, 2023.

What this means for you

Based on our conversations with many brokers, we believe that the majority of large, full-service brokers will continue to prepare and file Forms 144 for their clients after the transition to electronic filing. In order to do so, these brokers will, at a minimum, now require the EDGAR filing codes of any selling stockholder. In addition, some brokers are requiring amendments to service agreements and, for those brokers who plan to execute Forms 144 on behalf of their clients, you will likely be asked to deliver a power of attorney authorizing them to do so.

If you haven't already been in communication with your broker(s) about this rule change, we recommend proactively reaching out to them to determine whether they intend to continue making filings on your behalf and, if so, what they will require from you. If any of them are not planning to make filings on your behalf following the rule change, you will need to plan for how you will make these filings.

Each entity and control person that will potentially sell portfolio company securities will be required to have their own separate EDGAR codes. We recommend evaluating your structure –including any affiliated entities or individuals that could receive distributions in kind – to identify potential filing persons. If any of them do not have EDGAR codes, consider applying as soon as possible. The application process is quite variable and can take between one day to two weeks, depending on the SEC's backlog for processing applications. If you have questions concerning the identification of potential filing persons or need assistance with applying for EDGAR codes, please reach out to your Cooley contacts for assistance.

Finally, EDGAR code management practices vary considerably from fund to fund. The process of updating EDGAR codes can often result in avoidable fire drills when filings are triggered. Given the tight filing deadlines for Forms 144, it will be more important than ever for funds to maintain a current schedule of EDGAR filing codes for their affiliated entities and individuals. Additionally, you should ensure that current filing codes are provided to your brokers and any outside counsel that may be involved in preparing or submitting these filings on your behalf.

Action items

- Contact your brokers to confirm whether they intend to continue filing Forms 144 on your behalf and ascertain what they need from you in order to be prepared to file electronically beginning on April 13, 2023.
- Evaluate your structure to identify any entities or individuals that will need EDGAR codes and start the application process.
- Review your EDGAR code management practices and update them as needed to ensure that your brokers and outside counsel are promptly alerted to any updated codes.

Please reach out to the Cooley fund formation team if you have any questions. We are ready to assist you with this transition in any way we can.

This content is provided for general informational purposes only, and your access or use of the content does not create an attorney-client relationship between you or your organization and Cooley LLP, Cooley (UK) LLP, or any other affiliated practice or entity (collectively referred to as "Cooley"). By accessing this content, you agree that the information provided does not constitute legal or other professional advice. This content is not a substitute for obtaining legal advice from a qualified attorney licensed in your jurisdiction, and you should not act or refrain from acting based on this content. This content may be changed without notice. It is not guaranteed to be complete, correct or up to date, and it may not reflect the most current legal developments. Prior results do not guarantee a similar outcome. Do not send any confidential information to Cooley, as we do not have any duty to keep any information you provide to us confidential. When advising companies, our attorney-client relationship is with the company, not with any individual. This content may have been generated with the assistance of artificial intelligence (AI) in accordance with our AI Principles, may be considered Attorney Advertising and is subject to our legal notices.

Key Contacts

Darren DeStefano Reston	ddestefano@cooley.com +1 703 456 8034

This information is a general description of the law; it is not intended to provide specific legal advice nor is it intended to create an attorney-client relationship with Cooley LLP. Before taking any action on this information you should seek professional counsel.

Copyright © 2023 Cooley LLP, 3175 Hanover Street, Palo Alto, CA 94304; Cooley (UK) LLP, 22 Bishopsgate, London, UK EC2N 4BQ. Permission is granted to make and redistribute, without charge, copies of this entire

document provided that such copies are complete and unaltered and identify Cooley LLP as the author. All other rights reserved.