

Rule 144 Opinions Report

By the Securities Law Opinions Subcommittee, Federal Regulation of Securities Committee, ABA Business Law Section*

I. INTRODUCTION

In this report, we address legal opinions on the resale of securities relying on Rule 144 adopted by the Securities and Exchange Commission (the “SEC”) under the Securities Act of 1933, as amended (the “Securities Act”), typically known as Rule 144 opinions.¹ Section 5 of the Securities Act requires that all offers and sales of securities be registered unless an exemption from registration is available. Rule 144 provides a non-exclusive safe harbor from registration for resales of “restricted”² and “control”³ securities under Section 4(a)(1) of the Securities Act, which exempts sales by anyone “other than an issuer, underwriter or dealer.”⁴

A person who resells securities in compliance with Rule 144 is deemed not to be engaged in a “distribution” of securities and, therefore, not an “underwriter” as a result of the resale for purposes of the Section 4(a)(1) exemption. Rule 144 is an important safe harbor because it allows holders of restricted securities and

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1. Rule 144 opinions are a subset of “no registration” opinions, in this case relating to a resale. An opinion to permit a sale of securities where the securities remain restricted after the transfer—for example, pursuant to (i) Section 4(a)(1) of the Securities Act by way of the “4(1½) exemption” or (ii) Section 4(a)(7) of the Securities Act—would also be a “no registration” opinion relating to a resale but would not be a Rule 144 opinion and, therefore, is beyond the scope of this report. See Comm. on Fed. Reg. of Sec., ABA Bus. Law Section, *Legal Opinions on Section 4(1½) Resale Transactions*, 77 Bus. Law. 191 (2021). “No registration” opinions may also be given when an issuer sells securities in a private placement. See Comm. on Fed. Reg. of Sec., ABA Bus. Law Section, *No Registration Opinions (2015 Update)*, 71 Bus. Law. 129 (2015).

2. Restricted securities include securities “acquired directly or indirectly from the issuer, or from an affiliate of the issuer, in a transaction or chain of transactions not involving any public offering.” See paragraph (a)(3) of Securities Act Rule 144, 17 C.F.R. § 230.144 (2024).

3. Control securities are those that are held by an affiliate of the issuer, including restricted securities. Examples of control securities that are not restricted securities include securities purchased by an affiliate of the issuer in a registered public offering or in the public market or received under an equity compensation plan registered on Form S-8.

4. The title of Rule 144 is “Persons deemed not to be engaged in a distribution and therefore not underwriters.”

control persons (“affiliates”)⁵ to sell their securities into the public market and thereby benefit from public market prices and liquidity.

Rule 144 specifies conditions to be met for the safe harbor to apply. Rule 144 generally permits resales of restricted securities that have been held (i) for at least one year or (ii) for at least six months if the issuer is and has been subject to the reporting requirements of the Securities Exchange Act of 1934, as amended (the “Exchange Act”), for at least ninety days and is current in its periodic reports.⁶ For affiliates,⁷ Rule 144 imposes conditions and permits resales of securities only if volume, manner of sale, and other conditions of the rule are met.

Issuers typically limit transfers of restricted securities by legending physical certificates, providing similar notations on securities held in book-entry form, or otherwise limiting transfers and requiring that certifications and legal opinions or instruction letters be provided in connection with resales.⁸ Opinion language can vary, but in substance the opinions must conclude that no registration is required for the resale. In the context of resales under Rule 144, legal opinions may take the form of an opinion letter to the issuer or the transfer agent for the securities involved. The opinion may also indicate that the securities sold can be delivered to the purchaser without Securities Act restrictive legends (so-called “delegended”) upon transfer.⁹

Rule 144 opinions are just one of the safeguards that issuers and brokers use to help prevent unregistered distributions. Like other legal opinions, they are not a guarantee of the underlying legal conclusions or the truthfulness of the facts represented to the opinion giver, but rather represent a lawyer’s professional judgment about whether the conditions of Rule 144 have been or will be satisfied at the time the resale is made based on the facts represented and the diligence done by the opinion giver.¹⁰ While an opinion giver may have additional responsibility under the U.S. securities laws when giving a Rule 144 opinion, the

5. See *infra* Part II.C for a discussion of affiliate status.

6. Selling security holders of a “shell company” may not use Rule 144. Selling security holders of a former shell company (regardless of the length of time that has elapsed since it became a former shell company) can only use Rule 144 if the issuer is subject to Exchange Act reporting requirements, is current in its periodic reports, and at least one year has elapsed since it filed its “Form 10 information.” See Rule 144(i), including the definition of “Form 10 information” in Rule 144(i)(3).

7. References to “affiliates” throughout this report include any person who was an affiliate of the issuer at any time during the ninety days immediately preceding the date of sale.

8. See Comm. on Fed. Reg. of Sec., ABA Bus. Law Section, *Law of Private Placements (Non-Public Offerings) Not Entitled to Benefits of Safe Harbors—A Report*, 66 BUS. LAW. 85 (2010).

9. In this report, we follow the common practice of broadly including under the term “delegending” the actual removal of written restrictive legends from physical certificates, as well as the counterparts for electronic book-entry interests in securities, including the release by a transfer agent of electronic book-entry interests from an account designated as “restricted” (or with a “restricted” CUSIP number) to one that is not so designated or the release by a transfer agent of electronic book-entry interests from a “restricted” account to DTC (with an unrestricted CUSIP number) to permit their unrestricted trading in the public market through brokers and other intermediaries.

10. For a discussion of Rule 144 opinions delivered in advance of a resale when Rule 144 conditions apply, see *infra* Part IV.H (page 18) note 58.

opinion's substance and form are also governed by the customary practice applicable to third-party opinions.

Even in the absence of a resale, issuers (other than shell companies and former shell companies¹¹) are often comfortable with routinely removing legends and other transfer restrictions on restricted securities held by non-affiliates of the issuer once the required one-year holding period condition has been met, because no other Rule 144 conditions apply.¹² Until resold, however, the securities technically remain restricted securities within the meaning of Rule 144.

The SEC has focused on compliance with Rule 144 and has brought enforcement actions not only against sellers but against others involved in noncompliant transactions, including lawyers who gave Rule 144 opinions.¹³

We are issuing this report to assist lawyers who prepare Rule 144 opinions, taking into account regulatory and market developments, and to help lawyers avoid some of the pitfalls these opinions can involve. Sample language for Rule 144 opinions and seller's and broker's representation letters appears in Part VI of this report.¹⁴

II. RULE 144 REQUIREMENTS

A. CONDITIONS FOR RELIANCE ON RULE 144

There are five key conditions for reliance on Rule 144. Whether and how the conditions apply depends primarily on whether:

- (1) the securities are restricted securities, control securities (that is, held by an affiliate of the issuer), or both;
- (2) the issuer is a reporting or non-reporting company (that is, whether or not the issuer is "subject to" the reporting requirements of the Exchange Act for at least 90 days prior to the sale and not a voluntary filer);

11. For shell companies and former shell companies, under Rule 144(i) the equivalent of the current public information condition does not end after a one-year holding period.

12. See J. WILLIAM HICKS, *RESALES OF RESTRICTED SECURITIES* § 4:5 (2025) (text accompanying note 17). See also U.S. Sec. & Exch. Comm'n, Revisions to Rules 144 and 145, 72 Fed. Reg. 71546, 71549 n.65 (Dec. 17, 2007) (Release No. 33-8869) ("In the past, the staff in the Division of Corporation Finance has expressed the view that 'It is not inappropriate for issuers to remove restrictive legends from securities that may be resold in reliance on Rule 144(k).' Under the amendments that we are adopting, we do not object if issuers remove restrictive legends from securities held by non-affiliates after all of the applicable conditions in Rule 144 are satisfied." This guidance does not, however, apply to the removal of a legend from a certificate representing restricted securities held by an affiliate of the issuer.

13. See *SEC v. Greenstone Holdings*, 10 civ. 1302 (MGC) (S.D.N.Y. Nov. 20, 2012); *In re Sourlis*, File No. 3-15212 (SEC July 23, 2013), <https://www.sec.gov/litigation/admin/2013/34-70031.pdf>. SEC Litigation Release No. 25199 (Sept. 8, 2021).

14. Throughout, we have used broker and broker-dealer interchangeably, and use of that term would include any role as market maker under Rule 144.

- (3) the issuer is a shell company, such as a special purpose acquisition company (a “SPAC”), or a former shell company; and
- (4) the securities are debt or equity securities.

In summary, the five key conditions are:

- *Current Public Information (Rule 144(c))*: To satisfy the current public information condition,
 - (i) an issuer that has been subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act for at least ninety days prior to the sale must have filed all required reports under Section 13 or 15 (d) of the Exchange Act, other than on Form 8-K, and electronically submitted all required interactive data files for the twelve full calendar months preceding the sale (or for such shorter period that the issuer was required to file such reports),¹⁵ and
 - (ii) an issuer that is not a reporting issuer must make publicly available the information specified in Exchange Act Rule 15c2-11 (including the issuer’s most recent balance sheet and profit and loss and retained earnings statements).¹⁶

When applicable, the current public information condition must be satisfied at the time of each sale.

- *Holding Period (Rule 144(d))*: For a reporting issuer, restricted securities must have been held for at least six months prior to their resale. For a non-reporting issuer, restricted securities must have been held for at least one year prior to their resale. The commencement of the holding period begins when the full purchase price is paid.¹⁷ There are tacking provisions in Rule 144 that allow a holder of securities to add to its holding period the holding period of certain transferors and the holding period of certain other securities (for example, convertible securities of the same issuer held prior to their conversion).¹⁸
- *Volume Limitation (Rule 144(e))*: The amount of equity securities resold pursuant to Rule 144 by an affiliate may not exceed during any three-month period the greater of (i) 1 percent of the outstanding securities of that class and (ii) the average weekly trading volume of securities of

15. A Note to Rule 144(c) permits reliance on (i) the most recent quarterly or annual report filed by the issuer to establish compliance with these requirements or (ii) a written statement from the issuer to that effect, provided that in each case if a person knows or has reason to believe that the issuer has not complied, reliance is not allowed.

16. In the case of an insurance company, an annual statement specified in Exchange Act Section 12(g)(2)(G)(i) satisfies the current public information requirement.

17. See Rule 144(d)(2) addressing promissory notes, other obligations, and installment contracts.

18. Rule 144(d)(3) provides specific circumstances in which tacking is permitted.

that class, measured over a four-week period preceding the filing of the Form 144.¹⁹ Aggregation of sales volume will apply based on the definition of “person” in Rule 144(a)(2),²⁰ in the case of persons that agree to act in concert,²¹ and in some gift, trust and estate situations.

- *Manner of Sale (Rule 144(f))*: Securities may be resold by affiliates only in “brokers’ transactions,” directly with a “market maker” or in “riskless principal transactions.” The reseller of securities may not solicit or arrange solicitation of orders to buy the securities in anticipation of or in connection with the transaction or make any payment in connection with the offer or sale of the securities to any person other than the broker who executes the order to sell the securities. The broker has to limit solicitation as provided in Rule 144(g).
- *Form 144 Notice (Rule 144(h))*: Affiliates must file a Form 144 if the number of securities to be sold in reliance on Rule 144 in any three-month period exceeds 5,000 shares or has an aggregate sale price in excess of \$50,000. Until 2023, all Form 144 filings were required to be made in paper format and mailed to the SEC. Now, Form 144 must be filed electronically on EDGAR for securities of reporting issuers. The Form 144 is to be filed no later than concurrently with either the placing with a broker of an order to execute a resale of securities in reliance upon Rule 144 or the execution directly with a market maker of such resale.²² The seller must have a bona fide intent to resell the securities included on the Form 144 within a reasonable time after filing the notice.

The following charts summarize the foregoing requirements.²³

19. Prior Rule 144 resales by the seller during the measurement period will reduce the average weekly trading volume calculation. Note that if the seller’s prior Rule 144 sales were considered a distribution under Regulation M under the Exchange Act, those sales may not appear in the reported average weekly trading volume and if not so included do not need to be subtracted in calculating the average weekly trading volume. See U.S. Sec. & Exch. Comm’n, Resales of Restricted and Other Securities, 44 Fed. Reg. 46752 (Aug. 8, 1979) (Release No. 33-6099) (Question 39). For debt securities, the volume limitation is the greater of the amount that would be calculated under the volume condition for equity securities and 10 percent of the tranche or class of the debt securities outstanding.

20. See Rule 144(a)(2)(iii) (treating as the same selling security holder the person for whose account securities are being resold and any entity in which that person beneficially owns 10 percent or more of a class of that entity’s equity securities), among other provisions.

21. Rule 144(e)(vi) (aggregation for calculating sales volume in which “two or more affiliates or other persons agree to act in concert for the purpose of selling securities of an issuer”).

22. “Concurrently” is understood to mean not later than 10:00 p.m. Eastern Time on the day the order is placed. See *infra* Part IV.C.

23. These charts have been adapted from Revisions to Rules 144 and 145, *supra* note 12, at 71551. Note that additional requirements apply to former shell companies as described in *infra* Part II.B.

Restricted Securities of a Reporting Issuer

Resales by Affiliates	Resales by Non-Affiliates
<i>During six-month holding period:</i> No resales under Rule 144 permitted.	<i>During six-month holding period:</i> No resales under Rule 144 permitted.
<i>After six-month holding period:</i> Resales must satisfy the listed Rule 144 conditions:	<i>After six-month holding period but before one year:</i> Resales must satisfy only one additional Rule 144 condition:
<ul style="list-style-type: none">• Current public information• Volume limitation• Manner of sale• Filing of Form 144	<ul style="list-style-type: none">• Current public information <i>After one-year holding period:</i> Unlimited resales without any additional Rule 144 conditions.

Restricted Securities of a Non-Reporting Issuer

Resales by Affiliates	Resales by Non-Affiliates
<i>During one-year holding period:</i> No resales under Rule 144 permitted.	<i>During one-year holding period:</i> No resales under Rule 144 permitted.
<i>After one-year holding period:</i> Resales must satisfy the listed Rule 144 conditions (some may be hard to satisfy in the case of a non-reporting issuer):	<i>After one-year holding period:</i> Unlimited resales without any additional Rule 144 conditions.
<ul style="list-style-type: none">• Current public information• Volume limitation• Manner of sale• Filing of Form 144	

Control Securities That Are Not Restricted Securities

Reporting Issuer	Non-Reporting Issuer
<i>No holding period applies:</i> Resales must satisfy the listed Rule 144 conditions:	<i>No holding period applies:</i> Resales must satisfy the listed Rule 144 conditions (some may be hard to satisfy in the case of a non-reporting issuer):
<ul style="list-style-type: none">• Current public information• Volume limitation• Manner of sale• Filing of Form 144	<ul style="list-style-type: none">• Current public information• Volume limitation• Manner of sale• Filing of Form 144

B. SPECIAL CONSIDERATIONS FOR SHELL COMPANIES, INCLUDING SPACs, AND FORMER SHELL COMPANIES

For “shell company” issuers,²⁴ including SPACs, Rule 144 is not available for the resale of their securities. However, for a former shell company issuer (e.g., a SPAC that has completed a de-SPAC transaction), Rule 144 would be available for resales so long as the following conditions²⁵ are satisfied:

- the issuer is a reporting issuer;
- the issuer has filed all reports, other than Form 8-K reports, and other materials required to be filed by Section 13 or 15(d) of the Exchange Act, as applicable, during the preceding twelve months;²⁶ and
- one year has elapsed from the date that the issuer filed current Form 10 information with the SEC reflecting its status as an entity that is no longer a shell company.²⁷

For a de-SPAC transaction, the Form 10 information in practice is often considered to be filed when the “super” Form 8-K (or, in the case of a foreign private issuer, a Form 20-F) is filed following closing of the de-SPAC transaction.²⁸

C. AFFILIATE STATUS

A threshold question for analyzing a resale under Rule 144 is whether the seller of the securities is, or has recently been, an affiliate of the issuer. As discussed above, Rule 144 imposes significant additional conditions that any seller that is an affiliate of the issuer must satisfy. To qualify as a non-affiliate for purposes of Rule 144, a seller must not at the time of sale be, and for the three months prior to the time of sale must not have been, an affiliate of the issuer of the securities that are being sold. Otherwise, the resale will be subject to the conditions applicable to resales by an affiliate.

24. A shell company is an issuer, other than a business combination-related shell company or an asset-backed issuer, that (a) has no or nominal operations and (b) has either (i) no or nominal assets or (ii) assets consisting solely of cash and cash equivalents or assets consisting of any amount of cash and cash equivalents and nominal other assets. See Rule 144(i).

25. These are additional, not substitute, conditions.

26. This condition is similar to the current public information requirement in Rule 144(c) discussed in *supra* Part IIA & note 16. However, additional diligence may be necessary because Rule 144(i), unlike Rule 144(c), does not provide that a person may rely on public filings of the issuer or a statement of the issuer. The Rule 144(i) requirement does not end after one year for a non-affiliate holding restricted securities, which may interfere with an investor’s desire to hold their securities in a brokerage account, unless the broker assumes responsibility for sales being made in compliance with Rule 144 or pursuant to a resale registration statement.

27. The term “Form 10 information” means the information that is required by Form 10 or Form 20-F, as applicable to the issuer of the securities, to register under the Exchange Act each class of securities being sold under Rule 144. See Rule 144(i)(3).

28. The Form 10 information may be available earlier than when the “super” Form 8-K (or Form 20-F) is filed if the Form S-4 (or Form F-4) for the de-SPAC transaction includes all the necessary Form 10 information. See Rule 144(i)(3); Revisions to Rules 144 and 145, *supra* note 12, Fed. Reg. at 71557–58 (regarding Form 10 information being deemed filed when the initial filing is made and Rule 144(i)(2) being satisfied in the case of a Rule 145(a) transaction through the filing of the registration statement).

An “affiliate” is defined in Rule 144 as “a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such issuer.”²⁹

“Control” is defined in Rule 405 under the Securities Act as “the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.”³⁰ Determining whether a person is an affiliate is a complex question requiring an opinion giver to examine all of the relevant facts and circumstances. As a result, the SEC views the determination of affiliate status as a factual question and has a policy of not providing interpretive advice on affiliate status under Rule 144.

The following factors may be considered when determining affiliate status:

- *Ownership of Voting Securities*: The general view is that a security holder usually is not an affiliate of an issuer if the issuer’s equity it owns represents less than 10 percent of the voting power, and there are no other indicia of control.³¹ If the security holder owns or has the right to acquire equity interests in the issuer representing 10 percent or more of the voting power, affiliate status, as a matter of practice, is presumed by many practitioners, but the presumption can be overcome by other factors. With respect to ownership of voting equity securities, for example, a relevant factor will be whether there are stockholders unrelated to the person whose affiliate status is being determined that hold an equal or greater percentage of the voting power. At a minimum, ownership of equity securities representing 10 percent or more of the voting power leads most practitioners to examine other factors that might suggest (or not) that the security holder has control over the issuer.
- *Public Filings*: Ownership for SEC reporting purposes is typically determined on the basis of “beneficial ownership,” as defined in Rule 13d-3 under the Exchange Act. Under that definition, a person is generally considered to beneficially own equity securities if it has or shares voting or investment power over the securities. While beneficial ownership under this definition often provides a useful means of assessing potential affiliation through control—most obviously in the form of voting power—the concepts are distinct. Practitioners should be mindful of situations that might lead to significant beneficial ownership being established without

29. Rule 144(a)(1).

30. Securities Act Rule 405, 17 C.F.R. § 230.405 (2025).

31. The 10 percent threshold has some basis in analogous provisions of SEC rules and securities law lore, see, for example, Exchange Act Rule 10A-3(e)(1)(ii)(A)(1), 17 C.F.R. § 240.10A-3(e)(1)(ii)(A)(1) (2025), Exchange Act Rule 16a-1(a)(1), 17 C.F.R. § 240.16a-1(a)(1) (2025); U.S. SEC. & EXCH. COMM’N, DISCLOSURE TO INVESTORS—A REAPPRAISAL OF FEDERAL ADMINISTRATIVE POLICIES UNDER THE ‘33 AND ‘34 ACTS (1969) [hereinafter *Wheat Report*]. It is not, however, a rule of law but rather a rule of thumb for where to start the analysis. Rule 10A-3 specifically states that it does not create any presumption that a person holding more than 10 percent controls or is an affiliate of a specified person, and the *Wheat Report* recommendation to codify a definition of “affiliate” was not adopted.

necessarily establishing control—e.g., where the holder has a large economic interest, but its voting power is disproportionately low due to the presence of a class of “supervoting” shares or other control arrangements. On the other hand, control and possible affiliate status may be established through the importance of an investment interest to an issuer or the possibility of significant future equity ownership, even if this may not result in beneficial ownership of equity securities.

Beneficial ownership reports on Schedule 13D, which under Section 13(d) are required to be filed with the SEC when a holder’s beneficial ownership exceeds 5 percent of the relevant class of equity securities, provide useful information when assessing control of an issuer and potential affiliate status. In addition, a separate form (Schedule 13G) with reduced disclosure requirements is available to beneficial owners that have acquired the relevant securities without the “purpose nor with the effect of changing or influencing the control of the issuer.”³² The existence of a Schedule 13G filing and the information in that filing, while not alone determinative, are factors that can be considered in assessing affiliate status. Beneficial ownership reports often provide additional detail, including related agreements filed as exhibits, that can be useful when assessing the extent of a holder’s control.

- *Common Control*: The definition of the term “affiliate” includes persons under “common control,” which may require consideration of the control relationship that a selling security holder’s corporate parent (or other person with control) has with the issuer. Assuming that person controls its subsidiaries’ decisions with respect to the issuer’s securities, this analysis may lead to a determination that the parent’s combined indirect ownership interest in the issuer (through the parent’s subsidiaries) and perhaps other indicia of control at the parent level (e.g., representation on the issuer’s board of directors) cause the selling security holder and other subsidiaries of the parent to be affiliates of the issuer, even if each individual subsidiary’s ownership interest is small and none of them individually has any other indicia of control.
- *Aggregation and Disaggregation*: Combining of interests across entities and other persons is also reflected in aggregation principles that apply to ownership-level calculations. Under Section 13(d)(3) of the Exchange Act and Rule 13d-5, beneficial ownership is also aggregated among “group” members that agree to act together for the purpose of acquiring, holding, voting, or disposing of an issuer’s equity securities. Thus, the aggregate ownership level in an issuer for determining affiliate status of a selling security holder may be significantly higher than its record ownership level. Disaggregation of beneficial ownership has been recognized and permitted by the SEC for some Exchange Act purposes where organizations carefully separate their holdings into independently operated business units primarily through information barriers and separate and

32. See Exchange Act Rule 13d-1(b), (c), 17 C.F.R. § 240.13d-1(b), (c) (2025).

autonomous decision-making.³³ Disaggregation might be relevant to control and affiliate status analysis for Rule 144 to the extent Exchange Act beneficial ownership levels are considered relevant.

- *Blocking Provisions and Passivity Commitments*: In some situations, a security holder may avoid affiliate status if provisions that limit the rights of the holder (“blocking provisions”) or that commit the security holder not to vote or to vote securities in proportion to the votes of other security holders are included in the terms of convertible securities or other binding agreements, subject to the comment above in “Public Filings.”
- *Director Nomination or Appointment Rights*: Significant security holders may have the right to nominate or appoint one or more members to the board of directors of the issuer through a charter provision, stockholder agreement, investor rights agreement, or other arrangement. The right of a security holder to appoint a representative to the board of directors tends to weigh in favor of a determination that a security holder is an affiliate of the issuer. Even without the right to appoint a director, having a representative serve as a director typically weighs in favor of affiliate status.
- *Consent Rights*: Significant security holders may also have consent rights over specified actions to be taken by the issuer, such as amendments to constituent documents or major transactions. The presence of these consent rights also typically weighs in favor of a determination that a significant security holder is an affiliate of the issuer.
- *Other Contractual Rights*: If the selling security holder has other contractual rights, such as a commercial contract that makes up a substantial portion of the issuer’s business or on which the issuer is dependent, the selling security holder may have sufficient control to be considered an affiliate.
- *Directors and Executive Officers*: Directors and executive officers of the issuer will generally be considered affiliates of the issuer.
- *Control Triggers Under Other Regulatory Regimes*: Other regulatory regimes may presume control at certain levels of ownership of voting securities or with other indicia of control such as board representation. For example, under state insurance regulations, there is a presumption of control at 10 percent ownership of voting securities.

III. RULE 144 OPINION GIVER DILIGENCE

Rule 144 opinion givers should be aware of the context in which they give Rule 144 opinions and the potential for liability under the U.S. federal securities laws. Their opinions facilitate the resale into the public market of restricted or

33. See, e.g., U.S. Sec. & Exch. Comm’n, Amendments to Beneficial Ownership Reporting Requirements, 63 Fed. Reg. 2854 (Jan. 16, 1998) (Release No. 34-39538); The Goldman Sachs Grp., Inc., SEC No-Action Letter, 2001 WL 314646 (Mar. 30, 2001).

control securities that would otherwise require registration under the Securities Act. If their opinion is wrong, the sale into the public market could be an unregistered distribution of securities in violation of Section 5 of the Securities Act, and the issuer, the seller and the broker could have Section 12 liability under the Securities Act.³⁴

Another way to look at the context in which Rule 144 opinions are given is that there is typically a difference, which may be significant, in the price that an investor would pay for shares that are restricted securities compared to shares that can be freely resold in the public market. That means a seller has a financial incentive to convince the opinion giver that the sale will comply with Rule 144. Penny stocks scandals and pump and dump schemes have often been based on similar economic incentives and have sometimes involved attempts to sell under Rule 144. That means opinion givers have good reason to be cautious when rendering Rule 144 opinions, particularly in light of the SEC's regulatory scrutiny of opinion givers described earlier in this report.

When delivering a Rule 144 opinion, opinion givers should do the work necessary to satisfy themselves that the applicable conditions of Rule 144 have been satisfied. Opinion givers, when satisfied that they may reasonably do so, rely on various factual representations, covenants, and assumptions addressing the requirements of Rule 144, as described below. The steps opinion givers take to satisfy themselves that their reliance is reasonable will depend on the requirements of Rule 144 and the circumstances of the transaction, including (where applicable) their history with the selling security holder's earlier transactions in the securities and their experience with the practices and procedures of the issuer, the broker, and any transfer agent involved in the transaction.

The Rule 144 opinion giver's diligence may include receipt of representation letters or other certifications provided by the selling security holder, the broker, and, when appropriate, the issuer. However, if the opinion giver is aware of facts that are not consistent with the representations or certifications, the opinion giver should not simply rely on the representation letters or other certifications. Instead, the opinion giver should make further inquiry into the facts supporting the opinion.³⁵

In conducting diligence to support its Rule 144 opinion, an opinion giver will have access to public information, including SEC filings of the issuer, which provide evidence as to its satisfaction of its SEC reporting obligations and its shell company status.³⁶ Public filings may also include constituent documents and

34. See Securities Act § 12(a)(1), 15 U.S.C. § 77(a)(1).

35. The need for opinion givers to exercise particular care when establishing facts in connection with various "no registration" opinions has been long recognized. See Am. Bar Ass'n Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 335 (Feb. 2, 1974); see also The Ass'n of the Bar of the City of N.Y., *Report by Special Committee on Lawyers' Role in Securities Transactions*, 32 BUS. LAW. 1879 (1977); SEC v. Sourlis, 851 F.3d 139, 145–46 (2d Cir. 2016) (affirming the District Court's finding that the lawyer's failure to review the convertible notes identified in her Rule 144 opinion was "at the very least reckless," and her opinion letter statements that she had spoken to the original noteholders "were knowingly false").

36. For example, the cover pages of both Forms 10-K and 10-Q require an issuer to indicate (i) whether it is a shell company, (ii) whether it has satisfied its periodic reporting requirements for the

other corporate records and transaction documents the opinion giver can review to confirm when securities were issued and whether the securities were actually issued and paid for. In doing this work and determining whether they will provide a Rule 144 opinion, opinion givers may want to consider the character and track record of the security holder, broker, and issuer involved. The presence of an experienced broker in the transaction can help add comfort that the requirements of the rule are being met. A broker's own control procedures can assist the diligence process, especially if the broker is alerted to restricted securities being involved, such as through legending. Of course, establishing a firm foundation for a Rule 144 opinion may not be difficult if the opinion giver has been involved with the issuer or the selling security holder at various critical stages of the selling security holder's investment history and, for example, prepared or negotiated the original investment documents and worked on any relevant transfers, conversions, or exchanges or on the issuer's initial public offering ("IPO"). The more challenging situations from a diligence perspective normally arise when the opinion giver has limited to no history with the parties or preceding transactions.

IV. CHALLENGING RULE 144 OPINION SITUATIONS

A. ABILITY TO TACK UPON CONVERSION OR EXCHANGE

Start-up and other private companies use a variety of financing methods in addition to issuing common stock, such as issuing warrants, convertible debt securities, and convertible and nonconvertible preferred stock. As these companies mature and go public, they frequently use common stock to refinance their capital structure through the exercise or exchange of warrants or conversion of debt securities or preferred stock into common stock. Whether the holders who received common stock in those transactions can "tack" (i.e., add) the holding period of the prior securities to that of the common stock to satisfy the applicable holding period requires a detailed review of the current and prior transactions, the prior securities, and the exercise, exchange, or conversion.

For example, any additional investment provided by the holder counts as a new investment and begins a new holding period (even a penny per share upon exercise of warrants).³⁷ Conversely, if the holder surrenders only securities of the issuer in return for the common stock (even if the securities have accrued and unpaid dividends), then the holding period of the surrendered securities can generally be tacked on to the holding period of the common stock issued in

last twelve months (or for any shorter period that the issuer was required to file such reports) and that the issuer has been subject to such requirements for the past ninety days, and (iii) whether it has electronically submitted required interactive data files for the last twelve months (or for any shorter period that the issuer was required to submit such files). Forms 10-K and 10-Q do not, however, require disclosure that the issuer is a former shell company, so this should be verified through a separate inquiry.

37. *Div. of Corp. Fin., Compliance & Disclosure Interpretations: Securities Act Rules, Question 132.13*, U.S. SEC. & EXCHANGE COMMISSION, <https://www.sec.gov/rules-regulations/staff-guidance/compliance-disclosure-interpretations/securities-act-rules> (last updated Mar. 20, 2025).

exchange. An example is the cashless exercise of a warrant. Where, however, common stock is issued by a borrower to a lender to repay or refinance a loan that is not a debt security, tacking will not apply. Similarly, stock options granted to directors, employees, or consultants for no consideration are not an investment in the company for purposes of tacking.³⁸

Rule 144 includes tacking provisions that allow holders of securities in specified circumstances to tack the holding periods of other securities or holders to satisfy the current holder's holding period requirement, such as when convertible securities are converted.³⁹ A typical convertible security has a fixed conversion formula (subject to anti-dilution adjustments), which means that the holder of the convertible security is at economic risk with respect to the value of the underlying common stock. However, this is not necessarily the case for market-adjustable securities where the economics of conversion are not fixed at the time of the initial issuance but rather vary with the market price of the underlying common stock. In addition, market-adjustable securities often allow the holder to convert at a price that is a substantial discount to the then-prevailing market price of the underlying common stock. The SEC has expressed concerns about the use of tacking for conversion of securities where the holder does not bear economic risk with respect to the underlying common stock, and in 2021 proposed to eliminate tacking for some market-adjustable securities. The proposed amendments have not yet been adopted.⁴⁰ If a Rule 144 opinion is being given with respect to securities issued upon conversion of market-adjustable securities, an opinion giver may want to consider the SEC's concerns regarding the appropriateness of tacking for these kinds of securities.⁴¹

B. ABILITY TO TACK UPON REORGANIZATION

The preliminary note to Rule 144 states that the purpose of the required holding period is to ensure that a holder has assumed the economic risk of the holder's investment. Rule 144's method for determining the holding period is set forth in subsection (d) of the Rule. Rule 144(d) permits tacking of the holding periods for different securities where the investor retains its investment in the issuer, and no new investment is made, such as in a recapitalization. Rule 144(d)(3)(i) states that "securities acquired from the issuer . . . pursuant to a . . . recapitalization shall be deemed to have been acquired at the same time as . . . the securities surrendered in connection with the recapitalization."

38. See Note 2 to Rule 144(d)(3)(x).

39. See Rule 144(d)(3)(ii).

40. See U.S. Sec. & Exch. Comm'n, Rule 144 Holding Period and Form 144 Filings, 86 Fed. Reg. 5063 (Jan. 19, 2021) (Release No. 33-10911).

41. In some cases, rather than allege violations of Rule 144, the SEC has brought enforcement actions alleging that purchasers acquiring the securities upon conversion were acting as unregistered broker-dealers by reselling those securities. See *SEC v. Keener*, No. 22-14237 (11th Cir. 2024) (defendant was purchasing convertible notes from issuers, converting those notes into common stock at a discounted price, and selling that stock in the public market at a profit, all within a short period of time).

There are, however, exceptions to the “same issuer” general rule. In a series of no-action letters, the SEC staff has allowed holders to tack their holding periods upon the conversion of a limited partnership or limited liability company (“LLC”) into a corporation.⁴² While it may make sense for a limited partnership or LLC to convert into a corporation in preparation for its IPO, often the changes needed to prepare for an IPO result in the need to revise the entity’s structure in ways that interfere with a change in entity structure as originally envisioned in the governing document of the limited partnership or LLC. These changes will often preclude tacking of holding periods.

C. FAILURE TO TIMELY FILE FORM 144

An affiliate selling securities pursuant to Rule 144 must file with the SEC a Form 144 notice concurrently with placing a Rule 144 sale order with a broker, which, in the case of a reporting issuer, practically means that the Form 144 must be filed on EDGAR by 10:00 p.m. Eastern Time on the day of placing the order or of the sale.⁴³ Many investors seek to file the Form 144 after market close to delay alerting the market to their trades. Failure to file the Form 144 timely results in the selling security holder failing to satisfy a condition of Rule 144. In that circumstance, the opinion giver would have to consider any possible remedial action or, if the opinion has been delivered, whether to withdraw it. The selling security holder may be forced to break the trade and re-execute in the future with the proper Form 144 filing. An opinion giver might satisfy itself that the Form 144 notice filing condition will be met based on a representation that the filing will be made by 10:00 p.m. Eastern Time or based on the filing already appearing on EDGAR.

D. “PLAN OR SCHEME TO EVADE” CONSIDERATIONS

The instructions to Rule 144 state that the safe harbor is not available with respect to any transaction or series of transactions that, although in technical compliance with Rule 144, is part of a plan or scheme to evade the registration

42. See Hygeia Sciences, Inc., 1986 SEC No-Action LEXIS 1897 (Mar. 13, 1986); Cravath, Swaine & Moore, 2000 WL 190027 (S.E.C. No-Action Letter Feb. 11, 2000). The SEC staff identified in the no-action letters five elements that must be satisfied to permit tacking: (i) the governing document of the limited partnership or LLC must contemplate the reorganization into a corporation, (ii) the equity holders of the predecessor entity seeking to tack may not have veto or meaningful decision-making authority with respect to the reorganization, (iii) in the reorganization, the equity holders must receive a number of shares proportionate to the equity interest that they held in the predecessor entity, (iv) the successor corporation must carry on substantially the same business as the predecessor, and (v) the equity holders must not have provided any additional consideration for the shares of common stock that they receive in exchange for their equity interests in the predecessor entity. The SEC staff has refused relief as well. See, e.g., U.S. Sec. & Exch. Comm’n, Div. of Corp. Fin., Texas Roadhouse, Inc., No-Action Letter (July 28, 2005), <https://www.sec.gov/divisions/corpfin/cf-noaction/tri072805.htm>.

43. See 17 C.F.R. § 232.13(a)(4) (2025); U.S. Sec. & Exch. Comm’n, Div. of Corp. Fin., Compliance & Disclosure Interpretations: Securities Act Rules, Question 136.09 (Mar. 4, 2011), <https://www.sec.gov/rules-regulations/staff-guidance/compliance-disclosure-interpretations/securities-act-rules>. Some brokers may require the Form 144 to be filed simultaneously or in advance of a sale.

requirements of the Securities Act. The following paragraphs provide two examples of transactions that may constitute such a “plan” or “scheme.”

The situation in the *Sourlis* case (*see supra* Part I.B. and note 36), where back-dated convertible notes were prepared, is an example of the use of a scheme or device to give the appearance of complying with the Rule 144 holding period requirement. Similar situations include the creation of securities to reflect debt obligations that were not securities.

Another type of transaction that the SEC has flagged as a scheme is illustrated by the *Zacharias* case.⁴⁴ In that situation, a company arranged for an existing non-affiliate investor to sell shares to the public. The non-affiliate investor then purchased newly issued restricted shares from affiliates of the company. The SEC argued, and the court agreed, that, while each step of the transaction technically complied with the Securities Act, when viewed together, the company’s involvement in the multistep transaction, which may allow affiliates to sell their restricted shares at a price that reflected little or no “liquidity discount” to the prevailing market price for freely tradable shares without having to file a registration statement, was essentially using a device to avoid the Securities Act registration requirement. Although the sales to the public were made under Regulation S rather than Rule 144, the principle could presumably also be applied to Rule 144 sales.

The liquidity and pricing benefits of resales under Rule 144 can tempt a seller to use the rule as part of a device to evade registration requirements. The transactions described above are just a few examples, and they highlight the need for the opinion giver to conduct sufficient diligence, especially in situations where the opinion giver lacks background knowledge about the issuer, seller, or relevant transactions. Discussed elsewhere in this report are some of the kinds of diligence efforts counsel may employ—including review of original investment documentation and financial statements of the issuer and receipt of additional certifications from the issuer and seller—to gain comfort that the resales counsel is being asked to opine on do not run the risk of being considered part of a “plan or scheme” to evade.

E. COMMENCING THE HOLDING PERIOD—SHARES HELD IN A SHORT POSITION

The holding period requirement in Rule 144(d) is based on the amount of time beginning when the restricted securities were acquired and fully paid for by the selling security holder. As mentioned above, the preliminary note to Rule 144 states that the purpose of the required holding period is to ensure that a holder has assumed the economic risk of an investment. If a selling security holder has hedged its restricted securities position by establishing an offsetting short position (e.g., by borrowing unrestricted securities of the same class and selling them into the market), there is a question of how the security holder’s

44. *Zacharias v. SEC*, 569 F.3d 458 (D.C. Cir. 2009).

holding period should be calculated, because the holder will have reduced or eliminated its economic exposure to the securities through the short position. Prior to 1990, Rule 144 provided for the tolling of the holding period when a holder had a short position in, or any put or other option to dispose of, the securities (or their equivalent). While the current version of Rule 144 no longer provides for tolling in those circumstances, there are still situations where a short position could raise questions about Rule 144 eligibility. Depending on the particular facts of the transaction, some opinion givers consider whether short positions and other hedging activity by a seller seeking to avail themselves of Rule 144 should factor into the seller's holding period.

In the case of a "short sale against the box,"⁴⁵ the SEC has stated that, where a short seller closes out its open short position using restricted securities, all the conditions of Rule 144 must have been met at the time of the short sale (rather than when securities are delivered to close out that short position) for the seller to use restricted securities to close out the short position.⁴⁶ The SEC staff has similarly analyzed dealer hedging activity in respect of equity derivative transactions entered into with holders of restricted securities.⁴⁷

F. COOLING-OFF PERIOD BETWEEN RULE 144 SALES TO A MARKET MAKER

Rule 144(g) requires that a broker buying as a market maker not solicit or arrange for the solicitation of orders in anticipation of or in connection with a transaction. If a selling security holder wishes to sell securities in multiple transactions, some brokers are concerned that their sales efforts in connection with the initial sale executed with the broker acting as market maker could be seen as a solicitation for additional sales if completed in close proximity to one another. While not specifically addressed in Rule 144, some brokers may require a selling security holder to observe a cooling-off period after sales to a broker acting as a market maker under Rule 144 (e.g., 30 days, or a period calibrated to the volume of trading of the class of securities being sold) to avoid possible questions under Rule 144(g). Selling security holders similarly may be limited in their ability to sell through other brokers because the limitation on solicitation applies to the selling security holder as well. If a selling security holder has been

45. A "short sale against the box" is one in which the seller owns at least the same number of securities as the seller sells short but nevertheless asks its broker to borrow the necessary number of securities to deliver to the buyer. The seller's securities are held by its broker and may be used subsequently to close out its open short position. See Securities and Exchange Commission, Resales of Restricted and Other Securities, 44 Fed. Reg. 46752 (Aug. 8, 1979) (Release No. 33-6099), Question 37.

46. See Revisions to Rules 144 and 145, *supra* note 12, at 71549 n.90; see also SEC Div. Corp. Fin., Securities Act Rules C&DI, Q. 528.03 (Mar. 20, 2025). The courts have not always agreed with the SEC's position. See, e.g., SEC v. Lyon IV, No. 06 Civ. 14338 (SHS) (S.D.N.Y. Jan. 2, 2008); SEC v. Mangan, Jr., No. 3:06CV531 (W.D.N.C. Oct. 24, 2007). However, practitioners typically give weight to the SEC's position as the regulator with authority on these issues.

47. See, e.g., Goldman, Sachs & Co., SEC No-Action Letter, 1999 WL 1244018 (Dec. 20, 1999); Bank of America, N.A., Merrill Lynch, Pierce, Fenner & Smith Inc., SEC No-Action Letter, 2011 WL 6015714 (Dec. 1, 2011).

asked to observe a cooling-off period by one broker, an opinion giver might consider whether it is able to render a Rule 144 opinion if the selling security holder decides to use a different broker as a market maker during the requested cooling-off period.⁴⁸

G. IN-KIND DISTRIBUTIONS BY CLOSELY HELD ENTITIES

In a distribution of restricted securities held by a corporation, limited liability company, or partnership to its equity holders, the question can arise as to whether a distributee of restricted securities can tack the holding period of the distributing entity to the distributee's holding period to determine whether the requisite holding period has been satisfied. If the distributing entity is not an affiliate of the issuer, tacking is permitted by Rule 144(d)(1), which permits tacking back through all non-affiliate to non-affiliate transfers, even with payment of new consideration. However, if the distributing entity is an affiliate of the issuer, more difficult interpretive questions arise. In that situation, a distributee can tack its holding period if specified conditions are met:

- the distributee did not furnish any consideration for the securities in connection with the distribution,
- the distributing entity was “closely held”, and
- the distribution was made on a pro rata basis.

Guidance from the SEC staff as to whether a distributing entity is “closely held” is fairly old.⁴⁹ An opinion giver providing a Rule 144 opinion relying on tacking for a sale following a distribution from an entity that is an affiliate will need to be comfortable that the distributing entity is “closely held,” which will require the opinion giver to understand the structure of the entity. In cases that may not be consistent with the SEC's prior no-action relief, discussions with the SEC staff may be warranted. The opinion giver will also need to confirm that no consideration was provided and that the distribution was made on a pro rata basis.⁵⁰

48. This issue is most acute when the selling security holder is undertaking multiple Rule 144 transactions using a market maker or is switching from a sale to a broker acting as market maker to selling in brokers' transactions (i.e., “dribbling out”).

49. See, e.g., Kleiner & Perkins, SEC No-Action Letter, 1979 WL 14141 (Aug. 6, 1979) (two general partners and thirteen limited partners); Robert R. Barker & Co., SEC No-Action Letter, 1983 WL 28306 (June 20, 1983) (five general partners and twelve limited partners, substantially all of whom were members of the same family). While these old letters involve small numbers of equity holders, the SEC staff has also signed off on tacking of holding periods without the question of “closely held” being expressly addressed where the fund or partnership doing the distribution was within the Section 3(c)(1) exemption from the definition of investment company under the Investment Company Act of 1940 for entities with fewer than 100 holders. See, e.g., Hale and Dorr, SEC No-Action Letter (June 12, 1991); Merrill Lynch Capital Appreciation Fund II, SEC No-Action Letter (Sept. 28, 1994); Abacus Invs. Ltd., SEC No-Action Letter (Oct. 5, 2007).

50. Note that the distribution does not need to be pro rata to all security holders if it is pro rata to the security holders receiving the distribution (i.e., some security holders of the distributing entity may choose not to receive their pro rata portion of the distribution).

H. BLANKET OPINIONS (OTHER THAN AFTER ONE-YEAR HOLDING PERIOD FOR NON-AFFILIATES)

There are situations where, due to practical considerations, the Rule 144 opinion is sought before the actual resale takes place. In those situations, the opinion giver will want to satisfy itself that there are arrangements to ensure that all conditions of the rule will be met when the sales are made. For example, the opinion giver may seek to obtain additional representations and undertakings from the seller's broker to prevent the securities from being sold other than pursuant to Rule 144. The opinion giver may also choose to limit the time period during which the opinion can be used.

An example is when the seller gives the broker a limit order with a price above the current trading price and the issuer and broker may want to have the Rule 144 opinion in hand at the time the order is placed even though the actual resale will occur later or not at all.

In some circumstances, a blanket opinion covering a limited time period may be an efficient way of addressing the need to remove legends as part of a series of expected sales, such as pursuant to a 10b5-1 sales program.

In any of the foregoing and in similar circumstances, careful consideration should be given to the controls in place to ensure compliance with Rule 144 and to prevent securities that are not sold as originally contemplated from inadvertently entering the public trading markets. These controls often include requirements to reimpose transfer restrictions and legends on the unsold securities.⁵¹

I. QUALIFIED OR REASONED RULE 144 OPINIONS

The Subcommittee does not believe that a qualified Rule 144 opinion is likely to be acceptable to an opinion recipient because of the potential Securities Act liability for non-exempt unregistered resales. However, an unqualified Rule 144 opinion with discussion may sometimes be acceptable.

V. RULE 144 OPINIONS

If an opinion giver is comfortable that a resale complies with the requirements of Rule 144, the opinion giver can provide a legal opinion or instruction letter to the transfer agent, issuer, or relevant transferee. In this Part V, we discuss some of the materials an opinion giver might rely upon to support a Rule 144 opinion, as well as the question of which counsel should deliver the opinion. Part VI of this report includes illustrative opinion and representation letter language.

Seller Representation Letter: Rule 144 opinions typically rely on a representation letter by the selling security holder as to the factual predicates for giving the opinion, including the actual or intended sale of the securities, the length of the relevant holding period, affiliate/non-affiliate status (including, in the

51. See *infra* note 59.

case of a non-affiliate, specific facts that would support a determination that the selling security holder is not an affiliate), and, for affiliates, compliance, or an undertaking to comply, with any required Form 144 filing. The broker making the sale may have a form of seller representation letter, but counsel may determine that it needs to obtain a separate representation letter with additional representations from the selling security holder for opinion purposes.⁵²

Broker Representation Letter: If the selling security holder is an affiliate of the issuer, the executing broker-dealer typically must provide a representation letter. The letter should address the placement of the sell order, compliance with the manner-of-sale requirements and volume limitations (including related calculations), the filing of Form 144, and the broker's market-maker status, if applicable.

The Rule 144 opinion will typically rely on and assume the accuracy of the broker's representation letter.

Issuer Status: The opinion giver may also receive a representation that the issuer is not a current or former shell company (i.e., an issuer described in Rule 144(i)) and that there is current public information available regarding the issuer. In any case, the opinion giver should do the work necessary to satisfy itself as to the issuer's status.⁵³

Who Should Deliver the Opinion? Occasionally, the question arises as to which counsel—the issuer's counsel or the selling security holder's counsel—should deliver the Rule 144 opinion. One or the other may be in a better position to ascertain relevant facts related to the proposed sale or to deliver the opinion sooner.⁵⁴ However, with appropriate representation letters, diligence, and assumptions, as discussed in this report, either counsel should be able to get comfortable with giving the opinion. As a result, the transfer agent should be willing to accept an opinion from counsel representing either the issuer or the selling security holder.⁵⁵ Although counsel may rely on representations or make assumptions, because of the regulatory framework associated with compliance with Rule 144, the opinion giver should be satisfied that it has a reasonable basis for that reliance and any assumptions.⁵⁶

52. Seller representation letters vary by broker-dealer and may include representations that go beyond those needed to support a Rule 144 opinion, covering topics such as insider trading compliance or required filings under Schedule 13D/G and Section 16 of the Exchange Act. They also may include indemnification of the issuer, issuer's counsel, and the transfer agent. Provisions beyond those necessary to support a Rule 144 opinion are unlikely to form the basis for the issuer to refuse to allow the transfer to proceed.

53. See *supra* Part III.

54. The settlement cycle was shortened to T+1 effective May 28, 2024, increasing the time pressure to obtain the necessary Rule 144 opinion.

55. In practice, many transfer agents will accept Rule 144 opinions only from issuer's counsel or will require an instruction letter from the issuer along with an opinion from seller's counsel. Whether the transfer agent will accept Rule 144 opinions from other counsel should be worked out between the issuer and transfer agent in advance to avoid unnecessary delays.

56. See *supra* Part III.

VI. SAMPLE OPINION AND REPRESENTATION LETTER LANGUAGE

A. LEGAL OPINION LANGUAGE

Following satisfactory confirmations as to the necessary factual matters and in reliance on the representation letters, counsel may give an opinion, such as the following:

“Based on such matters of law as we have considered appropriate and, as to matters of fact, the Representation Letter[s],⁵⁷ we are of the opinion that the Securities may be transferred [today]⁵⁸ without registration under the Securities Act [in reliance on [paragraph (b)(1)][(b)(2)] of]⁵⁹ Rule 144] [and without any restrictive legend].”⁶⁰

B. SELLER REPRESENTATION LETTER (NON-AFFILIATES) LANGUAGE

Counsel may use the following language as a starting point in drafting a representation letter from a non-affiliate holder, tailored as appropriate to the applicable facts⁶¹:

57. Counsel may rely on representations in an agreement for the resale of the securities in lieu of or in addition to those in separate representation letters.

58. Because Rule 144 is applicable to sale transactions, and because opinions speak as of their date, some opinion givers want to both describe the proposed Rule 144 sale and give the opinion when the sale either happens or is imminent. Opinion givers may also be asked to provide opinions permitting the removal of a restrictive legend in advance of an actual transfer (e.g., to allow securities to be moved from the transfer agent to a brokerage account). This is typically straightforward where the issuer is not a current or former shell company, the holder is a non-affiliate, and the Rule 144 one-year holding period has passed. In other cases, however, opinion givers will need to consider whether, and in what form, an opinion could be given in light of factors such as the holder's affiliate status, the issuer's shell company or former shell company status, representations received from the parties involved, the conditions imposed prior to a sale, and the controls put in place by the broker and holder. For more discussion of this topic, see James A. Matarese, Ettore A. Santucci & Mark H. Burnett, *Securities Act Legend Removal Requests in PIPE Transactions*, AM. B. ASSOCIATION: BUS. L. SECTION (Sept. 6, 2023), https://www.americanbar.org/groups/business_law/resources/newsletters/2023-summer-loc/securities-act-legend-removal-requests/; Rob Evans, Stanley Keller & Eugene W. McDermott Jr., *SPACs and Legend Removal Opinions*, AM. B. ASSOCIATION: BUS. L. TODAY (Jan. 24, 2022), <https://businesslawtoday.org/2022/01/spacs-and-legend-removal-opinions/>.

The SEC's position is that “if a dispute arises about whether a restrictive legend can be removed, the SEC will not normally intervene. The removal of a legend is a matter solely in the discretion of the issuer. State law, not federal law, covers disputes about the removal of legends.” See “*Restricted Securities: Removing the Restrictive Legend*,” U.S. SEC. & EXCHANGE COMMISSION, <http://www.sec.gov/answers/restric.htm> (last visited Dec. 7, 2025).

59. An opinion that “no registration” is required for the proposed transaction should be sufficient. Some practitioners will specify the paragraph of Rule 144 on which the opinion relies to delineate among transfers by affiliates and non-affiliates, but that detail is not necessary to give an acceptable Rule 144 opinion. Similarly, the opinion need not reference Rule 144 at all, although many opinion givers will so specify. Transfer agents may sometimes request a specific reference to Rule 144 in the opinion.

60. This language would not be necessary for opinions pertaining to securities that do not bear a restrictive legend (e.g., control securities acquired by an affiliate in the public market and held in a brokerage account).

61. The sample language relies on various defined terms and terms of art that may not be familiar to some sellers. More direct factual representations supporting the conclusions could be added or used instead.

Holder hereby represents as follows:

1. Holder is not an underwriter with respect to the Securities nor will the proposed transaction be part of a distribution of securities of the issuer.
2. Holder:
 - (a) is not currently, and has not been during the prior three months, an “affiliate” of the issuer, as that term is defined in paragraph (a)(1) of Rule 144;
 - (b) does not have a special relationship, contractual or otherwise, with the issuer or management through which it or any other person under common control exercises any control or influence over the issuer;
 - (c) is not a director or an employee, officer, or other member of management of the issuer or any of its subsidiaries, and does not direct, influence or otherwise control management of the issuer;
 - (d) does not have a means of control over the issuer, contractual or otherwise, directly nor indirectly, through one or more intermediaries; and
 - (e) owns, beneficially or otherwise, less than [10] percent⁶² of the issued and outstanding [*describe class of voting equity securities*] of the issuer [and does not own any other securities of the issuer].⁶³
3. Holder has held the Securities of the issuer for a period of at least [one year] [six months]⁶⁴ as computed in accordance with paragraph (d) of Rule 144.

C. SELLER REPRESENTATION LETTER (AFFILIATES) LANGUAGE

In the case of an affiliate selling under Rule 144, counsel will want to obtain representations as to the manner of sale and volume limitations. Counsel may use the following language as a starting point for the representations, tailored as appropriate to the applicable facts, subject to the same considerations mentioned above for non-affiliates:

Holder hereby represents as follows:

1. Holder is not an underwriter with respect to the Securities nor will the proposed transaction be part of a distribution of securities of the issuer.

62. This formulation is for an issuer with a single class of voting equity securities. Revise as necessary to reflect 10 percent voting power. While a greater than 10 percent holder may not be an affiliate as discussed in Part II.C, it may be prudent to do additional diligence on any such holder who claims not to be an affiliate given the presumption that accompanies 10 percent or greater ownership.

63. If the security holder owns other securities of the issuer, consider specifying the securities owned and evaluating whether it affects the affiliate analysis.

64. If the holding period is less than one year, the current public information condition must be satisfied as well.

2. (a) the amount of Securities sold by Holder and by all persons whose sales are required to be aggregated with Holder pursuant to Rule 144 within the past three months, together with the Securities, does not exceed the maximum amount permitted by the applicable volume limitation under paragraph (e) of Rule 144;
 - (b) Holder has neither solicited nor made any arrangements for the solicitation of buy orders in connection with the proposed sale of the Securities, nor will Holder make any payment to any person in connection with this sale except the payment of the usual and customary brokers' commission with respect to any of the Securities that are sold in brokers' transactions;
 - (c) Holder does not currently intend to sell additional Securities through any means other than as may be permitted in the future by Rule 144, and if the amount of securities to be sold in reliance upon Rule 144 during any three-month period exceeds 5,000 shares or has an aggregate sale price in excess of \$50,000, Holder is today transmitting, for filing, the required "Notice of Proposed Sale of Securities Pursuant to Rule 144 under the Securities Act of 1933" (Form 144) to the U.S. Securities and Exchange Commission. It is Holder's bona fide intention to sell the Securities within a reasonable time after the filing of the notice.
 - (d) Holder has held the Securities of the issuer for a period of at least [one year][six months] as computed in accordance with paragraph (d) of Rule 144.⁶⁵
3. If the contemplated sale is not consummated, Holder understands that the Securities will continue to be "restricted securities" as that term is defined in subparagraph (a)(3) of Rule 144, and Holder shall (i) notify the issuer as soon as possible, (ii) instruct the Broker to return the Securities to the transfer agent for re-legending, and (iii) prior to any future contemplated sales, reconfirm with the issuer the availability of the exemption provided by Rule 144.⁶⁶

D. BROKER REPRESENTATION LETTER LANGUAGE

For affiliate sales, the manner of sale and volume conditions apply, and counsel should seek representation letters from the broker effectuating the sale confirming the additional facts that form the basis of the opinion. Each broker is likely to have their own form of representation letter that it can provide.⁶⁷

65. Include if the Securities are restricted securities. This paragraph is not necessary if the Securities are control securities that are not restricted securities (e.g., because the Securities have been acquired by the seller in the market or in a registered offering).

66. See *supra* note 65.

67. If counsel is not familiar with the broker or its Rule 144 procedures, additional diligence may be appropriate. Also, counsel should confirm that the letter covers all required conditions for a broker's letter.

Counsel may use the following language as a starting point in drafting a representation letter from the broker, tailored as appropriate to the applicable facts:

Broker hereby represents as follows:

1. Broker has done and will do no more than execute the order to sell the Securities for the seller in accordance with paragraph (f) of Rule 144 and has not received and will not receive more than the usual and customary brokers' commission; or Broker is, and will execute the order as, a "market maker" as that term is defined in Section 3(a)(38) of the Securities Exchange Act of 1934, as amended; or Broker will execute the order through a riskless principal transaction.
2. Broker has not solicited or arranged for the solicitation and will not solicit or arrange for the solicitation of customer orders to buy the Securities in anticipation of or in connection with this transaction.
3. Broker is not aware, after reasonable inquiry, of any circumstances indicating that the seller is an "underwriter" with respect to the Securities or that the transaction is a part of a "distribution" of securities of the issuer (as those terms are defined in or applied under the Securities Act of 1933, as amended).
4. The removal of the restrictive legends contemplated herein is only in connection with the sale being contemplated, and [if the contemplated sale is not consummated, we understand that the Securities will continue to be "restricted securities" as that term is defined in subparagraph (a)(3) of Rule 144 under the Securities Act, and we will return the Securities to the transfer agent for re-legending] OR [the sale order has been executed on [•] and is expected to settle in one business day].
5. A copy of the Form 144-Notice of Proposed Sale [was filed]/[will be filed] with the Securities and Exchange Commission by 10:00 p.m. Eastern Time on [•].

VII. CONCLUSION

This report and the sample opinion and representation letter language do not cover all situations in which Rule 144 opinions are given, but they generally describe the circumstances under which the opinions are given as well as the form and substance of those opinions and of the representation letters commonly relied upon by opinion givers.

