DBA Securities Section

From Restriction to Resale: Practical Insights on Rule 144 and Secondary Markets

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AGENDA

- The Secondary Markets
- Primary Laws and Regulations
- Rule 144 and 144A
- Alternative Resale Rules
- Section 4(a)(7) Resales

Secondary Market Sales

Why they are needed, and also expanding in scope and scale

Big Picture

- The secondary market for private securities involves a mix of accredited investors, qualified purchasers, and qualified institutional buyers all seeking to participate in the now myriad markets available to resell securities originally acquired in private offerings, or that own securities that are otherwise restricted and cannot be readily sold to a diversity of third parties.

Common Examples

- In many cases, the “secondary market” can consist simply of shareholders of all types, whether employees, founders, early investors or other stakeholders seeking to sell their ownership stakes in private companies to new investors before a public exit or acquisition.

Secondary Market Sales

Why they are needed, and also expanding in scope and scale

Motives

- Seller: Generally, such transactions provide much-needed liquidity in an otherwise illiquid asset class, enabling sellers to realize returns or adjust their portfolios.
- Buyer: For buyers, the secondary market offers access to established private companies with more visibility into performance and often shorter holding periods.

Common Transaction Types

- Common transaction types include the sale of fund interests by limited partners, general partner-led secondary transactions, and direct secondary sales between individuals or through specialized platforms, and/or through more formalized markets such as that driving private resales pursuant to Rule 144A.

Types of Trades

A diverse yet familiar set of trade types

Type of Secondary Sale	Description	Applicable Rules/Legal Frameworks
LP-Led Secondary	Sale of a limited partner's interest in a private fund to another investor.	Limited partnership agreement, consent requirements, Section 4(a)(1), Rule 144, state securities laws
GP-Led Secondary	General partner initiates sale or restructuring, often using continuation vehicles or fund recapitalizations.	SEC rules for private fund advisers, fund documents, Section 4(a)(1), Rule 144, state securities laws
Direct Secondary (Private Company Shares)	Sale of private company shares directly between investors, outside of a fund structure.	Section 4(a)(1), Rule 144, company transfer restrictions, state securities laws
Tender Offer	Company or investor offers to buy shares from multiple shareholders at a set price.	SEC tender offer rules, Section 4(a)(1), Rule 144, company policies
Structured/Synthetic Secondary	Customized transactions involving shared ownership, portfolio spinouts, or synthetic exposures.	Negotiated agreements, fund documents, Section 4(a)(1), Rule 144, state securities laws
Private Credit Secondaries	Sale of interests in private credit funds or loan portfolios, including LP- and GP-led deals.	Fund documents, Section 4(a)(1), Rule 144, state securities laws

The Scale

Is the secondary market truly active and relevant?

- The private secondary market has experienced significant growth over the past decade.
  - In 2015, global transaction volumes were under $50 billion.
  - By 2021, volumes had climbed to $132 billion, driven by strong demand and increased market acceptance.
  - The momentum continued, with 2024 volumes reaching $162 billion—a substantial increase from the previous year.
  - Projections for 2025 indicate that volumes could exceed $175 billion
- The increase in recent years is only being further fueled by ongoing demand from both **limited partners and general partners**, greater capital availability, and **broader adoption of secondary strategies**. This growth highlights the market's increasing maturity and importance in private capital management.
- As of 2025, the global, and known, secondaries "market" includes over $5 trillion of securities that are now in hands different from those of the original holders.

Impact of Asset Class and Theme

Private equity allows a closer look at relative inequities and opportunities

Buyout Funds

- Pricing reached 94% of NAV, a steady 300 basis point increase from 2023. Buyout portfolios – accounting for 70% of volume – frequently included younger vintages and brand-name sponsors, which strengthened pricing. Buyers with evergreen retail capital were particularly focused on diversified buyout portfolios, which further bolstered pricing.

Venture Funds

- Pricing jumped 700 basis points to 75% of NAV in 2024, a substantial recovery following years of suppressed venture pricing. This increase was driven in part by a growing number of scaled, high-quality companies in mature portfolios. The outlook for late-stage venture was further improved by buyers' ability to underwrite potential near-term IPOs on the back of record public index capitalizations. Venture funds accounted for 11% of total volume, relatively unchanged from 2023.

Real Estate Funds

- Pricing at 72% of NAV remained relatively flat compared to 2023. Despite the multiple Fed target rate cuts in 2024, long-term financing rates remained relatively sticky (US10Y yield ended 2024 at 4.6%) which is an ongoing challenge for real estate assets with approaching debt maturities. Consistent with 2023, real estate accounted for only 2% of volume.

Credit Funds

- Pricing rose dramatically to an all-time high of 91% of NAV, a jump of 1,400 basis points from 2023. New dedicated capital sources with a lower required rate of return for credit LP portfolios flooded the market, unlocking significant volume.
- Credit portfolios represented **12%** of volume compared to only **5% in 2023** as investors were willing to pay close to NAV for certain newer-vintage senior credit and direct lending funds.

Primary Laws

Not higher math; Just circling back to the familiar

Primary Law

- Private secondary sales are subject to a complex framework of federal and state securities laws.
- The Securities Act of 1933 regulates the **initial sale and resale** of private securities, generally requiring registration unless an exemption applies, such as those under Rule 144 or Regulation D.
- The Securities Exchange Act of 1934 governs **secondary trading**, promoting fairness and transparency and enforcing antifraud provisions.

Other Notable Rules

- Additional requirements include SEC regulations on restricted securities, state-level “blue sky” laws, and company-imposed transfer restrictions, such as rights of first refusal and information barriers.
- Collectively, these laws are designed to protect investors and ensure the integrity of private secondary market transactions.

Rule 144 Basics

The distinct difference; in form and substance

Rule 144

- Rule 144 is an exemption to the Securities Act of 1933 that allows the public sale or resale of “restricted”, “unregistered”, and “control securities” under certain conditions without triggering registration requirements.

Safe Harbor

- Rule 144 is not an **exemption** from registration, but instead a **safe harbor** provision that outlines how a sale of securities can be conducted lawfully.

Prime Objectives

- Rule 144 protects public investors from the risks associated with unregistered securities and insider trading while promoting **secondary market transactions** and **liquidity**.
- Rule 144 applies to all types of sellers, in addition to issuers of securities, underwriters, and dealers.
- Rule 144 provides a legal safe harbor for these sales, while ensuring buyers have adequate information about the securities being sold.

Not an Underwriter

- If a holder satisfies all of Rule 144’s applicable conditions, the holder is generally deemed not to be an “underwriter”
- Conditions differ for affiliates and non-affiliates
- Generally not available for business combination related shell companies or asset-backed issuers (1 year look-back)

Securities sold pursuant to Rule 144 are no longer “restricted securities” and may be resold freely by **non-affiliate** purchasers of the securities

Rule 144 vs. Rule 144A

The distinct difference both in form and substance

QIBs

- Rule 144A, although of course an integral part of Rule 144 , by contrast, focuses exclusively on sales to qualified institutional buyers (QIBs), allowing trades of unregistered securities freely amongst such parties, with fewer restrictions and no SEC registration required.

A Different World

- This greatly enhances liquidity for private placements but limits access to institutional investors only, not individuals

Quick Recap of Paths to Resale

- **Rule 144**: Non-exclusive safe harbor for public resale of restricted and control securities subject to compliance with certain conditions
- **"Section 4(a)(1½)"**: An originally informal legal doctrine allowing private resales of restricted securities when the seller is not an **issuer**, **underwriter**, or **dealer**, and the **buyer** is sophisticated. It blends elements of Sections 4(a)(1) and 4(a)(2), enabling compliant private secondary transactions without SEC registration.
- **Rule 144A**: Private resales to QIBs
- **Regulation S** under Securities Act: Resales of securities in "offshore transactions" with no "directed selling efforts" in United States

Feature	Rule 144	Rule 144A
Investor Type	Public, including individuals	Qualified Institutional Buyers (QIBs)
Holding Period	6–12 months (varies by issuer)	None
Resale Restrictions	Volume, manner, and filing limits	Fewer restrictions; no SEC registration
Liquidity	Limited, more fragmented	High, institutional trading
Typical Securities	Restricted/control securities	Unregistered debt, preferred, equity
Market Size (2024)	Not specified	Over $5 trillion outstanding

Rule 144 vs. Rule 144A

Distinctly different market; similar compliance framework

Restricted Securities

Not always written in the fine print

General Rule

- Securities sold in a private offering are "restricted securities" that may not be resold freely in the U.S. public secondary market.

Restricted Securities

- Securities acquired in unregistered, private sales from the issuer or from an affiliate of the issuer.

Control Securities

- Securities held by an **affiliate of the issuer**.
  - An "affiliate" of the issuer is a person **controlling, controlled by or under common control** with the issuer.
  - "**Control**" means the power to direct the management and policies of the company in question, whether through the ownership of voting securities, by contract, or otherwise.
  - Generally includes officers, directors and greater than 10% shareholders, **but requires facts and circumstances analysis**.

When Other Exemptions Fail

- Rule 144 used when commonly relied on exemptions of Sections 4(a)(1) and 4(a)(3) are not available for resales of restricted or control securities.
- For resales of privately placed securities and securities held by an affiliate of the issuer, a holder needs to find other available exemptions for its resales or have its resales covered by a registration statement.

Rule 144

General rule for sales by affiliates

Minimum holding period

- For **restricted securities** held by an **affiliate**: (i) 6 months if the issuer has been a reporting company for at least 90 days; or (ii) 1 year for other issuers.
- If shares are just **control** securities and **not restricted** securities, no holding period would apply.

Current public information

- For **reporting** issuers, filed all required periodic reports in the last 12 months.
- For **non-reporting** issuers, certain specified company information is publicly available.

Manner of sale

- For debt securities (including non-participatory preferred stock and asset-backed securities), no manner of sale limitations.
- For equity securities, the securities must be sold on an unsolicited basis, and either in (i) “brokers’ transactions,” (ii) transactions with a market-maker or (iii) “riskless principal” transactions (subject to compliance with certain requirements).

Rule 144

Filing requirements and volume limits

Form 144 Filing

- If sales during any 3-month period exceeds 5,000 shares or a price of $50,000, a notice must be filed with the SEC (and if listed, relevant securities exchange).
- Must have bona fide intention to sell within a reasonable time (generally 3 months).

Volume Limitation

- For **equity securities**, an **affiliate's** Rule 144 sales cannot exceed, in the preceding 3-month period, the greater of (i) 1% of the outstanding securities of the class and (ii) the average weekly trading volume of the securities on relevant U.S. exchanges during the preceding four weeks
- For **debt securities**, an **affiliate's** Rule 144 sales cannot exceed the greater of (i) limitations set by either of the two tests described above and (ii) 10% of the principal amount of the tranche of debt securities in question (or class, when the securities are non-participatory preferred stock) in the preceding 3-month period

Rule 144

Sales by non-affiliates

A "**non-affiliate**" is any person who is not an affiliate of the issuer at the time of sale **and** has not been an affiliate for at least 90 days prior to that time

Minimum Holding Period

- The same holding periods that apply to sales of restricted securities by affiliates **also apply** to sales by non-affiliates (*i.e.*, a 6-month holding period for securities of reporting companies and a 1-year holding period for securities of non-reporting companies)

Current Public Information

- During the period (from 6 months to 1 year), **non-affiliates** may **resell publicly** the securities of a reporting company so long as that company continues to make available the information required by Rule 144(c)
- **After one year**, **non-affiliates** may resell **publicly securities** of both reporting companies and non-reporting companies

No other Rule 144 conditions apply to sales by non-affiliates

Trade Type	Affiliate or Person Selling on Behalf of an Affiliate	Non-Affiliate (and Has Not Been an Affiliate During the Prior Three Months)
Restricted Securities of Reporting Issuers	During six-month holding period: No resales under Rule 144 permitted. After six-month holding period: May resell in accordance with all Rule 144 requirements including: •Current public information; •Volume limitations; •Manner-of-sale requirements for equity securities; and •Filing of Form 144.	During six-month holding period: No resales under Rule 144 permitted. After six-month holding period but before one year: Unlimited public resales under Rule 144 except that the current public information requirement still applies. After one-year holding period: Unlimited public resales under Rule 144; need not comply with any other Rule 144 requirements.
Restricted Securities of Non-Reporting Issuers	During one-year holding period: No resales under Rule 144 permitted. After one-year holding period may resell in accordance with all Rule 144 requirements, including: •Current public information; •Volume limitations; •Manner-of-sale requirements for equity securities; and •Filing of Form 144.	During one-year holding period: No resales under Rule 144 permitted. After one-year holding period: Unlimited public resales under Rule 144; need not comply with any other Rule 144 requirements.
Unrestricted Securities	No holding period: May resell in accordance with all Rule 144 requirements, including: •Current public information; •Volume limitations; •Manner-of-sale requirements for equity securities; and •Filing of Form 144.	No holding period: Unlimited public resales under Section 4(a)(1) of the Securities Act. Former affiliates cannot freely resell securities for a period of 90-days after they cease to be affiliates.

Alternatives to Standard Rule 144 Trades

Section 4(a)(1½)

Section 4(a)(1½)

- This exemption has evolved solely through practice, and without the benefit of any official rulemaking.
- Cover strictly private resales of restricted securities not involving an underwriter, dealer, or issuer.

Notable Elements

- A Section 4(a)(1) exemption which exempts transactions by anyone other than an "issuer, underwriter or dealer," and
- A Section 4(a)(2) analysis to determine whether the seller is an "underwriter," (i.e., whether the seller purchased the securities with a view to a distribution).

Where Used

- The Section 4(a)(1½) exemption can be used by **institutional** investors to resell restricted securities purchased in a **private placement**.
- The Section 4(a)(1½) exemption can also be used by **affiliates** for the sale of **control** securities when Rule 144 is unavailable.
- It is also, still, used for resales to **accredited investors**.
- But see Section 4(a)(7)…

Structuring Section 4(a)(1½) Sales

The facts and circumstances will matter

Key Details

- The seller must sell in a "private" offering to an investor that satisfies the qualifications (for example, sophistication, access to information, etc.) of an investor in a **Section 4(a)(2)** private offering.
- **The investor** must **agree** to be subject to the same restrictions **imposed on the seller** in relation to the securities (for example, securities with a restricted legend).

General Solicitation?

- Given that a Section 4(a)(1½) transaction seeks to replicate a statutory private placement, it is our view that general solicitation cannot be used in connection with this transaction.

Structuring Section 4(a)(1½) Sales

Standard practice tips

Private Placement Framework

- The 4(a)(1½) exemption seeks to recreate the conditions that enabled the original private placement and therefore many of the same practices are employed.

Standard Practices

- Purchaser agrees to resale restrictions and make representations and warranties regarding its sophistication and investment intent.
- Purchase identification is key, including its financial condition, to verify likelihood that the purchaser will be able to hold the securities for investment and not resell prematurely.
- Legal opinions confirming the view that no registration is required.
- Restrictive legends on the securities to alert the purchaser to the restricted nature of the securities.
- Stop transfer instructions from the issuer.
- Reselling the restricted securities in **large minimum denominations** or investments to **bolster** the purchaser's claims regarding its sophistication and investment intent.

Section 4(a)(7) to the Rescue?

The same…or different?

Section 4(a)(7)

- Section 4(a)(7) provides a statutory safe harbor for private resales of restricted securities, offering clarity for transactions that previously relied on less formal exemptions. Key requirements include:

Key Elements

- Purchaser Qualification: Buyers must be accredited investors.
- Solicitation Ban: No general advertising or solicitation is allowed.
- Issuer Status: The issuer cannot be a shell company, in bankruptcy, or a special-purpose entity.
- Holding Period: Securities must have been outstanding for at least 90 days.
- Bad-Actor Disqualification: Sellers and agents cannot be subject to certain disqualifying events.

Effect of Safe Harbor

- If these conditions are met, the resale is considered a private transaction, and sellers are protected from being deemed “underwriters”.
- The securities **remain restricted** and require a **new exemption** for further resales.
- Importantly, compliance with Section 4(a)(7) preempts state securities registration requirements, making it easier to complete transactions across jurisdictions.
- This safe harbor provides greater certainty and efficiency for private secondary market sales, **but it is not exclusive**—other exemptions may still be available for different types of transactions.

Filling the Gaps

Section 4(a)(1½) and Section 4(a)(7)

Coverage Gaps

- Section 4(a)(7) **only** applies if **all its conditions** are met (e.g., accredited buyers, 90-day holding).
- Transactions failing these criteria **may still use 4(a)(1½)** if they meet its standards (e.g., sales to sophisticated non-accredited investors).

Transactional Flexibility

- 4(a)(1½) allows for negotiated terms and structures not explicitly permitted under 4(a)(7), such as certain controlled sales or unique financing arrangements.

Doctrinal Resilience

- Courts continue to recognize 4(a)(1½) as a valid non-statutory exemption for private resales outside 4(a)(7)'s scope.

Focus on Section 4(a)(7)

The detail will matter

Essential Requisites

- Each purchaser must be an accredited investor
- Neither the seller nor any person acting on the seller's behalf engages in any form of general solicitation.
- Material information is provided regarding the issuer and all relevant parties to the transaction, including their affiliation to the issuer or any other party involved in the transaction.

Effect of Sale

- The securities sold in a Section 4(a)(7) resale transaction will be considered "**restricted securities**" and "**covered securities**" for **blue sky** purposes.
- A transaction effected pursuant to this exemption will **not be deemed to be a "distribution"** under the Securities Act.

Focus on Section 4(a)(7)

The detail will matter

Basic Identity Information

- The issuer's exact name (as well as the name of any predecessor).
- The address of the issuer's principal place of business.
- The exact title and class of the offered security, its par or stated value, and the current capitalization of the issuer.
- Details for the transfer agent or other person responsible for stock transfers
- The issuer's officers and directors.
- Information about any broker, dealer or other person being paid a commission or fee in connection with the sale of the securities.

Financial Information

- A statement of the nature of the issuer's business that will be presumed current if it is as of 12 months before the transaction date.
- The issuer's most recent balance sheet and profit and loss statement and similar financial statement for the two preceding fiscal years during which the issuer has been in business.
  - The balance sheet will be deemed reasonably current if it is as of a date not less than 16 months before the transaction date and the profit and loss statement shall be deemed reasonably current if it is as of a date not less than 12 months preceding the date of the issuer's balance sheet.
  - If the balance sheet is not as of a date less than six months before the transaction date, it must be accompanied by additional statements of profit and loss for the period from the dates of such balance sheet to a date less than six months before the transaction date.

Affiliations

- If the seller is an affiliate, a statement regarding the nature of the affiliation accompanied by a certification from the seller that it has no reasonable grounds to believe that the issuer is in violation of the securities laws or regulations.

Focus on Section 4(a)(7)

When not to use 4(a)(7)

Not Available for Resale

- If the **seller** is a direct or indirect **subsidiary** of the issuer;
- If the seller or any person that will be compensated in connection with the transaction, such as a broker-dealer, is subject to the **bad actor** disqualification provisions included in Rule 506 or described under Section 3(a)(39) of the Exchange Act;
- If the **issuer** is blank check, blind pool, shell company, special purpose acquisition company, or in bankruptcy or receivership;
- The transaction relates to a broker-dealer's or underwriter's **unsold allotment**; or
- The security that is the subject of the transaction is part of a class of securities that **has not been authorized and outstanding for at least 90 days** prior to the transaction date.

Effect of Sale

- The securities sold in a Section 4(a)(7) resale transaction will be considered "**restricted securities**" and "**covered securities**" for **blue sky** purposes.
- A transaction effected pursuant to this exemption will **not be deemed to be a "distribution"** under the Securities Act.

Why Section 4(a)(7)?

Key benefits

Flexibility

- Section 4(a)(7) is far more flexibible than:
  - Rule 144A – resales may only be made to QIBs and Rule 144A is only available in respect of certain securities
  - Rule 144 – resales may only be made in compliance with the holding period, volume and manner of sale requirements
  - Section 4(a)(1½) – as discussed, a private reseller can sell securities in excess of the Rule 144 volume limits

Specific Use Cases

- Remember that:
  - 4(a)(7) requires that the class of securities have been outstanding for 90 days
  - Securities sold in reliance on Section 4(a)(7) will be "restricted securities" as opposed to having securities sold under Rule 144 which become fungible with publicly traded stock
  - Section 4(a)(7) has an information requirement, which may not be appealing to privately held companies. Section 4(a)(1½) does not
  - Risk exists that purchasers are using Section 4(a)(7) to conduct further trades of the same securities not in compliance with same rule set

FROM RESTRICTION
TO RESALE:
PRACTICAL INSIGHTS ON RULE
144 AND SECONDARY MARKETS

QUESTIONS AND PARTING THOUGHTS