



## Securities Law ADVISORY ■

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### SEC Proposes Amendments to Rule 144 and Form 144

On December 22, 2020, the Securities and Exchange Commission (SEC) voted to propose [amendments to Rule 144](#) to eliminate the “tacking” of holding periods for “market-adjustable” convertible securities and revise the Form 144 notice of sale to:

- Eliminate notice of the filing requirement for sales of securities issued by nonreporting companies.
- Change the filing deadline to coincide with the Form 4 filing deadline.
- Require electronic filing of all Forms 144.
- Create an “online fillable” document for the filing of Form 144.

The proposed amendments would also make minor revisions to Forms 4 and 5 to add a checkbox that would permit filers to easily indicate that the reportable transactions were made pursuant to a transaction that satisfied Rule 10b5-1(c) (i.e., a 10b5-1 plan).

The public comment period for the proposed amendments will remain open for 60 days from the publication date of the proposing release in the *Federal Register*.

#### **Amendments to Form 144 Filing Requirements and Process**

The SEC proposed amendments that will (1) streamline Form 144 filing requirements by mandating electronic filing of all Form 144 notices; (2) eliminate the filing requirement for Form 144 notices related to the resale of securities of issuers that *are not subject* to Exchange Act reporting requirements; and (3) revise the Form 144 filing deadline to align with the Form 4 filing deadline.

#### **Electronic Form 144 filing**

Under the current rules, a Form 144 is currently permitted or required to be filed in paper form. Under the proposed amendments, *all* Form 144 filings would have to be electronically filed on EDGAR. The SEC is proposing a six-month transition period after the effective date of the amendments to allow first-time electronic filers to gain EDGAR codes and make the necessary preparations. In conjunction with this new mandate, the SEC also proposed amending Rule 144(h)(1) to delete the requirement that an affiliate send one copy of the Form 144 notice to the principal exchange on which the restricted securities are admitted to trading. This provision was intended to apply to paper Forms 144 and would be unnecessary if the electronic filing requirement is enacted.

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The SEC intends to provide an online fillable document on EDGAR for entering information required by Form 144, which will streamline the electronic filing process for those who are filing both a Form 144 and Form 4 to report the same sale of equity securities.

### ***Alignment of Form 144 and Form 4 filing deadlines – two business days following trade***

The SEC also proposes aligning the Form 144 and Form 4 filing deadlines by amending Rule 144(h)(2) to require that Forms 144 be filed before the end of the second business day following the day on which the sale of securities has been executed or the deemed date of execution, as opposed to concurrently with the placing of an order with a broker to execute the sale or the execution of a sale directly with a market maker. This new deadline would apply to every Form 144, regardless of whether a Form 4 is also being filed for the same transaction; would give Form 144 filers more time to file; and would allow the Form 144 to become publicly available sooner (due to the more immediate nature of electronic versus paper filing).

If these amendments are approved, the SEC plans to create a single user interface through which Forms 144 and Forms 4 could be submitted.

### ***Elimination of Form 144 filing requirements for nonreporting issuers***

The SEC also proposed amendments to Rule 144 and Rule 101(c)(6) of Regulation S-T so that affiliates that rely on Rule 144 would only be required to file a Form 144 notice when the issuer is subject to Exchange Act reporting requirements.

### ***Minor Form 144 amendments***

The SEC also proposed minor amendments to Form 144 that would update the form and eliminate certain fields that are immaterial. Specifically, the SEC proposed the deletion of the fields requiring the home address of the person for whose account the securities are to be sold and the IRS identification number of the issuer of the securities.

## **Amendments to Form 4 and Form 5**

The SEC proposed amendments to Form 4 and Form 5 that would add a checkbox to allow filers to indicate that a sale or purchase reported on the form was made pursuant to a transaction that satisfied Rule 10b5-1(c). The SEC believes that this update would allow for increasingly efficient disclosure of such information. Consistent with the current rules, filers could also choose to provide additional details.

## **Elimination of “Tacking” of Holding Periods for Convertible Market-Adjustable Securities**

Finally, the SEC voted to propose an amendment to Rule 144(d)(3)(ii) that would revise the method for determining the holding period for securities acquired upon the conversion or exchange of certain “market-adjustable securities.” The SEC’s release defines a market-adjustable security as “a convertible or exchangeable security that provides for a conversion rate, conversion price, or other terms that, in each case, would have the effect of offsetting, in whole or in part, declines in value of the underlying securities that may occur prior to conversion or exchange.”

One of the Rule 144 requirements for restricted securities is that a selling security holder must hold the securities for a specified period of time before resale. As Rule 144(d)(3)(ii) currently reads, for the sake of determining this holding period, securities acquired solely in exchange for other securities from the same issuer are considered to have been acquired simultaneously with the surrendered securities. In other words, the holding periods of the underlying

securities acquired upon the conversion or exchange of the convertible or exchangeable security may be “tacked” onto the holding period of the convertible or exchangeable security. If the proposed amendment goes into effect, the holding period for the securities underlying the market-adjustable security will not commence until conversion or exchange actually occurs (i.e., upon acquisition of the underlying securities); thus, a purchaser would need to hold the underlying securities for the applicable Rule 144 holding period before reselling them.

The SEC’s goal with the proposed amendment is to ensure that market-adjustable securities holders assume “the economic risks of their investment rather than acting as a conduit for an unregistered sale of securities to the public on behalf of an issuer.”

The amendment would only apply to market-adjustable securities transactions in which the following circumstances apply:

- The newly acquired securities were acquired from an issuer that, at the time of the conversion or exchange, does not have a class of securities listed, or approved for listing, on a national securities exchange registered pursuant to Section 6 of the Exchange Act; and
- The convertible or exchangeable security contains terms ... that offset, in whole or in part, declines in the market value of the underlying securities occurring prior to conversion or exchange, other than terms that adjust for ... issuer-initiated changes in its capitalization.

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