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## SEC Proposes Amendments to Rule 144 and Form 144

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On December 22, 2020, the U.S. Securities and Exchange Commission (SEC) proposed to amend Rule 144 to revise the holding period determination for securities acquired upon conversion or exchange of certain “market adjustable securities” of unlisted companies so that it does not begin until the securities are acquired upon the conversion or exchange. The proposed change is intended to mitigate the risk of unregistered distributions in connection with sales of market-adjustable securities.

The SEC also proposed a series of additional, largely technical amendments. The amendments would:

- mandate electronic filing of Form 144 with respect to resales of securities issued by companies subject to Exchange Act reporting but eliminate the requirement to file a Form 144 with respect to resales of securities issued by companies that are not subject to Exchange Act reporting;
- extend the filing deadline for all Forms 144 to coincide with the Form 4 deadline (*i.e.*, within two business days); and
- amend Forms 4 and 5 to add an optional check box where filers may indicate that a reported transaction is being made pursuant to a Rule 10b5-1 plan.

### Proposed Change to the Rule 144(d) Holding Period for Certain Market-Adjustable Securities

#### Background

One of the conditions applicable to the resale of restricted securities under Rule 144 is that a selling security holder must have held the subject securities for a prescribed minimum period of time. By imposing a holding period, the rule seeks to ensure that a selling security holder has assumed the full economic risks of investment and, therefore, is not acting, directly or indirectly, as a conduit for the issuer in an unregistered distribution of the securities to the public.

Rule 144 contains “tacking” provisions in specified situations that allow holders to count other holding periods — either of prior owners of the securities or of different securities owned by the holders — to satisfy their holding period requirement. One situation where Rule 144 permits tacking of a holding period involves convertible securities. Specifically, Rule 144(d)(3)(ii) allows securities acquired solely in exchange for other securities of the same issuer to be deemed to have been acquired at the same time as the securities surrendered for conversion or exchange.

# Capital Markets Alert

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### Market-Adjustable Securities

In transactions involving market-adjustable securities, the discounted conversion or exchange features in the securities typically provide holders with protection against investment losses that would occur due to declines in the market value of the underlying securities prior to conversion or exchange. As a result, after the Rule 144 holding period is satisfied, holders can convert the market-adjustable securities and quickly resell the underlying securities into the public market at prices above the price at which they were acquired. The SEC contends this creates an incentive to purchase the market-adjustable securities with a view to distribution of the underlying securities, which is inconsistent with the purpose of Rule 144 to provide a safe harbor for resale transactions that are not public distributions.

The proposal would amend Rule 144(d)(3)(ii) to eliminate “tacking” for securities acquired upon the conversion or exchange of the market-adjustable securities of an issuer that does not have a class of securities listed, or approved to be listed, on a national securities exchange. As a result, the holding period for the underlying securities, either six months for securities issued by an Exchange Act reporting company or one year for securities issued by a nonreporting company, would not begin until the conversion or exchange of the market-adjustable securities.

The proposed amendment would not affect the use of Rule 144 for most convertible or variable-rate securities transactions.<sup>1</sup> It would apply only to market-adjustable securities transactions in which:

- 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; and
- the convertible or exchangeable security contains terms, such as conversion rate or price adjustments, 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 stock splits, dividends, other issuer-initiated changes in its capitalization or other anti-dilution adjustments.

### Forms 4, 5 and 144 Filing Requirements

Form 144 is a notice form that must be filed with the SEC by an affiliate of an issuer who intends to resell restricted or control securities of that issuer in reliance upon Rule 144. Under Rule 144(h), an affiliate who intends to resell securities of the issuer

<sup>1</sup> The proposed amendment also would not impact the availability of the Securities Act Section 3(a)(9) exemption from registration for such conversions or exchanges as long as the requirements of Section 3(a)(9) are otherwise met.

during any three-month period in a transaction that exceeds either 5,000 shares or has an aggregate sales price of more than \$50,000 must file a Form 144 concurrently with either the placing of an order with a broker to execute the sale or the execution of a sale directly with a market maker. If the issuer is an Exchange Act reporting company, then the selling security holder may file the Form 144 electronically via EDGAR or submit it to the SEC in paper form. If the issuer is not an Exchange Act reporting company, then the selling security holder must submit the Form 144 to the SEC in paper form.<sup>2</sup>

The proposed amendments to the filing requirements for Forms 4, 5 and 144 are intended to update and simplify these requirements. To do so, the proposal would:

- mandate the electronic filing of all Form 144 filings related to the sale of securities of issuers that **are** subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act;
- eliminate the requirement to submit a copy of the Form 144 filing to the issuer’s principal national securities exchange;
- eliminate the Form 144 filing requirement related to the sale of securities of issuers that are **not** subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act;
- extend the Form 144 filing deadline to the end of the second business day following the day on which the sale of the securities has been executed or the deemed date of execution, which would coincide with the deadline for a Form 4 filing, if applicable;
- amend Forms 4 and 5 to add an optional check box to indicate that a reported transaction is intended to satisfy Rule 10b5-1(c), which provides an affirmative defense for trading on the basis of material nonpublic information in insider trading cases; and
- establish an online fillable Form 144 available to simplify electronic filing and to streamline the electronic filing of Forms 4 and 144 reporting the same sale of an issuer’s securities.

Importantly, the proposal would provide a six-month transition period to give Form 144 paper filers who would be first-time electronic filers sufficient time to apply for codes to make filings on EDGAR.

### Next Steps

The public comment period will remain open for 60 days following publication of the release in the *Federal Register*.

<sup>2</sup> The SEC’s Division of Corporation Finance has provided limited [temporary relief](#) from paper filings in light of the COVID-19 pandemic.

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