

December 28, 2020

## SEC Proposes Amendments to Rule 144

The SEC recently proposed amendments (available [here](#)) to Rule 144 (which sets forth a non-exclusive safe harbor from registration for resales of restricted and control securities). Under the proposal:

- electronic filing of Form 144 would be mandatory with respect to securities issued by issuers subject to Exchange Act reporting requirements;
- the Form 144 filing deadline would be extended to coincide with the Form 4 deadline (i.e., within 2 business days);
- the EDGAR filing process would be streamlined in the case where both a Form 144 and a Form 4 are required to report the same transaction;
- the requirement to file a Form 144 for resales of securities of issuers that are not subject to Exchange Act reporting would be eliminated;
- the holding period for securities acquired upon the conversion or exchange of certain market-adjustable securities of issuers that do not have securities listed on a national securities exchange would not begin until the securities are acquired upon conversion or exchange; and
- Form 4 and Form 5 would be amended to include a “check box” that filers could tick to indicate that the transactions being reported were made pursuant to a 10b5-1 plan.

### Form 144

Under Rule 144, an affiliate of an issuer who intends to resell restricted or control securities of that issuer in reliance on Rule 144, if selling more than 5,000 in number or \$50,000 in value, must file a Form 144, *Notice of Proposed Sale of Securities Pursuant to Rule 144 under the Securities Act of 1933*, with the SEC 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, with an additional paper copy mailed to the principal exchange on which the securities trade. Currently, Form 144 may be submitted either as a paper filing or as an electronic filing via EDGAR.<sup>1</sup>

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<sup>1</sup> As part of its COVID-19 relief efforts, the SEC is also permitting filers to submit Form 144 filings by emailing a complete PDF attachment to the SEC. See the Division of Corporation Finance Statement Regarding Requirements for Form 144 Paper Filings in Light of COVID-19 Concerns, available [here](#).

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Forms 144 that are submitted as paper filings are often not publicly available until long after the execution of any trade(s).

Under the proposed amendments, electronic filing of Form 144 would be mandatory for any affiliate resale of securities of issuers that are subject to Exchange Act reporting requirements, and the requirement to mail additional copies of Form 144 to the principal exchange on which the securities trade would be eliminated. The Form 144 deadline would be extended to coincide with the Form 4 deadline – i.e., a Form 144 would be required to be filed by the end of the second business day following the day of the transaction. This extended deadline would apply whether or not a Form 4 would be required to report the transaction. In addition, the SEC has proposed certain amendments to the EDGAR filing interface to streamline the preparation of Form 144 and Form 4 filings reporting the same transaction, so that filers would need to input the filing information only once into the EDGAR system, which could then generate both a Form 144 and a Form 4. Filers would have the opportunity to review and correct the information before choosing to file one or both forms on EDGAR.

Form 144 would no longer be required to be filed in respect of securities of issuers that are not subject to Exchange Act reporting requirements. This proposed revision would not alter any other conditions that would otherwise need to be met in order for resales of securities of non-reporting issuers to qualify for the Rule 144 safe harbor.

The SEC has also proposed minor amendments to Form 144 itself: changing the title to *Notice of Sale or Proposed Sale of Securities Pursuant to Rule 144 under the Securities Act of 1933*, to reflect that its filing may occur after the transaction, and removing the requirement to provide the seller's address and issuer's IRS identification number.

### **Holding Period for Market-Adjustable Securities**

To ensure that sellers have assumed the full economic risks of an investment in securities, and are thus not acting, directly or indirectly, as conduits for an issuer to sell unregistered securities to the public, Rule 144 prescribes minimum periods for which securities must be held prior to their resale. For securities acquired from an issuer subject to Exchange Act reporting requirements for at least 90 days prior to the sale, the securities must have been held for at least six months; for all other issuers, securities must be held for at least one year. In certain cases, Rule 144 permits a holder to “tack” holding periods (holdings by other persons or of other securities) to satisfy the holding period requirement. In the case of convertible securities, Rule 144 historically has permitted a holder to tack the holding period of the convertible instrument and the underlying security, where the underlying security is acquired solely in exchange for the convertible instrument.

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Market-adjustable securities where the conversion or exchange price is not fixed initially may allow holders to convert at conversion prices that are substantially discounted to the market price of the underlying securities at the time of conversion or exchange. Holders of such market-adjustable securities are thereby shielded from market risk and do not bear the economic risks of investment in the underlying security. Holders thus may have an incentive to purchase 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 transactions that are not distributions. As a result, the SEC has proposed that the holding period for securities acquired upon the conversion or exchange of certain market-adjustable securities would not begin until the securities are acquired upon conversion or exchange in circumstances where:

- the issuer does not have a class of securities listed 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 or other issuer-initiated changes in its capitalization.

The SEC has not proposed extending this change to securities of listed issuers, both because exchange shareholder approval requirements greatly diminish the likelihood of approval of these transactions, and because listed issuers generally have not been engaging in these transactions.

#### **Rule 10b5-1 Indication on Forms 4 and 5**

The SEC has proposed amending Form 4 and Form 5 to include a “check box” that filers could tick to indicate that the reported transactions were made pursuant to a 10b5-1 plan (filers could include additional details, such as the date of the 10b5-1 plan adoption, under “Explanation of Responses”).

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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