

CLIENT ALERT

# SEC Proposes Amendments to Rule 144

## Would Mandate Electronic Filing, Extend Deadline for Form 144

December 28, 2020

### AUTHOR

**Jeffrey S. Hochman**

As part of the continued flurry of activity prior to the upcoming change in administration, last week the Securities and Exchange Commission proposed changes to the holding period determination under Rule 144 for securities acquired upon the conversion or exchange of certain “market-adjustable” securities.<sup>1</sup> The proposed amendments are intended to reduce the risk of unregistered distributions in connection with sales of those securities. The proposal also includes amendments to update and simplify the Form 144 filing requirements.

Rule 144 provides a non-exclusive safe harbor from the statutory definition of “underwriter” to assist security holders in determining whether the exemption from registration under Section 4(a)(1) of the Securities Act is available for the resale of restricted or control securities. Rule 144 sets forth specific criteria under which security holders seeking to resell securities may rely to avoid being deemed to be engaged in a distribution and, therefore, to avoid acting as an underwriter under Section 2(a)(11) of the Securities Act.

### **Holding Period**

For purposes of calculating the holding period under Rule 144, securities acquired solely in exchange for other securities of the same issuer are deemed to have been acquired at the same time as the securities surrendered for conversion or exchange. The proposal would amend Rule 144(d)(3)(ii) to eliminate such “tacking” of the holding period for securities acquired upon the conversion or exchange of market-adjustable securities of an issuer that does not have a class of listed securities. As a result, the holding period for the underlying securities, either six months for securities issued by a

<sup>1</sup> See SEC Release No. 33-10911, *Rule 144 Holding Period and Form 144 Filings* (December 22, 2020), available [here](#).

---

## SEC Proposes Amendments to Rule 144

reporting company or one year for securities issued by a non-reporting company, would not begin until the conversion or exchange of the market-adjustable securities.

As proposed, the amendments would not affect the use of Rule 144 for most convertible or variable-rate securities transactions; they 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, did not have a class of securities listed, or approved for listing, on a national securities exchange registered pursuant to the Securities Exchange Act; 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.

### **Forms 4, 5 and 144 Filing Requirements**

In addition, to update and simplify the filing requirements for Forms 4, 5 and 144, the proposed amendments would:

- mandate the electronic filing of Form 144;
- with the electronic filing, delete the requirement to send a copy of the Form 144 to the principal exchange on which the securities are admitted to trading;
- eliminate the Form 144 filing requirement for the sale of securities of issuers not subject to the reporting requirements under the Exchange Act;
- amend the Form 144 filing deadline to be consistent with the two-business day deadline for Form 4 reports (instead of the current requirement to transmit the Form 144 at the time of placing the order to execute the sale) so that the two forms may be filed concurrently by persons subject to both filing requirements;
- make minor changes to Form 144 to update the form and eliminate certain personally identifiable information, such as the home address of the filing person; and
- amend Forms 4 and 5 to add an optional check box to indicate that a reported transaction was made pursuant to a plan under Exchange Act Rule 10b5-1(c).<sup>2</sup> In such case, for purposes of the Form 4 two-business day filing deadline, the date of execution of the transaction would be deemed to be the date on which the executing broker

---

<sup>2</sup> Rule 10b5-1(c) provides an affirmative defense from liability for insider trading for pre-planned transactions pursuant to a contract, instruction or written plan that was established in good faith at a time when the person was unaware of material non-public information, even if actual trades pursuant to the plan are executed at a time when the person may be aware of material non-public information.

---

## SEC Proposes Amendments to Rule 144

*notifies* the reporting person of execution of the transaction, so long as the notification date is not later than the third business day following the trade date.

The SEC would then provide filers with an option to file a Form 144 and a Form 4 through a single user interface on EDGAR, using the information entered to create separate Form 4 and Form 144 filings.

### **Comment Period; Transition Period**

The proposing release, as customary, includes a variety of questions seeking input regarding the scope of the proposed amendments, including whether the proposed change in the holding period determination for market-adjustable securities should be limited to non-listed companies only. The public comment period will remain open for 60 days following publication of the proposing release in the Federal Register. Following adoption, the proposed rules 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.

If you have any questions regarding this client alert, please contact the following attorney or the Willkie attorney with whom you regularly work.

---

**Jeffrey S. Hochman**

212 728 8592

[jhochman@willkie.com](mailto:jhochman@willkie.com)

Copyright © 2020 Willkie Farr & Gallagher LLP.

This alert is provided by Willkie Farr & Gallagher LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This alert may be considered advertising under applicable state laws.

Willkie Farr & Gallagher LLP is an international law firm with offices in New York, Washington, Houston, Palo Alto, San Francisco, Chicago, Paris, London, Frankfurt, Brussels, Milan and Rome. The firm is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000, and our fax number is (212) 728-8111. Our website is located at [www.willkie.com](http://www.willkie.com).