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# Proposed Rule 144 amendments

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The Securities and Exchange Commission (SEC) has proposed amendments to Rule 144 under the Securities Act of 1933 to prevent "tacking" of the holding period for securities acquired upon the conversion or exchange of certain "market-adjustable securities" and to modify the filing requirements for a notice on Form 144.

The discounted conversion or exchange features of market-adjustable 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. The proposed Rule 144 amendment is intended to reduce the risks of unregistered distributions in connection with market-adjustable securities transactions when the issuer is not a reporting company.

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

Currently, Rule 144 deems securities acquired solely in exchange for other securities of the same issuer to have been acquired at the same time as the securities surrendered for conversion or exchange. As a result, after the Rule 144 holding period is satisfied, holders can convert market-adjustable securities under the current regulation and, if the converted or exchanged securities have been held for the Rule 144 holding period, immediately sell the underlying securities into the public market. This creates an incentive to purchase market-adjustable securities without being exposed to market risk with a view to making an unregistered distribution of the underlying securities that would reach the public markets without the same level of disclosure and liability protections that registration provides to investors.

The proposed amendments would apply only to market-adjustable securities transactions under circumstances 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 registered pursuant to Section 6 of the Securities Exchange Act of 1934; 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.

Under the proposed amendments, the holding period for the underlying securities acquired upon conversion or exchange of market-adjustable securities would not begin until conversion or exchange. Consequently, a purchaser of market-adjustable securities would need to hold the underlying securities for the applicable Rule 144 holding period, one year for securities issued by a non-reporting company, before reselling them under Rule 144. The proposed amendment would not affect the use of Rule 144 for most convertible or variable-rate securities transactions.

The proposed amendments also include a note 1 to Rule 144(d)(3)(ii), which provides that if the surrendered securities originally did not provide for cashless conversion or exchange by their terms, and the holder provided consideration (other than solely securities of the same issuer) in connection with an amendment of the surrendered securities to permit cashless conversion or exchange, then the newly acquired securities would be deemed to have been acquired under Rule 144 at the same time as such amendment.

In addition, the SEC proposal calls for amendments that would mandate electronic filing of a notice on Form 144. Since the vast majority of Form 144s are filed in paper, the proposed amendments include a six-month transition period to allow Form 144 paper filers, who would be first-time electronic filers, to apply for the codes required to make filings on EDGAR. The amendments eliminate the requirement to send one copy of the Form 144 notice to the principal exchange on which the restricted securities are admitted to trading and make certain other changes to the text of Form 144.

The filing deadline for filing a Form 144 would be revised to require the notice to 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 (consistent with the Form 4 filing deadline), rather than have it due 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, as currently required. In addition, the proposed amendments would eliminate the requirement to file a Form 144 with respect to sales of securities issued by companies that are not subject to reporting under the Securities Exchange Act of 1934.

The comment period for the proposed amendments to Rule 144 will remain open until 60 days after publication in the Federal Register.

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