

## SUPPORTING STATEMENT FOR PROPOSED RULES RELATING TO RULE 144 HOLDING PERIOD AND FORM 144 FILINGS

This supporting statement is part of a submission under the Paperwork Reduction Act of 1995 (“PRA”).<sup>1</sup>

### A. JUSTIFICATION

#### 1. CIRCUMSTANCES MAKING THE COLLECTION OF INFORMATION NECESSARY

On December 22, 2020, the Securities and Exchange Commission (“Commission”) proposed amendments<sup>2</sup> to Rule 144<sup>3</sup> and Form 144<sup>4</sup> of the Securities Act of 1933 (“Securities Act”),<sup>5</sup> Form 4<sup>6</sup> and Form 5<sup>7</sup> of the Securities Exchange Act of 1934 (“Exchange Act”),<sup>8</sup> and Rule 101<sup>9</sup> of Regulation S-T.<sup>10</sup> The Commission proposed amending Rule 144(d)(3)(ii)<sup>11</sup> to revise the holding period determination for securities acquired upon the conversion or exchange of certain market-adjustable securities<sup>12</sup> of an issuer that does not have a class of securities listed, or approved to be listed, on a national securities exchange registered pursuant to Section 6<sup>13</sup> of the Exchange Act. As a result of this proposed amendment, the holding period for the acquired securities would not begin until conversion or exchange of the market-adjustable securities.

The Commission also proposed amendments to mandate the electronic filing of all Form 144 notices related to the resale of securities of issuers that are subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act and eliminate the filing requirement for Form 144 notices related to the resale of securities of issuers that are not subject to Exchange Act reporting. Additionally, the Commission proposed minor changes to update Form 144 and eliminate certain personally identifiable information and immaterial information fields that are unnecessary. The proposed amendments would also change the filing deadline for Form 144 to

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<sup>1</sup> 44 U.S.C. §3501, *et seq.*

<sup>2</sup> *Rule 144 Holding Period and Form 144 Filings*, Release No. 33-10911 (Dec. 22, 2020) [86 FR 5063 (Jan. 19, 2021)] (“Proposing Release”).

<sup>3</sup> 17 CFR 230.144.

<sup>4</sup> 17 CFR 239.144.

<sup>5</sup> 15 U.S.C. 77a *et seq.*

<sup>6</sup> 17 CFR 249.104.

<sup>7</sup> 17 CFR 249.105.

<sup>8</sup> 15 U.S.C. 78a *et seq.*

<sup>9</sup> 17 CFR 232.101.

<sup>10</sup> 17 CFR 232.10 through 232.903.

<sup>11</sup> 17 CFR 230.144(d)(3)(ii).

<sup>12</sup> As used in the Proposing Release, a “market-adjustable security” is 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.

<sup>13</sup> 15 U.S.C. 78f.

coincide with the filing deadline for Form 4.<sup>14</sup> Finally, the Commission proposed to amend Forms 4 and 5 to add a check box to permit filers to indicate that a sale or purchase reported on the form was made pursuant to a transaction that satisfied Rule 10b5-1(c).<sup>15</sup>

The amendments contain “collection of information” requirements within the meaning of the PRA. The titles for the collection of information are:

- Form ID (OMB Control Number 3235-0328);<sup>16</sup> and
- Form 144 (OMB Control Number 3235-0101).

## **2. PURPOSE AND USE OF THE INFORMATION COLLECTION**

The Commission proposed to amend Rule 144(d)(3)(ii) to revise the holding period determination for securities acquired upon the conversion or exchange of certain 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 registered pursuant to Section 6<sup>17</sup> of the Exchange Act, so that the holding period would not begin until the conversion or exchange. The proposed amendment is intended to mitigate the risk of unregistered distributions in connection with sales of market-adjustable securities. As defined in the proposed rule, a “market-adjustable security” is 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.

The application of the “tacking” provision of Rule 144(d)(3)(ii) to market-adjustable securities undermines one of the key premises of Rule 144,<sup>18</sup> which is that holding securities at risk for an appropriate period of time prior to resale can demonstrate that the seller did not purchase the securities with a view to distribution<sup>19</sup> and, therefore, is not an underwriter for the

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<sup>14</sup> As indicated in the release, if the amendments are adopted, the Commission plans to streamline filing procedures for individuals who are subject to notice filing requirements under Rule 144 and reporting requirements under Section 16[15 U.S.C. 78p] of the Exchange Act.

<sup>15</sup> 17 CFR 240.10b5-1(c).

<sup>16</sup> 17 CFR 239.63.

<sup>17</sup> 15 U.S.C. 78f.

<sup>18</sup> Permitting the holding period of the underlying securities to be “tacked” onto the holding period of the convertible or exchangeable security, pursuant to Rule 144(d)(3)(ii), allows the initial holders of market-adjustable securities to structure transactions without significant economic risk prior to conversion. The structure of these transactions incentivizes purchases “with a view to distribution” because, by selling the underlying securities into the market promptly after conversion, holders of market-adjustable securities can capture the value of the built-in discount to the then-current market value. This is inconsistent with the purpose of Rule 144, which is to provide a safe harbor for transactions that are not distributions of securities.

<sup>19</sup> The term “underwriter” is broadly defined to mean any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates, or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking. *See* Securities Act Section 2(a)(11) [15 U.S.C. 77b(a)(11)]. The interpretation of this definition traditionally has focused on the words “with a view to” in the phrase “purchased from an issuer with a view to ... distribution.” For simplicity, in this release we often only refer to the “with a view to” prong of the underwriter definition.

purpose of Securities Act Section 4(a)(1).<sup>20</sup> To help maintain the effectiveness of this key aspect of the Rule 144 safe harbor, the Commission proposed to amend the Rule 144 holding period for the securities received on conversion or exchange of market-adjustable securities so that the holding period would not commence until the time the underlying securities are acquired.

The proposed amendments to Form 144 are intended to update and simplify the filing requirements of that form. Form 144 is a notice form that must be filed with the Commission by an affiliate of an issuer who intends to resell restricted or control securities<sup>21</sup> of that issuer in reliance upon Securities Act Rule 144.<sup>22</sup> Under Securities Act Rule 144(h), an affiliate who intends to resell securities of the issuer 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.

### **3. CONSIDERATION GIVEN TO INFORMATION TECHNOLOGY**

The forms that would be affected by the proposed amendments either are filed electronically with the Commission using the Commission's Electronic Data Gathering, Analysis and Retrieval (EDGAR) system already or would be required to be filed electronically with the Commission using the EDGAR system under the proposed amendments. Previously, filers had to submit Form ID in paper to the Commission. Form ID is now completely electronic, so that filers can submit the form online to the Commission. Form ID is available at <https://www.filermanagement.edgarfiling.sec.gov/filermgmt/selectFormId.html>.

### **4. DUPLICATION OF INFORMATION**

We believe that the proposed amendments would not duplicate, overlap, or conflict with other federal rules.

### **5. REDUCING THE BURDEN ON SMALL ENTITIES**

The proposed amendments would affect small entities that issue securities as well as those that hold securities. However, many of the proposed changes would simplify and streamline existing disclosure requirements in ways that are expected to reduce compliance burdens for all registrants, including small entities. Although the proposed amendment to require electronic filing of Form 144 for the resales of securities of Exchange Act reporting issuers could modestly increase compliance burdens for those filers that do not currently file Form 144 electronically, the proposed amendment to eliminate the Form 144 filing requirement for resales of securities of issuers that are not subject to the reporting requirements of Sections 13 and 15(d) of the Exchange Act would reduce compliance burdens for filers, including small entities.

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<sup>20</sup> 15 U.S.C. 77d(a)(1).

<sup>21</sup> Restricted securities are securities acquired pursuant to one of the transactions listed in Securities Act Rule 144(a)(3), such as securities issued in a private placement. Although not defined in Rule 144, the term "control securities" commonly refers to securities held by an affiliate of the issuer, regardless of how the affiliate acquired the securities. *See* Rule 144(b)(2).

<sup>22</sup> *See* Rule 144(a)(1) (defining "affiliate" of the issuer as a person who directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the issuer).

## **6. CONSEQUENCES OF NOT CONDUCTING COLLECTION**

Form ID is used by registrants, individuals, third party filers, or their agents to request access codes that permit the filing of documents on EDGAR. The information provided on Form ID is essential to the security of EDGAR and is used solely for the purpose of screening applicants and granting access to EDGAR.

Form 144 is a notice form that must be filed with the Commission by an affiliate of an issuer who intends to resell restricted or control securities of that issuer in reliance upon Securities Act Rule 144. Not conducting this collection would deprive investors of access to information that is important to their voting and investment decisions.

## **7. SPECIAL CIRCUMSTANCES**

There are no special circumstances in connection with these amendments.

## **8. CONSULTATIONS WITH PERSONS OUTSIDE THE AGENCY**

The Proposing Release solicits comment on the new “collection of information” requirements and the associated paperwork burdens. In response to the solicitation for comment in the Proposing Release, registrants, investors, and other market participants may provide comments. In addition, the Commission and staff participate in ongoing dialogue with representatives of various market participants through public conferences, roundtables, and meetings. All comments received on the proposal are available at <https://www.sec.gov/comments/s7-24-20/s72420.htm>. The Commission will consider all comments received prior to publishing the final rules as required by 5 CFR 1320.11(f).

## **9. PAYMENT OR GIFT TO RESPONDENTS**

No payment or gift has been provided to any respondents.

## **10. CONFIDENTIALITY**

All documents submitted to the Commission are available to the public.

## **11. SENSITIVE QUESTIONS**

No information of a sensitive nature would be required in connection with the amendment to Forms ID and 144. These information collections collect basic PII that may include a name and job title. However, the agency has determined that the information collections do not constitute a system of record for purposes of the Privacy Act. Information is not retrieved by a personal identifier. In accordance with Section 208 of the E-Government Act of 2002, the agency has conducted a PIA of the EDGAR system, in connection with this collection of information. The EDGAR PIA, published on February 5, 2020, is provided as a supplemental document and is also available at <https://www.sec.gov/privacy>.

## **12. and 13. ESTIMATES OF HOUR AND COST BURDENS**

Although the proposed amendments to the holding period are expected to reduce the number of market-adjustable securities transactions, the Commission does not anticipate that these proposed amendments would affect the burdens and costs associated with Form 144. The requirement to file Form 144 only applies to affiliates of the issuer. The investors in the market-adjustable securities generally do not meet the definition of affiliate in our regulations and, therefore, are not required to file Form 144.

The Commission also does not believe that the proposed amendment to change the filing deadline for Form 144 to coincide with the filing deadline for Form 4 would affect an issuer's burden hours or costs for PRA purposes. Changing the filing deadline would not substantively modify existing collection of information requirements or otherwise affect the overall burden estimates associated with Form 144.

Similarly, the Commission does not believe that the proposed amendments to permit Form 4 and Form 5 filers to indicate through a check box on the forms that a sale or purchase reported on the forms was made pursuant to Rule 10b5-1(c) would affect an issuer's burden hours or costs for PRA purposes. Filers must already determine whether their sale or purchase reported on the forms was made pursuant to Rule 10b5-1(c), so adding a check a box on the forms would not substantively modify existing collection of information requirements or otherwise affect the overall burden estimates associated with Forms 4 or 5.

The Commission anticipates that the proposed amendment to mandate the electronic filing of Form 144 would result in a number of filers using EDGAR to file their Form 144 electronically who do not currently do so. Filers who have not previously made an electronic filing on EDGAR are required to file a Form ID to obtain access codes that will enable them to file a document on EDGAR.

The Commission estimates that approximately 12,250 filers would be required to switch from paper filings of their Form 144 to electronic filings of that form. Of those 12,250 filers, however, the Commission estimates that 25 percent have already filed a Form ID as a result of other EDGAR filing obligations, so only approximately 75 percent of Form 144 filers would need to file a Form ID. As a result, the Commission estimates that approximately 9,188 filers would be required to file a Form ID because of the proposed amendment to mandate the electronic filing of Form 144.

The Commission estimates that respondents require approximately 0.15 hours to complete the Form ID and that, for purposes of the PRA, 100 percent of the burden of preparation for Form ID is carried by the respondent internally. Therefore, the Commission estimates that this proposed amendment would result in an incremental increase of 1,378 annual burden hours for Form ID.

The Commission expects that the proposed amendment to eliminate the requirement to file a Form 144 to report the resale of securities of issuers that are not subject to the reporting requirements of Sections 13 or 15(d) of the Exchange Act would reduce the number of filings of

that form. The Commission estimates that 313 filers would no longer be required to file Form 144. It further estimates that, for PRA purposes, each notice on Form 144 imposes a burden of one hour and that 100 percent of the burden of preparation for Form 144 is carried by the respondent internally. Therefore, the Commission estimates that this proposed amendment would result in an incremental decrease of 313 annual burden hours for Form 144.

The table below summarizes the estimated effects of the amendments on the paperwork burdens associated with the affected collections of information.

**Table 1. Estimated Paperwork Burden Effects of the Amendments**

<b>Proposed Amendments and Effects</b>	<b>Proposed Affected Collections of Information</b>	<b>Estimated Net Effect</b>
<p><b>Form ID:</b></p> <ul style="list-style-type: none"> <li>Amend Rules 101(a) and 101(b) of Regulation S-T to mandate the electronic filing of all Form 144 filings for the sale of securities of Exchange Act reporting companies.</li> </ul>	<ul style="list-style-type: none"> <li>Form ID</li> </ul>	<ul style="list-style-type: none"> <li>Increase of 0.15 hour compliance burden per response to the new collection of information.</li> </ul>
<p><b>Form 144:</b></p> <ul style="list-style-type: none"> <li>Eliminate the requirement to file a Form 144 for resales of securities of issuers that are not subject to Exchange Act reporting.</li> </ul>	<ul style="list-style-type: none"> <li>Form 144</li> </ul>	<ul style="list-style-type: none"> <li>Decrease of 1.0 hour compliance burden per response to the new collection of information.</li> </ul>

#### **14. COSTS TO FEDERAL GOVERNMENT**

The annual cost of reviewing and processing disclosure documents, including registration statements, post-effective amendments, proxy statements, annual reports, and other filings of operating companies amounted to \$102 million in fiscal year 2018, based on the Commission’s computation of the value of staff time devoted to this activity and related overhead.

#### **15. REASON FOR CHANGE IN BURDEN**

The proposed amendments to Form 144, which are the only proposals in the release that are expected to have an impact on PRA burden estimates, are intended to update and simplify the Form 144 filing requirements. Among other things, the proposed amendments would mandate the electronic filing of all Form 144 notices related to the resale of securities of issuers that are subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act and eliminate the filing requirement for Form 144 notices related to the resale of securities of issuers that are not subject to Exchange Act reporting.

The table below illustrates the changes in cost and hour burdens from the burdens currently approved by OMB. The total estimated burdens were calculated by adding the incremental burdens to the existing burdens.

**Table 2. Calculation of the Incremental Change in Burden Estimates of Current Responses Resulting from the Amendments**

	Current Burden			Proposed Burden Change					
	Current Annual Responses (A)	Current Burden Hours (B)	Current Cost Burden (C)	Proposed Change in Annual Responses (D)	Proposed Change in Burden Hours (E)	Proposed Change in Professional Costs (F)	Proposed Annual Affected Responses (G) = (A) + (D)	Proposed Burden Hours for Affected Responses (H) = (B) + (E)	Proposed Cost Burden for Affected Responses (I) = (C) + (F)
Form ID	48,493	7,274	\$0	9,188	1,378	\$0	57,681	8,652	\$0
Form 144	33,725	33,725	\$0	(313)	(313)	\$0	33,412	33,412	\$0

**16. INFORMATION COLLECTION PLANNED FOR STATISTICAL PURPOSES**

The information collections do not employ statistical methods.

**17. APPROVAL TO OMIT OMB EXPIRATION DATE**

We request authorization to omit the expiration date on the electronic version of these forms. Including the expiration date on the electronic version of the forms will result in increased costs because the need to make changes to the forms may not follow the application’s scheduled version release dates. The OMB control number will be displayed.

**18. EXCEPTIONS TO CERTIFICATION FOR PAPERWORK REDUCTION ACT SUBMISSIONS**

There are no exceptions to certification for the PRA submissions.

**B. STATISTICAL METHODS**

The information collections do not employ statistical methods.

## Form ID Short Statement

The proposed amendments would amend Rule 144(d)(3)(ii) to revise the holding period determination for securities acquired upon the conversion or exchange of certain 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 registered pursuant to Section 6 of the Exchange Act. As a result, the holding period for the underlying securities would not begin until conversion or exchange.

The proposed amendments would also mandate the electronic filing of all Form 144 notices related to the resale of securities of issuers that are subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act, and eliminating the filing requirement for Form 144 notices related to the resale of securities of issuers that are not subject to Exchange Act reporting. Additionally, the proposed amendments would eliminate two unnecessary data fields, and the Commission intend to create an online fillable document for entering the information required by Form 144. The amendments would also change the filing deadline for Form 144 to coincide with the filing deadline for Form 4. Finally, the proposed amendments would amend Forms 4 and 5 to add a check box to permit filers to indicate that a sale or purchase reported on the form was made pursuant to a transaction that satisfied Rule 10b5-1(c).

For Form ID, the Commission estimates that proposed amendments would result in an increase of 1,378 internal burden hours and no change in outside professional costs.

## **Form 144 Short Statement**

The proposed amendments would amend Rule 144(d)(3)(ii) to revise the holding period determination for securities acquired upon the conversion or exchange of certain 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 registered pursuant to Section 6 of the Exchange Act. As a result, the holding period for the underlying securities would not begin until conversion or exchange.

The proposed amendments would also mandate the electronic filing of all Form 144 notices related to the resale of securities of issuers that are subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act, and eliminate the filing requirement for Form 144 notices related to the resale of securities of issuers that are not subject to Exchange Act reporting. Additionally, the proposed amendments would eliminate two unnecessary data fields, and the Commission intends to create an online fillable document for entering the information required by Form 144. The amendments would also change the filing deadline for Form 144 to coincide with the filing deadline for Form 4. Finally, the proposed amendments would amend Forms 4 and 5 to add a check box to permit filers to indicate that a sale or purchase reported on the form was made pursuant to a transaction that satisfied Rule 10b5-1(c).

For Form 144, the Commission estimates that proposed amendments would result in a decrease of 313 internal burden hours and no change in outside professional costs.