

List of Subjects**14 CFR Part 241**

Air carriers, Reporting and recordkeeping requirements, Uniform system of accounts.

14 CFR Part 298

Air taxis, Reporting and recordkeeping requirements.

Issued in Washington, DC.

Elaine L. Chao,

Secretary of Transportation.

Proposed Rule

Accordingly, the Department proposes to amend 14 CFR parts 241 and 298 as follows:

PART 241—UNIFORM SYSTEM OF ACCOUNTS AND REPORTS FOR LARGE CERTIFICATED AIR CARRIERS

- 1. The authority citation for part 241 continues to read as follows:

Authority: 49 U.S.C. 329, 41101, 41708, and 41709.

Sec. 19–7 [Removed]

- 2. Remove Sec. 19–7.
- 3. Add Sec. 19–8 to read as follows:

Sec. 19–8 Passenger Origin—Destination Survey applicability.

(a) All U.S. certificated and commuter air carriers conducting scheduled passenger services (except helicopter carriers) shall participate in a Passenger Origin-Destination (O&D) Survey covering domestic and international air carrier operations, as prescribed by the Department's Bureau of Transportation Statistics (BTS), Office of Airline Information (OAI).

(b) A statistically valid sample of flight coupons shall be selected for reporting purposes. The sample shall consist of a selection of all Tickets involving a Reporting Carrier that meet the reporting criteria as defined in the Instructions, or further defined in Directives, except those participating O&D carriers with nonstandard ticketing procedures, or other special operating characteristics, may propose alternative procedures. Such departures from standard O&D Survey practices shall not be authorized unless approved in writing by the Director, Office of Airline Information under the procedures in Sec. 1–2. The data to be recorded and reported, as stipulated in the Instructions and Directives, shall include at a minimum the following data elements: Reporting Carrier, Reporting Month, Reporting Year, Record Identification Number, Issuing Carrier, Total Amount, Tax Amount, Exchanged Ticket Indicator, Airport,

Operating Carrier, Marketing Carrier, Scheduled Flight Year, Scheduled Flight Month, Dwell Time and Via Airport(s).

(c) Any Ticket that is submitted that involves a O&D Survey Reporting Carrier providing service in whole or in part under this part or 49 U.S.C. 41308 or 41309 and any data covering the operations of foreign air carriers that are similar to the information collected in the Passenger Origin-Destination Survey are generally not available to the Department, the U.S. carriers, or U.S. interests. Therefore, because of the damaging competitive impact on U.S. carriers and the adverse effect upon the public interest that would result from unilateral disclosure of the U.S. survey data, the Department will not disclose the international data in the Passenger Origin-Destination Survey except:

(1) To an air carrier directly participating in and contributing input data to the Survey or to a legal or consulting firm designated by an air carrier to use on its behalf O&D data in connection with a specific assignment by such carrier;

(2) To parties to any proceeding before the Department to the extent that such data are relevant and material to the issues in the proceeding upon a determination to this effect by the Administrative Law Judge or by the Department's decision-maker. Any data to which access is granted pursuant to this section may be introduced into evidence subject to the normal rules of admissibility of evidence.

(3) To agencies and other components of the U.S. Government.

(4) To other persons upon a showing that the release of the data will serve specifically identified needs of U.S. users which are consistent with U.S. interests.

(5) To foreign governments and foreign users as provided in formal reciprocal arrangements between the foreign and U.S. Governments for the exchange of comparable O&D data.

(6) Or as otherwise determined by the Department as consistent with its regulatory functions and responsibilities.

(d) Each O&D Survey Reporting Carrier shall maintain its prescribed reportable records in a manner and at such locations as will permit ready accessibility for examination by representatives of DOT. The record retention requirements are prescribed in part 249 of this chapter.

PART 298—EXEMPTIONS FOR AIR TAXI AND COMMUTER AIR CARRIER OPERATIONS

- 4. The authority citation for part 298 continues to read as follows:

Authority: 49 U.S.C. 329 and chapters 401, 411, and 417.

- 5. In § 298.60, revise paragraph (a) to read as follows:

§ 298.60 General reporting instructions.

(a) Each commuter air carrier and each small certificated air carrier shall file the applicable schedules of Form 298–C, “Report of Financial and Operating Statistics for Small Aircraft Operators”, Schedule T–100, “U.S. Air Carrier Traffic and Capacity Data by Nonstop Segment and On-Flight Market”, and the “Passenger Origin—Destination Survey” prescribed in part 241, Sec. 19–8, of this subchapter.

* * * * *

[FR Doc. 2020–29229 Filed 1–15–21; 8:45 am]

BILLING CODE 4910–9X–P

SECURITIES AND EXCHANGE COMMISSION**17 CFR Parts 230, 232, 239, and 249**

[Release Nos. 33–10911; 34–90773; File No. S7–24–20]

RIN 3235–AM78

Rule 144 Holding Period and Form 144 Filings

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission (“Commission”) is proposing to amend Rule 144 to revise the holding period determination 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. Under the proposed amendments, the holding period for those securities would not begin until the securities are acquired upon the conversion or exchange of the market-adjustable security. The Commission is also proposing to mandate electronic filing of Form 144 with respect to securities issued by issuers subject to Exchange Act reporting requirements, to amend the filing deadline for Form 144 to coincide with the filing deadline for Form 4, and to streamline the filing process in cases where both Form 4 and Form 144 are required to report the same transaction. Finally, the Commission is proposing to eliminate

the requirement to file a Form 144 for resales of securities of issuers that are not subject to Exchange Act reporting.

DATES: Comments should be received on or before March 22, 2021.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/submitcomments.htm>).

Paper Comments

- Send paper comments to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090. All submissions should refer to File Number S7-24-20. We will post all

submitted comments, requests, other submissions and other materials on our internet website (<http://www.sec.gov/rules/proposed.shtml>). Typically, comments are also available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Due to pandemic conditions, however, access to the Commission's public reference room is not permitted at this time. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information. You should submit only information that you wish to make available publicly.

Studies, memoranda or other substantive items may be added by the Commission or staff to the comment file during this rulemaking. A notification of the inclusion in the comment file of any such materials will be made available on the Commission's website. To ensure direct electronic receipt of such notifications, sign up through the "Stay Connected" option at www.sec.gov to receive notifications by email.

FOR FURTHER INFORMATION CONTACT: John Fieldsend or Sean Harrison, at (202) 551-3430, in the Office of Rulemaking, Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: We are proposing amendments to:

Commission reference		CFR citation (17 CFR)
Regulation S-T [17 CFR 232.10 through 232.903]	Rule 101	§ 232.101.
Securities Act of 1933 ("Securities Act") [15 U.S.C. 77a <i>et seq.</i>]	Rule 144(b)(3)	§ 230.144(b)(3).
	Rule 144(d)(3)(ii)	§ 230.144(d)(3)(ii).
	Rule 144(h)	§ 230.144(h).
	Form 144	§ 239.144.
Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. 78a <i>et seq.</i>]	Form 4	§ 249.104.
	Form 5	§ 249.105.

Table of Contents

I. Discussion of the Proposed Amendments	2. Economic Baseline.
A. Overview of the Proposed Amendments	a. Affected parties
B. Proposed Amendment to Rule 144(d)(3)(ii)	b. EDGAR
1. Background	3. Benefits and Costs of Proposed Amendments to Form 144, Form 4, and Regulation S-T
a. Rule 144 Safe Harbor	4. Efficiency, Competition, and Capital Formation
b. Rule 144 Holding Period Condition and Tacking	5. Reasonable Alternatives
c. Market-Adjustable Securities Transactions	D. Request for Comment
2. Proposed Amendment	III. Paperwork Reduction Act
C. Proposed Amendment to the Form 144 Filing Requirements	A. Summary of the Collections of Information
1. Background	B. Summary of the Proposed Amendments' Effects on the Collections of Information
2. Proposed Amendments	C. Incremental and Aggregate Burden and Cost Estimates
a. Mandatory Electronic Filing of Form 144	D. Request for Comment
b. Eliminating Form 144 Filing Requirement for Investors Selling Securities of Non-Reporting Issuers	IV. Initial Regulatory Flexibility Act Analysis
c. Filing Options for Form 4 and Form 144	A. Reasons for, and Objectives of, the Proposed Action
d. Rule 10b5-1(c) Transaction Indication in Forms 4 and 5	B. Legal Basis
II. Economic Analysis	C. Small Entities Subject to the Proposed Rules
A. Introduction	D. Proposed Reporting, Recordkeeping, and other Compliance Requirements
B. Proposed Amendments to Holding Period for Market-Adjustable Securities	E. Duplicative, Overlapping, or Conflicting Federal Rules
1. Broad Economic Considerations	F. Significant Alternatives
2. Economic Baseline	G. Request for Comment
3. Benefits and Costs to Proposed Amendment to Rule 144(d)(3)(ii)	V. Small Business Regulatory Enforcement Fairness Act
4. Effects on Efficiency, Competition, and Capital Formation	VI. Statutory Authority
5. Reasonable Alternatives	Text of the Proposed Amendments
6. Request for Comment	
C. Proposed Amendments to Form 144, Form 4 and Regulation S-T	
1. Broad Economic Considerations	

I. Discussion of the Proposed Amendments

A. Overview of the Proposed Amendments

We are proposing to amend Rule 144, Form 144, Form 4, Form 5 and Rule 101 of Regulation S-T. We propose 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 6¹ of the Exchange Act ("unlisted issuer") so that the holding period would not begin until the conversion or exchange. As used in this 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.

We are proposing this amendment to mitigate the risk of unregistered distributions in connection with sales of market-adjustable securities. As

¹ 15 U.S.C. 78f.

discussed below, the application of the “tacking” provisions of Rule 144 to market-adjustable securities undermines one of the key premises of Rule 144, 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 distribution² and, therefore, is not an underwriter for the purpose of Securities Act Section 4(a)(1).³ Amending the Rule 144 holding period for the securities received on conversion or exchange of market-adjustable securities so that it will not commence until the time the underlying securities are acquired would help maintain the effectiveness of this key aspect of the Rule 144 safe harbor.

We are also proposing amendments to update and simplify the Form 144 filing requirements by mandating 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, we are proposing to eliminate two unnecessary data fields and intend to create an online fillable document for entering the information required by Form 144. In connection with these amendments, we are planning to streamline filing procedures for individuals who are subject to notice filing requirements under Rule 144 and reporting requirements under Section 16⁴ of the Exchange Act. These amendments would also change the filing deadline for Form 144 to coincide with the filing deadline for Form 4. In addition, we are proposing 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 17 CFR 240.10b5-1(c) (“Rule 10b5-1(c)”).

We welcome feedback and encourage interested parties to submit comments on any or all aspects of the proposed

rule amendments. When commenting, it would be most helpful if you include the reasoning behind your position or recommendation.

B. Proposed Amendment to Rule 144(d)(3)(ii)

1. Background

a. Rule 144 Safe Harbor

Securities Act Section 5 requires registration of all offers and sales of securities in interstate commerce or by use of the United States mails, unless an exemption from the registration requirement is available.⁵ Securities Act Section 4(a)(1) provides an exemption for “transactions by any person other than an issuer, underwriter, or dealer.” Securities Act Section 2(a)(11) defines an “underwriter” 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.⁶

In 1972,⁷ the Commission adopted Rule 144 to provide a non-exclusive safe harbor from the statutory definition of “underwriter” to assist security holders in determining whether the Section 4(a)(1) exemption is available for their resale of restricted or control securities.⁸ Rule 144 sets forth objective criteria on which security holders seeking to resell such securities may rely to be assured they would not be deemed to be engaged in a distribution and, therefore, not be considered an underwriter under Section 2(a)(11). A selling security holder that seeks to rely on the safe harbor for the resale of securities must satisfy the following conditions:⁹

⁵ 15 U.S.C. 77e.

⁶ As used in Section 2(a)(11), the term “issuer” includes any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer. An affiliate of an issuer is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such issuer. See 17 CFR 230.405 and 17 CFR 230.144(a)(1).

⁷ See *Definition of Terms “Underwriter” and “Brokers’ Transactions,”* Release No. 33-5223 (Jan. 11, 1972) [37 FR 591 (Jan. 14, 1972)] (“1972 Adopting Release”).

⁸ 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).

⁹ In general, these are the conditions that a selling security holder must satisfy when seeking to rely on the safe harbor for the resale of securities. However, a person seeking to rely on the safe harbor when reselling securities of certain types of companies must satisfy different conditions. See 17 CFR 230.144(i).

- There must be adequate current public information available about the issuer if the selling security holder is an affiliate of the issuer;¹⁰

- The selling security holder must have held the securities for a specified holding period if the securities being sold are restricted securities;¹¹

- The resale must be within specified sales volume limitations if the selling security holder is an affiliate of the issuer;¹²

- The resale must comply with the manner of sale requirements if the selling security holder is an affiliate of the issuer;¹³ and

- The selling security holder must file a Form 144 if the selling security holder is an affiliate of the issuer and the amount of securities being sold exceeds specified thresholds.¹⁴

b. Rule 144 Holding Period Condition and Tacking

One of the conditions of Rule 144 for restricted securities is that a selling security holder must have held the securities for a specified period of time prior to resale. This condition helps to ensure that a holder who claims an exemption under Section 4(a)(1) has assumed the full economic risks of investment and, therefore, is not acting as a conduit, directly or indirectly, on behalf of the issuer for the sale of unregistered securities to the public.¹⁵ Under Rule 144(d)(1)(i), restricted securities acquired from an issuer that has been subject to Exchange Act reporting for at least 90 days before the sale (a “reporting issuer”) must be held for a minimum of six months. If the issuer is not subject to Exchange Act reporting, or has not been for a period of at least 90 days immediately before the sale (a “non-reporting issuer”), the restricted securities must be held for a minimum of one year pursuant to Rule 144(d)(1)(ii).

As originally adopted, Rule 144 required a two-year holding period before a security holder could make

¹⁰ See 17 CFR 230.144(c). A sale by a non-affiliate also must satisfy the current public information condition if the non-affiliate is selling securities of a reporting issuer and has held the securities for less than one year.

¹¹ See 17 CFR 230.144(d).

¹² See 17 CFR 230.144(e).

¹³ See 17 CFR 230.144(f) and (g).

¹⁴ See Rule 144(h).

¹⁵ See 1972 Adopting Release, *supra* note 7, at 594 (noting that the holding period condition in Rule 144 was designed to assure that the registration provisions of the Securities Act are not circumvented by persons acting, directly or indirectly, as conduits for an issuer in connection with resales of restricted securities and that to accomplish this, the rule provides that such persons be subject to the full economic risks of investment during the holding period).

² 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.

³ 15 U.S.C. 77d(a)(1).

⁴ 15 U.S.C. 78p.

limited sales of restricted securities.¹⁶ Later changes to the rule established a separate three-year holding period for unlimited sales of restricted securities by non-affiliates of the issuer.¹⁷ In 1997, the Commission shortened the holding periods for restricted securities to one-year and two-year periods, respectively.¹⁸ In 2007, the Commission adopted the current holding periods of six months for reporting issuers and one year for non-reporting issuers based on its observations of Rule 144's application since 1997 and its desire that the holding period be no longer than necessary nor impose any unnecessary costs or restrictions on capital formation.¹⁹ By reducing the holding periods for restricted securities, the Commission intended to help companies to raise capital more easily and less expensively.²⁰

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 the holding period involves convertible securities. 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. A variation of this provision has existed since 1972,²¹ and the

current version of this provision was adopted in 2007.²²

c. Market-Adjustable Securities Transactions

A typical convertible security, for example a convertible bond, a convertible promissory note, or convertible preferred stock, can be converted into a different security, such as shares of the issuer's common stock, under specified terms and conditions.²³ In a conventional convertible security transaction, the conversion formula is generally fixed, such that the convertible security converts into common stock based on a conversion price that is fixed at the time the convertible security is sold and remains at that fixed price through its conversion. Convertible securities may contain mechanical adjustments to the number of underlying shares and the conversion price upon the occurrence of events such as splits, dividends, or other distributions on the underlying securities. They also may contain anti-dilution provisions designed to protect the holder's economic interest if the issuer subsequently issues shares of the underlying securities at a price below their current market value or below the holder's original purchase price. The terms of market-adjustable securities, however, go beyond these typical adjustments and anti-dilution provisions to adjust for, and protect the holder against, general decreases in market value of the underlying securities.²⁴

While the holder of a typical convertible security is at substantial economic risk upon conversion with respect to the underlying security if the underlying security fails to appreciate or declines in value, this is not the case in market-adjustable securities transactions where the conversion or exchange price and/or the amount of securities received on conversion are not fixed at the time of the initial transaction. In these transactions, holders have the right to convert the securities into the underlying securities (often shares of

common stock) at a conversion price that yields a substantial discount to the market price of the underlying securities at the time of conversion or exchange. If the securities are converted or exchanged after the Rule 144 holding period is satisfied, the underlying securities may be sold quickly into the public market at prices above the price at which they were acquired. Accordingly, initial purchasers or subsequent holders have an incentive to purchase the market-adjustable securities with a view to distribution of the underlying securities following conversion to capture the difference between the built-in discount and the market value of the underlying securities. As noted above, when a holder purchases with a view to distribution, it is acting as an underwriter and is unable to rely on the Section 4(a)(1) exemption from registration.

A holding period is essential to assure that purchasers have assumed the economic risks of investment, and therefore, are not acting as conduits for sale to the public of unregistered securities, directly or indirectly, on behalf of an issuer.²⁵ The discounted conversion or exchange features in 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. As a result, these holders are not exposed to the market risk associated with holding the underlying security prior to conversion or exchange;²⁶ they are only exposed to that market risk during the time that they hold the underlying security after the conversion or exchange.²⁷ In these circumstances, holders that convert and promptly resell the underlying security in order to secure a profit on the sale based on the built-in discount have not assumed the economic risks of investment of the underlying security. Therefore, under Rule 144's current

¹⁶ See *id.*

¹⁷ See *Resales of Securities*, Release No. 33-6032 (Mar. 5, 1979) [44 FR 15610 (Mar. 14, 1979)] and *Resales of Securities*, Release No. 33-6286 (Feb. 6, 1981) [46 FR 12195 (Feb. 13, 1981)] ("1981 Adopting Release").

¹⁸ See *Revision of Holding Period Requirements in Rules 144 and 145*, Release No. 33-7390 (Feb. 20, 1997) [62 FR 9242 (Feb. 28, 1997)]. In that adopting release, the Commission stated that it was shortening the holding to reduce the cost of capital, lower the illiquidity discount given by companies raising capital in private placements, and increase the usefulness of the Rule 144 safe harbor. See *id.* at 9242. Additionally, the Commission stated that it did not believe that the shorter holding periods would diminish investor protection because the holding periods were still sufficiently long to ensure that resales under Rule 144 would not facilitate indirect public distributions of unregistered securities by issuers or affiliates.

¹⁹ See *Revisions to Rules 144 and 145*, Release No. 33-8869 (Dec. 6, 2007) [72 FR 71546 (Dec. 17, 2007)] ("2007 Adopting Release"). In the 2007 Adopting Release, the Commission eliminated the bifurcated holding periods for affiliates and non-affiliates, and added different holding periods for reporting and non-reporting issuers because non-reporting issuers are not obliged to file periodic reports with updated financial information that are publicly available on EDGAR.

²⁰ See *id.*

²¹ See 1972 Adopting Release, *supra* note 7, at 597.

²² See 2007 Adopting Release, *supra* note 19, at 71555.

²³ See *infra* Section II.B.1; see also, *Convertible Securities*, U.S. Sec. & Exchange Commission (last visited Dec. 18, 2020), available at <https://www.sec.gov/fast-answers/answersconvertibleshtm.html>.

²⁴ For example, the conversion or exchange rate of the overlying convertible securities into the underlying equity securities may be discounted from a weighted average price of the publicly traded class of securities, typically, common stock, calculated for a period leading up to the date of conversion or exchange. Therefore, the conversion price provides a discount from the recent market price that can be realized at the time sales of the underlying equity securities begin.

²⁵ See 1972 Adopting Release, *supra* note 7.

²⁶ Prior to conversion or exchange, a holder of market-adjustable securities is at risk of bankruptcy of the issuer. However, this risk is borne for a briefer duration currently than when Rule 144 was originally adopted because of the shortened holding periods.

²⁷ This period of time can be very limited because the discounted equity securities acquisition, through conversion or exchange, and the market-priced sales can occur almost simultaneously. For example, when the applicable holding period ends, the holder may demand that the issuer issue the required number of underlying securities at the discounted conversion or exchange price and concurrently sell those securities at market prices. The underlying securities are received from the issuer in time to settle the sales at market prices made earlier.

formulation, holders are able to purchase market-adjustable securities with a view to distribution while still satisfying the holding period requirements and tacking period provisions of Rule 144.

Permitting the holding period of the underlying securities to be “tacked” onto the holding period of the convertible or exchangeable security 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 to provide a safe harbor for transactions that are not distributions of securities. These unregistered transactions pose the risk that distributions of securities will reach the public markets without the same level of disclosure and liability protections that registration provides to investors.

2. Proposed Amendment

We are proposing to amend Rule 144(d)(3)(ii) to provide that the holding period for the securities acquired upon conversion or exchange of certain market-adjustable securities issued by unlisted issuers would not begin until conversion or exchange.²⁸ The proposed amendment would be limited to unlisted issuers because national securities exchanges registered pursuant to Section 6 of the Exchange Act have certain listing requirements, such as requiring shareholder approval of an issuance of 20 percent or more of a company’s common stock. Because market-adjustable securities have the potential to result in highly dilutive issuances of large amounts of the issuer’s securities, these required approvals are not likely to be granted in the situations the amendment is intended to address.²⁹

²⁸ Nothing in this proposed amendment is intended to impact the availability of the Securities Act Section 3(a)(9), 15 U.S.C. 77c(a)(9), exemption from registration for such conversions or exchanges as long as the requirements of Section 3(a)(9) are otherwise met.

²⁹ See, e.g., Section 312.03(c) of the New York Stock Exchange LLC Listed Company Manual (requiring shareholder approval of any issuance of securities in any transaction or related transactions relating to 20 percent or more of a listed company’s stock before the issuance) and Nasdaq Stock Market LLC Listing Rule 5635(d) (requiring shareholder approval prior to an issuance or potential issuance by a company of common stock (or securities convertible into or exercisable for common stock),

We have also observed that issuers that are able to satisfy the listing criteria of these exchanges have generally not been engaging in these transactions. The proposed amendment is intended to avoid the potential under the current Rule 144 safe harbor for holders to acquire market-adjustable securities with a view to an unregistered distribution of the underlying securities acquired upon their conversion or exchange, resulting in significant resales of the underlying securities without investors having the benefit of registration.³⁰

The proposed amendment would not affect the use of Rule 144 for most convertible or variable-rate securities transactions. The proposed amendment would apply only to market-adjustable securities transactions where:

- 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 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.

We believe the proposed amendment would reduce the potential for unregistered distributions because after the conversion or exchange of the overlying convertible securities, the underlying securities would need to be held for the applicable Rule 144 holding period before they would be eligible for resale under the Rule 144 safe harbor. A holder who has held the underlying securities for the entire six months or one year, as applicable, during which period market adjustments are no longer available, is generally appropriately excluded from the definition of an underwriter.

While we believe the proposed amendment would mitigate the risk of unregistered distributions in connection with market-adjustable securities

which alone or together with sales by officers, directors, or certain other shareholders equals 20 percent or more of the common stock or 20 percent or more of the voting power outstanding before the issuance at a price that is less than the certain, minimum price).

³⁰ In addition to lacking the disclosure and liability protections that registration provides, market-adjustable securities may result in extreme dilution to holders of the underlying securities, especially when the conversions or exchanges occur in tranches at subsequently lower market prices.

transactions, we also emphasize that the Rule 144 safe harbor is not available to any person with respect to any transaction or series of transactions that is part of a plan or scheme to evade the registration requirements of the Securities Act, as currently stated in the Preliminary Note to Rule 144. We propose to move this statement to new paragraph (b)(3) of Rule 144 so that the statement is explicitly included in the rule text.³¹

Request for Comment

1. Should we amend Rule 144(d)(3)(ii) as proposed?

2. Should the rule only apply if the issuer is an “unlisted issuer” at the time of conversion or exchange, as proposed? Or should the determination of whether an issuer is unlisted be made at the time the holder buys the market-adjustable security, the time of the resale of any of the underlying equity securities, or some other time? Should the determination be made both at the time of the purchase of the market-adjustable security and at the time of the conversion or exchange, or some other combination of times?

3. Is the description of market-adjustable securities in proposed Rule 144(d)(3)(ii) sufficient to achieve the purpose of the proposal? If not, how should we modify the description?

4. Should we define the securities that would be subject to the proposed rules more narrowly or more broadly? If so, how? We do not intend for adjustments for recapitalizations, stock or cash dividends, or other anti-dilution adjustments that apply to issuer-initiated actions, to be considered the type of adjustments that would cause a security to be considered a market-adjustable security. However, are there specific additional factors or clarification that we should provide in the rule to indicate when a transaction may be considered a market-adjustable securities transaction?

5. As an alternative to the proposed amendment to Rule 144(d)(3)(ii), should we amend Rule 144(d)(1)(i) to increase from six months to one year (or some other period) the holding period that would apply to the market-adjustable securities that are issued by reporting, unlisted issuers? Should we amend Rule 144(d)(1)(i) to increase the holding period to one year (or some other period) for these market-adjustable

³¹ In addition to this amendment, due to current Federal Register formatting requirements we are also proposing a technical change to move the rest of Rule 144’s Preliminary Note to a note that immediately follows the rule. Neither new Rule 144(b)(3) nor this technical change would alter the substance of the Preliminary Note.

securities in addition to amending Rule 144(d)(3)(ii) as proposed?

6. Are there alternative approaches that we should consider that would better mitigate the risk of unregistered distributions of securities acquired upon the conversion or exchange of market-adjustable securities?

7. Should market-adjustable securities of both listed and unlisted issuers be covered by the amendment to Rule 144(d)(3)(ii) rather than only those of unlisted issuers, as proposed? Do an exchange's listing criteria provide sufficient safeguards against the type of transaction that the proposal seeks to address? If not, are there alternatives that we should consider?

8. Should the proposed amendment to Rule 144(d)(3)(ii) only apply to issuers that do not have a class of *equity* security listed on an exchange, rather than to issuers that do not have any class of security listed on an exchange, as proposed?

9. Are there any additional amendments or changes to the proposed amendments that we should consider that would help achieve the purposes of the proposal?

C. Proposed Amendment to the Form 144 Filing Requirements

1. Background

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 securities³² of that issuer in reliance upon Securities Act Rule 144.³³ 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.

Rule 101(b) of Regulation S–T permits Form 144 to be filed electronically or in paper if the issuer of the securities is subject to Exchange Act reporting requirements. If the issuer of the securities is not subject to Exchange Act reporting requirements, Rule 101(c)(6) of Regulation S–T requires Form 144 to be filed in paper.³⁴ During the 2019

calendar year, the Commission received over 31,000 Form 144 filings. Based on an analysis of these filings, Commission staff estimates that approximately 99 percent related to the resale of securities of issuers subject to Exchange Act reporting requirements. Although most of these Form 144 filings can be made electronically, during the 2019 calendar year, only 221 Form 144 filings were made electronically and the vast majority were filed in paper.³⁵

2. Proposed Amendments

a. Mandatory Electronic Filing of Form 144

Since the Commission's implementation of the Electronic Data Gathering, Analysis, and Retrieval system ("EDGAR"), we have sought to make the system more comprehensive by subjecting more filings to our mandated electronic filing requirements. The mandated electronic submission of documents required to be filed with the Commission has enabled investors, market participants, and other EDGAR users to access more quickly the information contained in registration statements, periodic reports, and other filings made with the Commission. We are proposing rule amendments that would mandate the electronic filing of Form 144 and eliminate the paper filing option. Specifically, we propose to 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.

Mandating the electronic filing of Form 144 would facilitate more efficient

health and safety concerns related to COVID–19, the Division of Corporation Finance provided temporary no-action relief that specified that it would not recommend enforcement action to the Commission if Forms 144 for the period from and including April 10, 2020 to June 30, 2020 were submitted as a complete PDF attachment and emailed to the Commission in lieu of filing the form in paper. Subsequently, on June 25, 2020, the Division of Corporation Finance updated this no-action relief by indefinitely extending it from the period beginning on April 10, 2020. *See Division of Corporation Finance Statement Regarding Requirements for Form 144 Paper Filings in Light of COVID–19 Concerns*, U.S. Sec. & Exchange Comm'n (June 25, 2020), available at <https://www.sec.gov/corpfin/announcement/form-144-paper-filings-email-option-update>.

³⁵ The paper filings of Form 144 are retained in the Commission's public reference room for a period of 90 days. Investors or other interested parties wishing to access and review a Form 144 filed in paper must do so in person at our public reference room or subscribe to a third party information service that records and distributes the information electronically after a paper Form 144 is filed. Due to pandemic conditions, prospective data users cannot, at this time, access the Commission's public reference room. Therefore, access to paper filings is limited to those records which have been obtained and incorporated by vendor databases.

storage and retrieval of the transaction information and facilitate analysis of this information. In addition, as described in more detail below, Form 144 filers would benefit from the planned EDGAR changes to make the form an online fillable document that would make electronic filing easier. Under the proposed amendments, affiliates of an issuer that is subject to Exchange Act reporting who resell or expect to resell securities in reliance upon Rule 144 in an amount exceeding the Form 144 filing thresholds would be required to file a Form 144 electronically on EDGAR.³⁶ Any Form 144 filer who has not previously made an electronic filing on EDGAR would need to apply for EDGAR access in accordance with the EDGAR Filer Manual in order to file documents on EDGAR. We are also proposing to provide a six-month transition period after the effective date of the amendments to Regulation S–T to give Form 144 paper filers who would be first-time electronic filers sufficient time to apply for codes to make filings on EDGAR.

In addition, we propose to amend Rule 144(h)(1) to delete the requirement that an affiliate send one copy of the Form 144 notice to the principal exchange, if any, on which the restricted securities are admitted to trading. This provision was designed for Form 144 filings made in paper and will no longer be needed if we mandate the electronic filing of Form 144.³⁷

We are also proposing minor changes to Form 144 to update the form and eliminate certain personally identifiable information ("PII") and immaterial information fields that are unnecessary. Specifically, we propose to delete the fields requiring the home address of the person for whose account the securities are to be sold and the IRS identification number of the issuer of the securities.³⁸

³⁶ An affiliate, however, would be able to file the form in paper pursuant to a temporary hardship exemption under 17 CFR 232.201 (Rule 201 of Regulation S–T) if the affiliate experiences unanticipated technical difficulties preventing the timely preparation and submission of the electronic filing.

³⁷ Many exchanges have rules or guidance that specify that it is not necessary for a company listed on the exchange to provide it with physical copies of any documents that the company has filed on EDGAR. *See, e.g., New York Stock Exchange Listed Company Regulation Guidance Memo*, N.Y. Stock Exch. (Feb. 20, 2018), available at https://www.nyse.com/publicdocs/nyse/regulation/nyse/2018_Listed_Company_Regulation_Guidance_Memo.pdf.

³⁸ For purposes of Form 144, we have determined that we can achieve our regulatory objectives without the PII. Furthermore, the IRS identification number of the issuer is redundant as this information is required to be disclosed on the cover

³² See Rule 144(h).

³³ 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).

³⁴ In April 2020, in recognition of several logistical difficulties related to the submission of Form 144 in paper pursuant to Rules 101(b)(4) or 101(c)(6) of Regulation S–T, as well as ongoing

We intend to provide an online fillable document on EDGAR for entering information required by Form 144 and to streamline the electronic filing process for those filing both a Form 144 and a Form 4 to report the same sale of equity securities, as discussed in more detail below. In connection with these changes, we are also proposing to amend the Form 144 filing deadline to coincide with the Form 4 filing deadline.³⁹ Specifically, we propose to amend Securities Act Rule 144(h)(2) to revise the filing deadline to require that a Form 144 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 execution⁴⁰ 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.

The proposed amendment to the Form 144 filing deadline would facilitate this new filing process. This filing deadline would apply to all Forms 144, regardless of whether a Form 4 also needs to be filed for the same transaction.⁴¹ The proposal therefore would provide all Form 144 filers more time to file the form, yet would generally result in the Form 144 becoming publicly available earlier than under the existing filing deadline because the Form 144 would be filed electronically rather than mailed to the Commission in paper at the time the sale is executed. The proposed filing deadline, however, would not preclude filers from filing a Form 144 concurrently with either the placing of an order to execute a sale with a broker,

or the execution of a sale directly with a market maker.

Finally, we observe that the Commission considered Rule 144 to be in the nature of an experiment at the time of its adoption in 1972.⁴² The Commission has used Form 144 filings to monitor the operation of the rule and as an enforcement tool to assist in the detection of abuses.⁴³ Since the Commission initially adopted the Rule 144 requirements, the Commission has amended the rule to eliminate certain Form 144 filing requirements.⁴⁴ While, at this time, we are not proposing the elimination of the current Form 144 filing requirement for sales of securities by affiliates of issuers that are subject to Exchange Act reporting, we are soliciting comment on the continued utility of Form 144 filings.

Request for Comment

10. Do investors or other market participants have an interest in the information provided by Form 144? Does Form 144 provide important information that would not otherwise be publicly available? Do investors or other market participants obtain benefits from this information? If so, please describe the benefits.

11. How do market participants and the public currently access Form 144 information? Should we mandate the electronic filing of Form 144 for affiliates' sales of securities of issuers that are subject to Exchange Act reporting and that exceed the thresholds in Rule 144(h), as proposed? Would electronic filing of Form 144 make those forms more readily accessible to the public? Would electronic filing result in cost savings? Given that the majority of Form 144 filings are made in paper, has the inability to access the paper Forms 144 filed during the pandemic had any effect on the usefulness of this information to market participants and the public?

12. Should we, as proposed, amend Rule 144(h)(1) to eliminate the requirement that an affiliate send one copy of the Form 144 notice to the principal exchange, if any, on which the restricted securities are admitted to trading?

13. Should we amend Form 144 to update the form and eliminate certain

information, as proposed? Is there any other information in Form 144 that we should remove because it is unnecessary to further the purposes of Rule 144? Is there any other information that should be included in the form?

14. Should we instead continue to permit a Form 144 filer to have the option of filing in paper or electronically?

15. In the alternative, should we eliminate the Form 144 filing requirement altogether?

16. Is the proposed six-month transition period appropriate? Would a shorter or longer transition period be more appropriate (e.g., three months, nine months)?

17. Is it common for Form 144 filers to use a filing agent or a third party such as a broker to prepare and submit the Form 144 filing? If so, would the proposed amendments create any difficulties in the filing process or add costs to the process?

18. Should we amend the Form 144 filing deadline to coincide with the Form 4 filing deadline, as proposed? If not, should we change the deadline in some other way?

19. If we mandate the electronic filing of Form 144 without amending the filing due date, the Form 144 disclosures would be available to investors and other EDGAR users more quickly than if we amend the Form 144 filing deadline to coincide with the Form 4 filing deadline. Should we maintain the existing Form 144 filing deadline that requires the form to be transmitted for filing concurrently with either the placing with a broker of an order to execute a sale of securities in reliance on the rule or execution of the sale directly with a market maker? Is there a benefit to having the Form 144 filed at an earlier date than a Form 4 that reports the same sale? If so, how does that benefit compare to the efficiencies that a filer subject to both the Form 144 and Form 4 requirements could realize from being able to file both forms simultaneously?

b. Eliminating Form 144 Filing Requirement for Investors Selling Securities of Non-Reporting Issuers

As noted above, the Commission staff estimates that approximately one percent of the Form 144 filings made during the 2019 calendar year related to the resale of securities of issuers that are not subject to Exchange Act reporting.⁴⁵ The proposed amendments discussed above that would mandate the electronic filing of a Form 144 notice for the securities of an Exchange Act

page of registration statements and periodic reports and would be available through these forms.

³⁹ We are proposing to amend the filing deadline for Form 144 to facilitate the simultaneous filing of Form 144 and Form 4. See *infra* Section II.B.2.c.

⁴⁰ Consistent with the exception to the Form 4 two-business day filing deadline provided in Exchange Act Rule 16a-3(g)(2)(i) [17 CFR 240.16a-3(g)(2)(i)], the proposed amendments provide that if the transaction is pursuant to a contract, instruction or written plan that satisfies the affirmative defense conditions of Exchange Act Rule 10b5-1(c), and the affiliate does not select the date of execution, the date on which the executing broker, dealer notifies the security holder of the execution of the transaction is deemed the date of execution for a transaction.

⁴¹ To better reflect the proposed change to the Form 144 filing deadline, we also propose to revise the title of Form 144 to read: "Notice of sale or proposed sale of securities pursuant to Rule 144 under the Securities Act of 1933." We are also proposing a conforming amendment to Instruction 3(d) to Form 144 to clarify that the filer should provide the total sales proceeds for completed sales rather than the aggregate market value for sales that have not yet been completed.

⁴² See 1972 Adopting Release, *supra* note 7, at 595.

⁴³ See *Resales of Securities*, Release No. 33-6252 (Oct. 24, 1980) [45 FR 72685 (Nov. 3, 1980)] at 72686.

⁴⁴ See, e.g., 1981 Adopting Release, *supra* note 17, at 12197 (amending Rule 144 to relieve non-affiliates from the Form 144 filing requirement and explaining that the "costs and burdens of the requirement outweigh its usefulness, at least in this area").

⁴⁵ See *infra* Section I.C.1.

reporting issuer would reduce a large majority of the paper Form 144 filings that the Commission receives. Although one of the primary goals of EDGAR is to facilitate the dissemination of financial and business information contained in Commission filings,⁴⁶ given the limited number of paper Form 144 filings related to non-reporting issuers that we receive, we believe that the benefits of having this information filed electronically would not justify the burdens on filers. For this reason, we are proposing to amend Rule 144 and Rule 101(c)(6) of Regulation S–T to require affiliates relying on Rule 144 to file a notice of sale on Form 144 only when the issuer of the securities is subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act.

Form 144 provides the Commission, among other things, with information concerning the issuer, the person on whose behalf the securities are to be sold, the broker who will execute the sale order, the securities to be sold, the approximate date of sale, and other securities of the same issuer sold during the past three months. The form, however, is not the sole source of information available to the Commission regarding resale transactions under the rule. For example, brokers are generally required to make and maintain records, for a period of time, of all purchases and sales of securities⁴⁷ and to furnish promptly legible, true, complete, and current copies of those records upon request by a representative of the Commission.⁴⁸ In addition, brokers that execute a sale under Rule 144 must conduct a reasonable inquiry to determine that the person for whose account the securities are sold is not an underwriter or that the transaction is not part of a distribution of securities of the issuer.⁴⁹

Although the Form 144 filing requirement would be eliminated for resales of securities by affiliates of issuers that are not subject to Exchange Act reporting, the proposed amendments to eliminate the Form 144 filing requirement would not change any of the other conditions of the Rule 144 safe harbor.

Request for Comment

20. Should we eliminate the Form 144 filing requirement for affiliates' sales of securities of non-reporting companies, as proposed? Does Form 144 provide

important information concerning the resale of securities of non-reporting issuers that would not otherwise be publicly available to investors or other users of this information? Do investors or market participants currently rely on Form 144 for this information or do they rely on other publicly available sources? If so, which other public sources are relied upon?

21. Do investors have an interest in the information provided by Form 144 regarding the resale of securities of non-reporting issuers? Do investors or market participants obtain benefits from this information? If so, please describe the benefits.

22. We have received comments indicating that the information contained in Form 144 could be used to satisfy some of the public information requirements in Rule 144(c)(2),⁵⁰ in particular the information specified in Rule 15c2–11(b)(5)(i)(N) and (b)(5)(i)(P).⁵¹ For the purpose of Rule 144(c)(2), is the Rule 15c2–11 information specified in paragraphs (b)(5)(i)(N) and (b)(5)(i)(P) publicly available from other sources? If so, which sources?

23. Rule 15c2–11 does not require that the information specified in paragraphs (b)(5)(i)(N) and (b)(5)(i)(P) of Rule 15c2–11 be publicly available but requires, in certain circumstances, that a broker-dealer make it available upon request of a person expressing an interest in a proposed transaction in the issuer's security. Rule 144(c)(2) requires the information specified in these paragraphs to be publicly available. Should we amend Rule 144(c)(2) to

⁵⁰ See letter from OTC Markets Group Inc. (dated Sept. 24, 2019), available at <https://www.sec.gov/comments/s7-08-19/s70819-6193364-192517.pdf>, which was submitted in response to the *Concept Release on Harmonization of Securities Offerings Exemptions*, Release No. 33–10649 (Jun. 18, 2019) [84 FR 30460 (Jun. 26, 2019)] (recommending “pre-publication” of Form 144 so that the information contained in it is publicly available for the purposes of rule 144(c)(2)). See also U.S. Sec. & Exch. Comm’n, Report on the 39th Annual Small Business Forum 31 (2020) (recommending “pre-publication” of Form 144), available at https://www.sec.gov/files/2020-oasb-forum-report-final_0.pdf.

⁵¹ See 17 CFR 240.15c2–11. Rule 15c2–11(b)(5)(i)(N) requires information about whether the broker or dealer or any associated person of the broker or dealer is affiliated, directly or indirectly, with the issuer. Rule 15c2–11(b)(5)(i)(P) requires information about whether the quotation is being submitted or published, directly or indirectly, by or on behalf of the issuer or a company insider and, if so, the name of such person and the basis for any exemption under the Federal securities laws for any sales of such securities on behalf of such person. In the recently adopted amendments to Rule 15c2–11, the prior references to Rule 15c2–11(a)(5)(xiv) and (a)(5)(xvi) were changed to (b)(5)(i)(N) and (b)(5)(i)(P). See *Publication or Submission of Quotations Without Specified Information*, Release No. 33–10842 (Sept. 16, 2020) [85 FR 68124 (Oct. 27, 2020)].

require the information in these paragraphs to be available upon request in accordance with the provisions of Rule 15c2–11(b)(5)(ii) instead of publicly available?

24. How do the costs of electronically filing a Form 144 notice related to the resale of securities of a non-reporting issuer compare with the benefits of having the form available on EDGAR?

c. Filing Options for Form 4 and Form 144

Section 16 of the Exchange Act applies to every person who is the beneficial owner of more than 10 percent of any class of equity security registered under Section 12 of the Exchange Act⁵² and each officer and director (collectively, “reporting persons” or “insiders”) of the issuer of the security. Upon becoming a reporting person, or upon the Section 12 registration of that class of securities, Section 16(a) requires a reporting person to file an initial report with the Commission disclosing the amount of his or her beneficial ownership of all equity securities of the issuer. To keep this information current, Section 16(a) also requires insiders to report changes in such ownership. Under Rule 16a–3 of the Exchange Act,⁵³ insiders are required to report most changes in beneficial ownership, including purchases and sales of securities, on Form 4.

As discussed above, Rule 144 requires an affiliate of an issuer to file a Form 144 concurrently with either the placing with a broker of an order to execute a sale of securities in reliance upon Rule 144 or the execution directly with a market maker of such a sale. Some of the disclosures required by Form 144 duplicate the disclosure requirements of Form 4. For example, both Form 144 and Form 4 require disclosure concerning the title of the class of securities being sold, the number of shares subject to sale, the aggregate market value of those shares, and the date of sale.

Many affiliates of an issuer under Rule 144 are also insiders of that issuer under Section 16 of the Exchange Act. Affiliates selling securities under Rule 144 often are required to file a Form 4 within two business days after they file a Form 144 to report information regarding the same sale of securities.⁵⁴

⁵² 15 U.S.C. 78l.

⁵³ 17 CFR 240.16a–3.

⁵⁴ The Sarbanes-Oxley Act of 2002 [Public Law 107–204, 116 Stat. 745] amended Section 16(a) to require insiders to file Form 4 before the end of the second business day following the day on which the subject transaction has been executed or at such other time as the Commission shall establish if the

⁴⁶ See *Electronic Filing, Processing and Information Dissemination System*, Release No. 33–6519 (Mar. 22, 1984) [49 FR 12707 (Mar. 30, 1984)].

⁴⁷ See 17 CFR 240.17a–3 and 17 CFR 240.17a–4.

⁴⁸ See 17 CFR 240.17a–4(f).

⁴⁹ See 17 CFR 230.144(g)(4) (Rule 144(g)(4)).

In June 2007, the Commission issued a release proposing amendments to update Securities Act Rules 144 and 145.⁵⁵ In that release, the Commission discussed possible approaches to, and requested comment about, amending Form 144 and Form 4 in order to reduce duplicative requirements and coordinate the filing requirements of these two forms. The Commission ultimately did not adopt any amendments to the forms to reduce duplicative requirements.⁵⁶ The Commission also has received a rulemaking petition requesting that the Commission revise its rules and regulations so that Form 144 be combined into Form 4 for persons that need to file both forms.⁵⁷

If we adopt the proposed amendments to Form 144 discussed above, we intend to modify EDGAR to provide filers with the option to file a Form 144 and a Form 4 through a single user interface. The system would use the information entered into the fields to create separate Form 4 and Form 144 filings. After the information is entered, a filer would have the opportunity to correct errors and verify the accuracy of the information before choosing to file one or both forms on EDGAR. Once the information is filed on EDGAR, the system would provide the filer with separate accession numbers for the Form 4 and Form 144 and also a return copy for both the Form 4 and Form 144 shortly after filing. We believe these changes would make the filing of these forms more efficient for filers subject to both reporting requirements. This filing option, however, would not be available for a Form 4 filing that is made on behalf of multiple insiders.⁵⁸

2-day period is not feasible. On August 27, 2002, the Commission adopted rule and form amendments to implement this filing deadline. See *Ownership Reports and Trading by Officers, Directors and Principal Security Holders*, Release No. 34-46421 (Aug. 27, 2002) [67 FR 56462 (Sept. 3, 2002)].

⁵⁵ 17 CFR 230.145. See *Revisions to Rule 144 and Rule 145*, Release No. 33-8813 (June 22, 2007) [72 FR 36822 (July 5, 2007)].

⁵⁶ In the 2007 Adopting Release, the Commission stated that it expected to issue a separate release in the future to provide affiliates that are subject to both the Form 4 and Form 144 filing requirements with greater flexibility in satisfying their requirements. See 2007 Adopting Release, *supra* note 19, at 72 FR 71554 and 71555.

⁵⁷ See *Request for rulemaking to combine Form 144 into Form 4*, File No. 4-671 (Dec. 13, 2013) (requesting that the Commission amend its rules to combine Form 144 with Form 4), <https://www.sec.gov/rules/petitions/2013/petn4-671.pdf>. The proposal, if adopted, would achieve the objectives sought by the petitioner.

⁵⁸ Form 4 permits multiple insiders to file on a single form if they all have an interest in the transaction(s) being reported. Form 144, however, does not have a similar feature.

In addition, we would make Form 144 available online as a fillable document that could be used by filers that do not have a corresponding Form 4 reporting obligation, as well as those who need to report the same sale on Form 4 and Form 144 but choose to enter the information separately for each form. An online fillable form would enable the convenient input of information, and support the electronic assembly of such information and transmission to EDGAR, without requiring a Form 144 filer to purchase or maintain additional software or technology. The fillable form would be similar to other fillable forms that are currently available to file Forms D,⁵⁹ 3, 4, and 5.

Request for Comment

25. If the Commission adopts the proposed rules, should we enable the filing of a Form 4 and Form 144 on EDGAR through a single user interface? Would this option make the filing of these documents more efficient for filers?

26. Are there alternative methods that we should consider that could reduce the duplicative requirements of Form 144 and Form 4?

d. Rule 10b5-1(c) Transaction Indication in Forms 4 and 5

Form 144 requires a selling security holder to represent, as of the date that the form is signed, that he or she does not know any material adverse information in regard to the current and prospective operations of the issuer of the securities to be sold which has not been publicly disclosed. In 2007, we amended Form 144 to allow filers who satisfy Rule 10b5-1(c) by adopting a written trading plan or providing trading instructions to make that representation as of the date they adopted the plan or gave instructions, rather than the date they signed the Form 144.⁶⁰

Exchange Act Rule 16a-3(g) provides that a reporting person must report specified changes in beneficial ownership on Form 4 before the end of

the second business day following the date of execution for the transaction. In addition, Rule 16a-3(f) provides that every person who at any time during an issuer's fiscal year was subject to Section 16 of the Exchange Act must file a Form 5 within 45 days after the issuer's fiscal year end to disclose certain beneficial ownership transactions and holdings not reported previously on Forms 3,⁶¹ 4, or 5. For transactions executed pursuant to a contract, instruction, or written plan for the purchase or sale of equity securities that satisfies the affirmative defense conditions of Rule 10b5-1(c)⁶² and for which the reporting person does not select the date of execution, the date on which the executing broker, dealer, or plan administrator notifies the reporting person of execution of the transaction is deemed the date of execution, so long as the notification date is not later than the third business day following the trade date.⁶³

We propose to permit a Form 4 filer, at the filer's option, to indicate through a check box on the form that a sale or purchase reported on the form was made pursuant to Rule 10b5-1(c). We believe that the check box option would provide Form 4 filers with an efficient method to provide this disclosure. Consistent with current practice, filers could provide additional information, such as the date of a Rule 10b5-1 plan, in the "Explanation of Responses" portion of the form along with other relevant information about the transactions reported on the Form 4. We propose to add a similar checkbox to Form 5.⁶⁴

⁶¹ 17 CFR 249.103.

⁶² Reporting persons sometimes provide additional disclosure in the "Explanation of Responses" portion of Form 4 indicating that a transaction satisfies the affirmative defenses conditions of Rule 10b5-1(c). For example, a reporting person may state that a transaction was made pursuant to a written trading plan and indicate the date the plan was adopted.

⁶³ See 17 CFR 240.16a-3(g)(2) (Exchange Act Rule 16a-3(g)(2)) and 17 CFR 240.16a-3(g)(4) (Exchange Act Rule 16a-3(g)(4)). If the notification date is later than the third business day following the trade date, the date of execution is deemed to be the third business day following the trade date.

⁶⁴ Under the proposal, the check boxes on Forms 4 and 5 would permit filers to indicate whether a transaction was made pursuant to a binding contract, instruction, or written trading plan for the purchase or sale of equity securities of the issuer that satisfies the conditions of Rule 10b5-1(c). This is broader than the representation on Form 144, which refers only to written trading plans and trading instructions, because the purpose of the proposed amendment is to simplify reporting for filers who provide Rule 10b5-1(c) transaction information in the "Explanation of Responses" portion of Forms 4 and 5, and some filers provide this information with respect to transactions made pursuant to binding contracts.

⁵⁹ 17 CFR 239.500.

⁶⁰ See 2007 Adopting Release, *supra* note 19. Exchange Act Rule 10b5-1 defines when a purchase or sale of a security constitutes trading "on the basis of" material nonpublic information in insider trading cases brought under Section 10(b) of the Exchange Act [15 U.S.C. 78j] and Rule 10b-5. Specifically, a purchase or sale of a security of an issuer is "on the basis of" material nonpublic information about that security or issuer if the person making the purchase or sale was aware of the material nonpublic information when the person made the purchase or sale. Rule 10b5-1(c) establishes affirmative defenses that permit a person to trade in circumstances where it is clear that the information was not a factor in the decision to trade.

Request for Comment

27. Should we add a check box to Forms 4 and 5 to provide filers the option of disclosing that their sales or purchases were made pursuant to Rule 10b5-1(c)?

28. Should we instead require Form 4 and Form 5 to indicate via a check box whether any of their reported transactions were made pursuant to Rule 10b5-1(c) rather than provide it as an option for the filer?

29. Would a Rule 10b5-1(c) check box on Forms 4 and 5 provide useful information to investors and market participants?

II. Economic Analysis

A. Introduction

The Commission is proposing amendments to Rule 144, Form 144, Form 4, Form 5, and Regulation S-T. We are mindful of the costs imposed by and the benefits obtained from our rules and the proposed amendments.⁶⁵ The discussion below addresses the potential economic effects of the proposed amendments. These effects include the likely benefits and costs of the proposed amendments and reasonable alternatives thereto, as well as the potential effects on efficiency, competition, and capital formation. We attempt to quantify these economic effects whenever possible; however, due to data limitations, in many cases we are unable to do so. When we are unable to provide a quantitative assessment, we provide a qualitative discussion of the economic effects instead.

Due to the differing nature of the proposed amendments' baselines, affected parties, and anticipated economic effects, we provide separate analyses of the proposed changes. We first discuss the economic effects of the proposed amendments to the holding period for securities acquired upon conversion or exchange of certain market-adjustable securities issued by unlisted issuers, and then separately discuss the proposed amendments to Form 144, Form 4, Form 5, and Regulation S-T.

⁶⁵ Section 2(b) of the Securities Act, 15 U.S.C. 77b(b), and Section 3(f) of the Exchange Act, 15 U.S.C. 78c(f), require us, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation. In addition, Section 23(a)(2) of the Exchange Act, 15 U.S.C. 78w(a)(2), requires us to consider the effects on competition of any rules that the Commission adopts under the Exchange Act and prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

B. Proposed Amendments to Holding Period for Market-Adjustable Securities

1. Broad Economic Considerations

The size of the market for all U.S.-issued convertible securities has historically been slightly less than half the size of the seasoned equity market and just less than one-tenth the size of the regular bond market.⁶⁶ Despite this difference in size, it is generally understood that the market for convertible securities is an important and highly innovative market that can provide solutions to investment inefficiencies or barriers to capital formation that would otherwise occur if issuers were restricted to offerings of only non-hybrid securities.⁶⁷ Studies have suggested that because convertible securities can mitigate certain agency problems, forms of adverse selection, overinvestment, and misallocation of risk, they enable firms to make investments in business opportunities that would otherwise be infeasible for those firms.⁶⁸ Empirical evidence on the impact of these investments on longer-term firm value and shareholder wealth, however, is ambiguous on whether such investments represent efficient allocations of external financing.⁶⁹ Interpreting the value of convertible bond financing from market outcomes like short-term stock returns or long-term stock price performance is further complicated by the increase in arbitrage hedge fund activity and arbitrage-related short-selling.⁷⁰ Therefore, while there are a number of reasons why convertible securities can uniquely facilitate investments of economic value, it is

⁶⁶ Marie Dutordoir et al., *What We Do and Do Not Know About Convertible Bond Financing*, 24 J. CORP. FIN. 3 (2014) ("Dutordoir").

⁶⁷ *Id.*; see also Craig Lewis and Patrick Verwijmeren, *Convertible Security Design and Contract Innovation*, 17 J. CORP. FIN. 809 (2011).

⁶⁸ See Dutordoir, *supra* note 66; see also Sudha Krishnaswami & Devrim Yaman, *The Role of Convertible Bonds in Alleviating Contracting Costs*, 78 Q. REV. ECON. FIN. 942 (2008); Craig Lewis et al., *Agency Problems, Information Asymmetries, and Convertible Debt Security Design*, J. FIN. INTERMEDIATION (1998).

⁶⁹ See Felix Ziedler et al., *Risk Dynamics Surrounding the Issuance of Convertible Bonds*, 18 J. CORP. FIN. 273 (2012); Dutordoir, *supra* note 66; Craig Lewis et al., *The Long-Run Performance of Firms that Issue Convertible Debt: An Empirical Analysis of Operating Characteristics and Analysts Forecasts*, 7 J. CORP. FIN. 447 (2001).

⁷⁰ See Eric Duca et al., *Why are Convertible Bond Announcements Associated with Increasingly Negative Issuer Stock Returns? An Arbitrage-Based Explanation*, 36 J. BANKING & FIN. 2884 (2012); see also Stephen Brown et al., *Convertibles and Hedge Funds as Distributors of Equity Exposure*, 25 REV. FIN. STUD. 3077 (2012), and Darwin Choi et al., *Convertible Bond Arbitrage, Liquidity Externalities, and Stock Prices*, 91 J. FIN. ECON. 227 (2009).

difficult to generalize about their impact on shareholder wealth.

Market-adjustable securities⁷¹ are an innovation in the market for convertible securities dating back to the 1990s.⁷² By allowing the holder of the market-adjustable security to convert at discount to the market price (or a reference price based on recent market prices), the issuer can avoid the adverse selection problems it would face by offering equity or fixed-rate convertible securities instead. In practice, however, it does not appear that many issuers have taken advantage of this aspect of market-adjustable securities, and their use has been concentrated in the subpopulation of issuers who are unable to issue additional equity or fixed-rate convertibles, such as financially distressed firms, other low- or no-revenue firms, and those approaching bankruptcy.⁷³

The main economic characteristic of market-adjustable securities is that they may provide protection to the holder against declines in market value from the time of purchase of the overlying security until the time of conversion or exchange.⁷⁴ Although the risk to investors from purchasing such a security is significantly lower than the risk associated with a convertible security with a fixed conversion rate, risks associated with the investment during the pre-conversion period still exist.⁷⁵

We are proposing to amend Rule 144(d)(3)(ii) to provide that the holding period for certain securities acquired

⁷¹ In the empirical literature cited in the Economic Analysis section, the term "floating priced convertibles" is often used to denote the "market-adjustable securities" referred to in this release. Other terms, such as "floating rate convertibles" or "future-priced convertibles," also may be used in the literature referring to the same securities.

⁷² See Dutordoir, *supra* note 66.

⁷³ See Austin Dwyer et al., *An Investigation of Death Spiral Convertible Bonds*, (Tenn. State Univ., Working Paper, 2018) ("Dwyer et al."); Zachary T. Knepper, *Future-Priced Convertible Securities and the Outlook for Death Spiral Securities-Fraud Litigation*, 26 WHITTIER L. REV. 359 (2004); Pierre Hillion & Theo Vermaelen, *Death Spiral Convertibles*, 71 J. Fin. Econ. 381 (2004) ("Hillion & Vermaelen") (examining 467 floating-priced convertibles issued over the 1994-1998 period and finding, among other things, that such convertibles are issued by younger, smaller, riskier issuers, for which adverse selection problems are potentially large.)

⁷⁴ One common method that may provide such protection is the inclusion of a floating conversion rate. When the amount of securities to be received upon conversion of a convertible security is conditioned on the stock price performance of the issuer prior to conversion, the conversion ratio is known as a floating conversion rate.

⁷⁵ For example, investors are exposed to risk during the pre-conversion period if the company becomes bankrupt and its stock price declines to zero value.

upon conversion or exchange of market-adjustable securities issued by unlisted issuers would not begin until the conversion or exchange occurs. The proposed amendment would expose the holder of the market-adjustable security to the economic risk of the underlying securities during the proposed corresponding holding period following the conversion or exchange.

We expect that exposing these investments to risk during the post-conversion or post-exchange period would limit market-adjustable security holders' ability to immediately resell converted or exchanged market-adjustable securities, which might otherwise constitute a public distribution of securities without the investor protections afforded by registration. However, the proposed holding period would reduce the liquidity of these investments, and thus could prevent some unlisted issuers from obtaining financing or increasing the costs of doing so, particularly since market-adjustable securities may constitute a "last resort" form of financing for issuers.⁷⁶ To the extent that such firms have presented attractive arbitrage opportunities, it is foreseeable that demand-side investors would hold significant bargaining power in the design of the securities' specific terms and could require additional compensation for limitations imposed upon that power or on final contract terms in future exchanges.

Overall, we believe that the net impact of the proposed amendments may depend on the relative significance of these two competing consequences.

2. Economic Baseline

The economic baseline for the proposed amendment includes unlisted issuers that issue, or may seek to issue, market-adjustable securities.⁷⁷ We estimate that as of the end of 2019, there were approximately 2,760 unlisted reporting issuers.⁷⁸ We find that during

2019, 106 of these issuers submitted a combined 207 disclosures regarding convertible securities issued that included a floating conversion rate feature.⁷⁹ Of the identified floating conversion rate issues, roughly 80 percent involved convertible debt and 20 percent involved convertible preferred stock. Issuers of these securities are predominantly non-accelerated filers⁸⁰ and smaller reporting companies ("SRCs")⁸¹ concentrated in pharmaceutical, biotechnology, and business technology industries.⁸² Approximately 25 percent of these convertible issuers had no revenue in their most recent fiscal year, but had average net income and market capitalization of approximately –\$5.3 million and \$18.8 million, respectively. For the remaining 75 percent of issuers, average revenue, net income, and market capitalization values were \$7.2 million, –\$12.0 million, and \$12.3 million for the most recent fiscal year reported in 2019. We are unable to assess such characteristics for the population of unlisted, non-reporting issuers given current limitations to data availability.

Of Form 144 filings submitted in calendar year 2019, approximately two

unable to construct a reliable estimate of the number of unlisted, non-reporting issuers who may also be affected by the proposed amendments. We request information on such issuers in the Request for Comment. *See infra* Section I.B.6.

⁷⁹ This number is based on a search of Forms 8–K (17 CFR 249.308) filed by unlisted issuers that indicate the issuance of a convertible security that appears to have a floating conversion rate. If there are other issued securities by unlisted issuers that meet the definition of a market-adjustable security, the number reported represents a lower bound of the prevalence of such securities in the market.

⁸⁰ Although Rule 12b–2 defines the terms "accelerated filer" and "large accelerated filer," it does not define the term "non-accelerated filer." If an issuer does not meet the definition of accelerated filer or large accelerated filer, it is considered a non-accelerated filer. *See Accelerated Filer and Large Accelerated Filer Definitions*, Release No. 34–88365 (Mar. 12, 2020) [85 FR 17178 (Mar. 26, 2020)] (Accelerated Filer Adopting Release), <https://www.sec.gov/rules/final/2020/34-88365.pdf>

⁸¹ "Smaller reporting company" is defined in 17 CFR 229.10(f) as an issuer that is not an investment company, an asset-backed issuer (as defined in 17 CFR 229.1101), or a majority-owned subsidiary of a parent that is not a smaller reporting company and that: (i) Had a public float of less than \$250 million; or (ii) had annual revenues of less than \$100 million and either no public float, or a public float of less than \$700 million.

⁸² In calendar year 2019, all 106 identified unlisted reporting issuers of floating-rate convertibles self-identified as either a non-accelerated filer, a smaller reporting company, or both. Insofar as recently adopted amendments to the definitions of accelerated filer and smaller reporting company will effect cost savings for issuers newly eligible as non-accelerated filers or smaller reporting companies, the ability to reinvest such savings in business operations may to some degree offset the potential increased costs of financing to issuers affected by the proposed amendment to Rule 144(d)(1)(ii).

percent pertained to transactions in reporting, unlisted issuances and only one percent to intended sales of non-reporting, unlisted issuances.

3. Benefits and Costs to Proposed Amendment to Rule 144(d)(3)(ii)

As observed, use of the current tacking provisions essentially eliminates the holding period that would otherwise apply to the underlying securities after conversion or exchange, enabling holders of the overlying securities to convert and then immediately sell the underlying securities received upon conversion or exchange to the open market.⁸³ Investments in such securities carry little risk given the floating conversion rate and the ability of holders to sell the stock to the open market immediately upon conversion.

The proposed amendment to Rule 144(d)(3)(ii) would require the holding period of the underlying securities to begin upon conversion or exchange of the overlying securities by the holder. Upon conversion or exchange, the amount or value of the underlying securities received by the holder would have been determined. The proposed restriction from selling the underlying securities in the open market during the holding period would put the value of the underlying securities and the holder's investment at risk because, upon conversion or exchange, any subsequent decline in the stock price of the underlying securities during the holding period would result in a decrease in the value of the investment to the holder.

The proposed amendment to Rule 144(d)(3)(ii) would likely have a number of benefits. We believe this proposed amendment would curb the occurrence of situations where purchasers of such instruments have a view to an unregistered public distribution. Restricting the underlying securities from being sold to the broader market during the proposed holding period would introduce greater risk to the holder of the market-adjustable securities. During the holding period, any decline in the price of the underlying securities would decrease the value of the investment. We expect that this proposed amendment would discourage parties from engaging in such transactions because they would no longer be able to immediately distribute the underlying securities on an unregistered basis to capture the discount feature of these instruments. Instead, such parties would now be exposed to economic risk for the requisite holding period following

⁷⁶ See Ming Dong *et al.*, *Why Do Firms Issue Convertible Bonds?* 7 CRITICAL FIN. REV. 111 (2018) ("Dong *et al.*"). See also Hillion & Vermaelen, *supra* note 73; Helgi Walker *et al.*, *Aggressive SEC Enforcement Actions Could Limit Small Business Recovery Resources*, NATIONAL LAW JOURNAL (Aug. 20, 2020, 1:08 p.m.), available at <https://www.gibsondunn.com/wp-content/uploads/2020/08/Walker-Goldsmith-Seibald-Richman-Aggressive-SEC-Enforcement-Actions-Could-Limit-Small-Business-Recovery-Resources-NLJ-08-20-2020.pdf>.

⁷⁷ See Section I.B.2

⁷⁸ This estimate is based upon staff review of all filers who submitted a 10–K, 20–F, 40–F, or an amendment thereto within calendar year 2019. Unlisted reporting issuers are identified by unique CIKs as those without a class of securities registered pursuant to Section 12(b) of the Exchange Act. Because of limitations in available data, we were

⁸³ See *supra* Section I.B.1.

conversion. To the extent that this would lead to fewer instances of significant, unregistered but public distributions of the underlying securities, it would enhance investor protection.

However, we anticipate that the proposed amendment to Rule 144(d)(3)(ii) may also impose costs on some market participants including, but not limited to, an increase in the cost of financing and a decrease in total access to financing for unlisted issuers. The proposed post-conversion holding period would reduce the liquidity of these investments. As a consequence, investors are likely to demand additional compensation for providing capital through market-adjustable securities to these issuers. Academic literature links the issuance of convertibles with a floating conversion rate, such as market-adjustable securities, to smaller, potentially higher growth issuers with elevated likelihoods of bankruptcy and less diversified sources of potential revenue that are in need of immediate financing.⁸⁴ The same literature also suggests that such issuers have limited options to raise capital due to their characteristics and issue market-adjustable securities, as a “last resort” form of financing. To the extent that these issuers have limited options to raise capital, the proposed amendment may also trigger changes to the design of these contracts in order to provide additional compensation to investors for the increase in risk. For example, investors may demand a steeper upfront discount when investing in these securities.

The net effect of the proposed amendment on the affected issuers’ other existing shareholders is unclear.⁸⁵ The proposed amendment could affect existing shareholders of affected issuers if it changes the propensity of such issuers to issue unregistered market-adjustable securities or if it changes the terms of those securities. Conversion of these unregistered securities may dilute the holdings of existing shareholders, which may lead to a significant decline in the value of existing shareholders’ holdings. If the proposed amendment changes the propensity of issuers to issue unregistered market-adjustable securities, it could also affect the likelihood of such effects on existing shareholders.

Similarly, if as a result of the proposed amendment, potential buyers of unregistered market-adjustable securities demand a higher conversion

rate, the proposed amendment may increase the potential dilutive effects of conversion. If shareholders are unaware of the existence of these contracts and plan of distribution, such as for non-reporting issuers, or if shareholders are aware but not able to infer the consequences of these contracts, they may experience the negative effects of these unregistered distributions. Because of uncertainty surrounding how the proposed amendment would affect the issuance of unregistered market-adjustable securities across issuer types and the terms of such securities, the net effect of the proposed amendment on the affected issuers’ other existing shareholders is unclear. Below we request comment on the effects of the proposal on non-converting, existing shareholders.

4. Effects on Efficiency, Competition, and Capital Formation

As discussed above, the proposed amendment is likely to have an effect on capital formation. To the extent that the sales of underlying securities into the broader market following a conversion of market-adjustable securities constitute a distribution of securities, the proposed amendment is likely to reduce the number of instances in which existing shareholders and new investors would not have the disclosure and liability protections that registration provides. In addition, investors in the underlying securities may be more willing to increase their investments in the issuer because they are less concerned about potential dilution of their holdings and therefore capital formation may be improved.⁸⁶ However, if the costs to the issuers of these market-adjustable securities increase, issuers continuing to sell such securities may raise less capital. Other issuers may be required to seek other options for raising capital.

Because total effects on efficiency and competition would aggregate across issuers, industries, and markets that the proposed changes may impact differentially, we anticipate that the unique impact of the amendment to the holding period requirements would not be readily observable or reliably quantified. We invite commenters to submit data or studies that would facilitate estimating such effects.

5. Reasonable Alternatives

We could propose to amend the holding period for only a subset of unlisted issuers, either reporting or non-reporting. Such an alternative would

create an asymmetry within the subset of unlisted issuers with regard to the required holding period, and accordingly provide a disincentive for transactions in market-adjustable securities that in effect may result in an unregistered distribution of securities for only a subset of unlisted issuers. Under such alternative, it is possible that currently observed unregistered distributions would continue to take place in the subset of unlisted issuers that would not be affected by the proposed amendments.

We could, in addition to amending the start of the holding period, propose to increase the holding period for market-adjustable securities that are issued by reporting unlisted issuers from six months to one year to align with the holding period for such securities issued by non-reporting unlisted issuers. Such alternative would reduce the liquidity of these investments to the holder, and accordingly increase the issuers’ financing costs. To the extent that market-adjustable securities are issued by reporting unlisted issuers to replicate the distribution of securities, it is possible that increasing the holding period could provide disincentives for potentially abusive practices.

6. Request for Comment

30. What are the economic effects of the proposed amendments to Rule 144(d)(3)(ii)? To the extent possible, please provide any data, studies, or other evidence that would allow us to quantify or better qualitatively assess the costs and benefits of the proposed amendments to affected parties. In particular, have we assessed all of the costs and benefits to market participants who would be affected by the change in tacking provisions?

31. We seek information on the prevalence of market-adjustable securities issued by non-reporting unlisted issuers. Please provide any data, studies, or other evidence that would allow us to quantify this component of the industry baseline.

32. What is the impact of the proposed rule on efficiency, competition, and capital formation?

C. Proposed Amendments to Form 144, Form 4, and Regulation S-T

1. Broad Economic Considerations

Existing Commission rules require the filing in paper of Form 144 for securities of issuers not subject to Exchange Act reporting requirements, and allow for either paper or electronic filing of Form 144 for securities of issuers subject to

⁸⁴ See Hillion & Vermaelen, *supra* note 73; Dwyer *et al.*, *supra* note 73; Dong *et al.*, *supra* note 76.

⁸⁵ See *supra* note 66 and accompanying text.

⁸⁶ See *supra* at note 30; see also *supra* Section II.B.3.

Exchange Act reporting requirements.⁸⁷ By requiring the electronic filing of all Forms 144, the proposed amendments seek to lower the cost of access to Form 144 information and to enable investors, market participants and other EDGAR users to access that information more quickly.⁸⁸ The proposed amendments are expected to enable those filers that currently are permitted to file Form 144 either in paper or electronically to benefit from the technology and efficiency associated with electronic filing, thereby potentially lowering the cost and burden of existing compliance requirements. As discussed in more detail below, while some filers may incur an initial cost to transition to electronic filing, we expect that the proposed amendments to file Form 144 electronically on EDGAR would result in cost savings on an ongoing basis and over the long term. Because we are additionally proposing a six-month transition period, filers for whom the initial costs of transition might otherwise be highest might reduce their transition costs by availing themselves of the additional time to adopt requisite technological changes to their submissions processes.

Additionally, the proposed amendments would eliminate the filing requirement for affiliates of issuers not subject to Exchange Act reporting requirements, thus eliminating certain compliance costs for those affiliates.

Finally, we are proposing to allow Form 4 and Form 5 filers, at their discretion, to include a check box to indicate that a sale or purchase of

securities was made pursuant to Rule 10b5-1(c). Because this would be discretionary, we expect that filers will elect to do so when the anticipated benefits of doing so exceed the related costs and that this additional information may provide benefits to Form 144 data users.

The discussion below addresses the potential economic effects of the proposed amendments, including their likely costs and benefits as well as the likely effects of the proposed amendments on efficiency, competition, and capital formation, relative to the economic baseline, which comprises the filing practices in existence today.

2. Economic Baseline

Existing Commission rules permit Form 144 to be submitted either electronically via EDGAR or in paper form only for forms reporting proposed sales of reporting issuers. Regulation S-T does not provide for the electronic filing of Form 144 to report proposed sales of securities of issuers not subject to Exchange Act reporting requirements. Recently, in response to COVID-19 conditions, Commission staff announced a no-action position that temporarily affords Form 144 filers a third option to submit paper Form 144s via email.⁸⁹ In the period following this announcement, the Commission received approximately 13,400 Form 144 submissions: 52.9 percent in paper form, 46.5 percent electronically via email, and 0.6 percent electronically on EDGAR.⁹⁰ Thus, while when given the

option, many paper filers have elected to submit their forms electronically via email, very few filers have opted to file Form 144 electronically on EDGAR.

Figures 1 and 2 provide examples to illustrate the lag time between when Form 144 is received by the Commission and when that information becomes available in a commercial database. As seen in Figure 1, in one commercial database, pre-COVID-19, most Form 144 filings became available in commercial databases six days after being received by the Commission. We further observe that in 2020, while the six-day lag time for availability of the majority of the filings remains true for the year on aggregate, after the additional ability to file via email was introduced, the majority of Form 144 filings have been processed and posted in that commercial database in fewer than five days (Figure 2). Overall, the number of records available via that commercial database is considerably lower in 2020 than in 2019, which may reflect increased difficulty and delays in integrating the paper form submissions into such databases under COVID-19 conditions. Thus, while access to data from paper submissions has been significantly reduced by the pandemic, we observe in Figure 2 that for transactions disclosed via a Form 144 submitted electronically via email or EDGAR, data vendors and those who access Form 144 filing data from such sources now appear to receive that information with a shorter delay.

BILLING CODE 8011-01-P

received during this same window of time in the four preceding years was approximately 11,800 Form 144s.

⁸⁷ See *supra* Section I.C.1.

⁸⁸ See *id.*; see also 1972 Adopting Release, *supra* note 7, at 595.

⁸⁹ See *supra* note 34.

⁹⁰ Staff analysis is based on all Form 144 filings received by the Commission between April 13 and August 31, 2020. The average number of filings

Figure 1.⁹¹

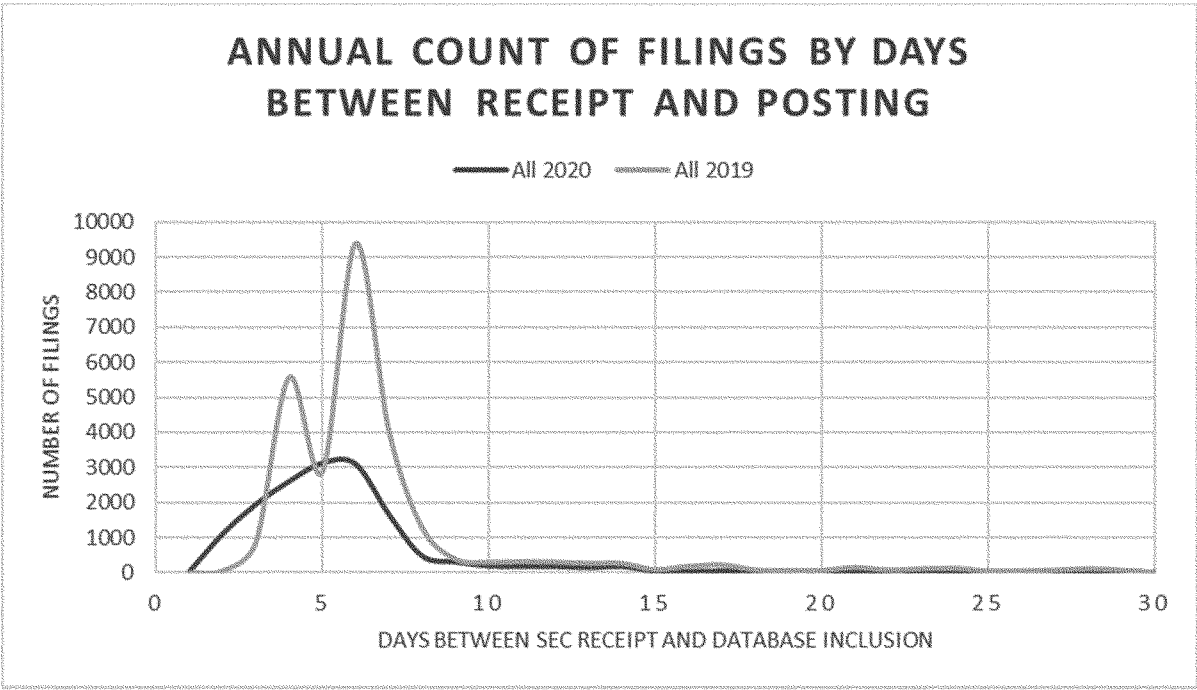
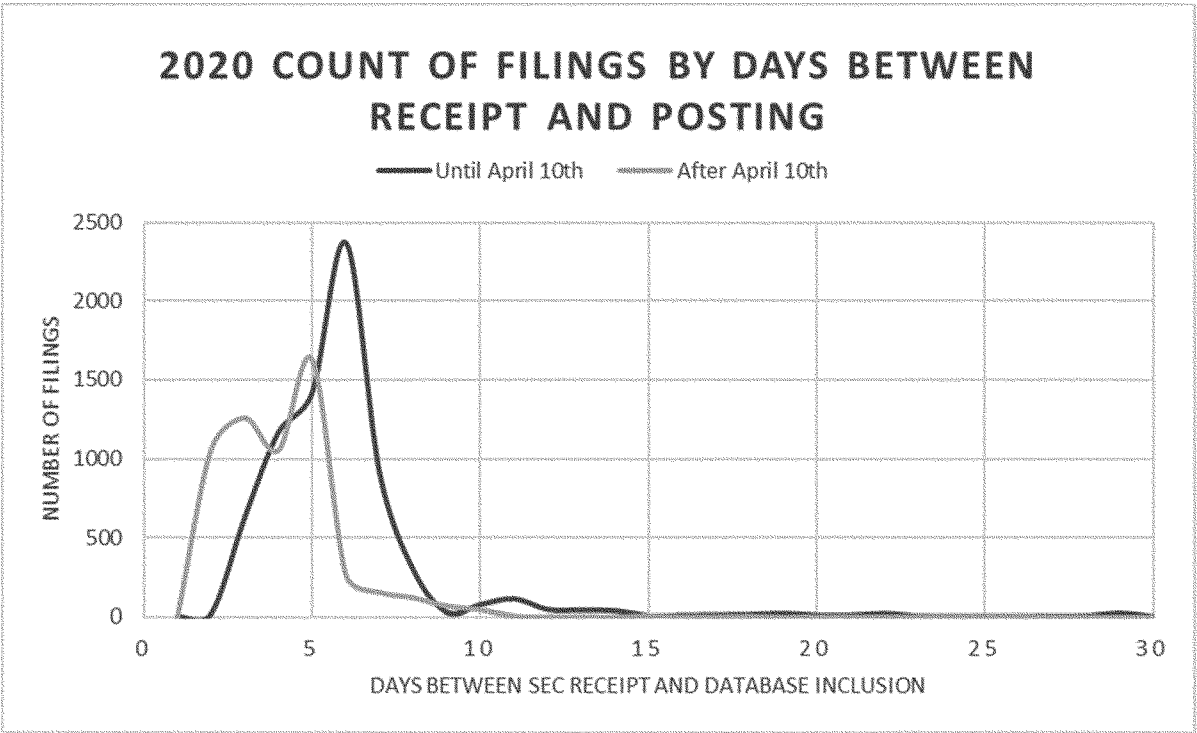


Figure 2.⁹²



a. Affected Parties^{91 92}

The main parties that would be affected by the proposed amendments are current and future filers of Form 144, specifically affiliates of an issuer subject to Exchange Act reporting requirements.⁹³ It is our understanding that the majority of affected filers currently prepare and file these forms individually or with the assistance of a broker or personal counsel.⁹⁴ Filings of Forms 144 from holders of securities of an issuer not subject to Exchange Act reporting requirements currently make up approximately one percent of all Form 144 filings.⁹⁵ As the majority of Form 144 filings are paper filings, most filers would have to modify their processes for submitting their Form 144 filings if the Commission adopts the proposed amendments. Based on past filings, we estimate that approximately 12,250 filers would be required to switch from paper filings to electronic filings and 313 filers would no longer be subject to filing Form 144.⁹⁶

Additionally, the proposed change to electronic filing may affect the manner by which members of the public obtain these filings. Currently, the public can access these filings using EDGAR on the Commission's website or, for paper filings (under normal operating conditions), by visiting the Commission's public reference room in person, or, for either format, by subscribing to a third-party information vendor (such as private information aggregators that distribute the information obtained from EDGAR or the Commission's public reference room and records).⁹⁷ While the proposed amendments would not change the general public's ultimate access to the Form 144 information from affiliates selling securities of an issuer subject to Exchange Act reporting requirements, the public would no longer have access

to similar information from the relatively small subpopulation of affiliates filing Form 144 to report sales (or potential sales) of securities of issuers not subject to Exchange Act reporting requirements.

b. EDGAR

From 2016 to 2019, an average of 30,000 Form 144 filings were made each year, of which an average of approximately 250 were submitted electronically via EDGAR. As EDGAR submissions thus constitute less than one percent of all Form 144 submissions per year, the proposed amendments could be anticipated to significantly increase the volume of Form 144 filings made electronically on EDGAR.⁹⁸

3. Benefits and Costs of Proposed Amendments to Form 144, Form 4, and Regulation S–T

The proposed amendments would change some of the Commission's current practices related to making Form 144 information available to the public. First, holders of securities of an issuer subject to Exchange Act reporting requirements would be required to file Form 144 electronically. In contrast, holders of securities of an issuer not subject to Exchange Act reporting requirements would no longer be required to file Form 144. Second, the deadline for filing a Form 144 would be revised to coincide with the filing deadline of Form 4, which reports changes in beneficial ownership (purchases and sales of securities and derivatives and exercise of options) 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. As Form 4 is required to be submitted within two business days of a change in beneficial ownership, this could result in a delay of the reporting of an affiliate's sale of restricted or control securities on Form 144 by two business days.

This proposed change in the Form 144 filing deadline could result in the information on Form 144 sales being made available later than under the current rule. However, because

currently most Form 144 filings are made in paper form and thus as a practical matter are generally accessible to most of the public only after a delay of a number of days (e.g., after being uploaded into electronic databases for purchase as in Figure 1), it is likely that any delay due to changing the deadline of Form 144 to align with Form 4 submissions would be offset by the proposed change to require electronic filing. Under the proposal, the public would be able to access the filing electronically via EDGAR upon submission rather than needing to wait for electronic access via a commercial database.⁹⁹

After initial transition costs, the proposed amendments are expected to benefit all Form 144 filers. Filers are expected to realize direct benefits in the form of reduced time required to file forms electronically, compared to a paper filing, and avoided copying and mailing expenses. Filers who make multiple submissions of Form 144 per year or longer submissions likely would benefit most. Electronic filing using EDGAR and the revised filing deadline are expected to make the filing process more efficient by making it easier and less costly for filers to assure timely receipt of the filing (e.g., filers would have no reason to pay for premium services such as delivery confirmation).¹⁰⁰ We anticipate that the proposed amendments will also provide benefits to users of the Form 144 disclosures by significantly reducing both time and costs currently associated with obtaining the data contained in paper form submissions.¹⁰¹

The proposal would also modify the data format in which Form 144 would be electronically submitted. Form 144 would be available on EDGAR as a fillable document, similar to other fillable forms that filers can use such as Forms D, 3, 4, and 5.¹⁰² An online fillable form would enable the convenient input of information and support the electronic assembly of such

⁹¹ Based on Form 144 filings accessed via Thomson Reuters Insiders Data with the field "SEC Receipt" dated between January 1, 2019 and August 31, 2020.

⁹² Based on Form 144 filings accessed via Thomson Reuters Insiders Data with the field "SEC Receipt" dated between January 1, 2020 and August 31, 2020.

⁹³ See *supra* Section I.C.1.

⁹⁴ See letter from Jesse Brill (dated Dec. 18, 2013), available at <https://www.sec.gov/rules/petitions/2013/petn4-671.pdf>.

⁹⁵ See *supra* Section I.C.2.b.

⁹⁶ These estimates assume that filers of Form 144 submissions in our data are not also affiliates of other issuers. Because we lack data on the holdings of filers in securities of issuers other than those disclosed in the Form 144, we are unable to identify any filers that are such affiliates.

⁹⁷ Paper filings submitted via email based on the staff's no-action position are available at <https://www.sec.gov/corpfin/form-144-email>. See *supra* note 34.

⁹⁸ A rate of change based on the current one percent EDGAR submission rate may slightly overestimate the changes in volume to the extent that the proposed removal of a filing requirement for securities not subject to Exchange Act reporting requirements may simultaneously decrease total submissions. Further, based on the observed EDGAR filing behavior of affiliates who use an issuer's existing access to EDGAR, the number of new Form IDs required to be processed could be reduced, but would not otherwise affect the increase in submission volume.

⁹⁹ Data users who continue to choose to access these filings via a commercial database rather than accessing EDGAR might also be able to access them more quickly than at present, depending on the interplay of the two-business-day-delay and the change from paper to electronic filing. We note that, as seen in Figure 2, electronic databases appear to incorporate email filings more quickly than paper submissions, which may indicate that electronic filings would also be processed more quickly.

¹⁰⁰ The proposed amendments also benefit filers by avoiding uncertainty about how to comply with paper filing obligations in events similar to the current COVID-19 pandemic.

¹⁰¹ We estimate, for example, that annual subscription costs for access to Form 144 data from a third party vendor would approach \$2,600 per person.

¹⁰² See *supra* Section I.C.2.c.

information and transmission to EDGAR, without requiring a Form 144 filer to purchase or maintain additional software or technology, thus minimizing the compliance costs. This modification of the data format of Form 144 would also benefit data users by standardizing the inputted data into a structured, machine-readable custom XML format and thus making it easier to extract and process that data.

The fillable form would be similar to other fillable forms that are currently available to file Forms D, 3, 4, and 5.

We expect that filers who use EDGAR for purposes of complying with filing obligations under existing rules would not incur additional EDGAR access costs due to the proposed rules. If filers with EDGAR experience require time or specialized training to switch Form 144 from paper to EDGAR, then they may incur an additional initial transition cost. Given the experience of such filers with EDGAR filing, as well as the six-month transition period proposed, we expect such cost would be minimal.

The proposed amendments also would result in the direct costs of transitioning to filing electronically using EDGAR for the large subset of filers who do not currently file electronically on EDGAR. Currently, 52.9 percent of filers file paper forms and 46.5 percent file via email.¹⁰³ In particular, such filers would need to prepare a Form ID as required by Rule 10(b) of Regulation S-T and submit the Form ID following the processes detailed in Volume I of the EDGAR Filer Manual.¹⁰⁴ Once a Form ID has been successfully completed and processed, EDGAR establishes a Central Index Key ("CIK") number, which permits each authorized user to create an EDGAR access code, enabling the filer to use EDGAR. We estimate that approximately 25 percent of Form 144 filers have already prepared a Form ID and obtained a CIK number through other EDGAR filing obligations.¹⁰⁵ Therefore, we estimate that at most 75 percent of Form 144 filers would need to file a

Form ID as a result of the proposed amendments.¹⁰⁶ For purposes of the PRA, we estimate that respondents require 0.15 hours to complete the Form ID and that 100 percent of the burden of preparation for Form ID is carried by the respondent. For purposes of the Paperwork Reduction Act of 1995 ("PRA")¹⁰⁷ discussed below, we estimate that the proposed amendments would result in an incremental increase of at 1,378 annual burden hours for Form ID.¹⁰⁸ We believe that such direct costs would be justified by the anticipated benefits from eliminating paper filing of Form 144.

The remaining costs of transitioning to EDGAR, which would apply to all Form 144 filers that do not currently file using EDGAR, would be mitigated by the ease of filing Form 144. The revised Form 144 would be an online fillable form with a similar user interface to Form 4, and for simultaneous filings of Forms 4 and 144, the same user interface could be used to file both forms.¹⁰⁹ Because current EDGAR filers represent such a small proportion of those who submit Form 144, our ability to generalize electronic filing behavior from this group to the full population of filers may be of limited reliability.¹¹⁰ However to the extent that behavior may be similar, we estimate that up to one-third of affiliates submitting a Form 144 who do not currently access EDGAR may be able use an issuer's existing connection to EDGAR or rely upon other support by issuers in meeting their Form 144 electronic filing obligations. These filers likely will incur lower costs as a result of the proposed amendments than filers who cannot or will not use an issuer's existing connection to EDGAR. We lack the data to quantify the difference in costs.

In addition, we estimate 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 Exchange Act reporting requirements would result in a one

percent reduction of current filings of Form 144.¹¹¹

For Form 144 filers, we do not expect that the proposed custom XML format would impose any incremental costs, because filers would be able to enter their disclosures directly into the online fillable form. We expect that completing this XML-based fillable form would not require any more time than any other fillable form and would generally require the same time as completing the paper form. Some filers may choose to file directly in custom XML format (pursuant to the Commission's custom XML schema) integrated into their software because it enables greater automation of reporting. Other filers without XML experience or software could simply use the online fillable form and would not be required to license any XML-based filing preparation software or establish any XML-based filing processes.

The proposed amendments could reduce revenue for market information aggregators who currently aggregate the information from Form 144 filings into databases and provide access to such databases to various users of this data for a fee.¹¹² The online filing of Form 144 may make it more cost-effective for some data users to extract the data themselves. The reduction in revenue could be mitigated by the lower cost of retrieving information from Form 144 filings that is filed in an electronic format. Data aggregators could sell fewer subscriptions to make the same profit or lower the fee that they charge which might make their services continue to be attractive even with the electronic availability of the filings.

We recognize that the potential costs and benefits of electronic filing are sensitive to various assumptions, including the number of affected filers; the effect of electronic filing using EDGAR on the time burden of filing Form 144; printing and mailing costs incurred today; and the type and cost of staff, if any, involved in the electronic filing of Form 144. The cost savings realized by individual filers may vary across all filers depending on variables such as filer size, number of filings submitted, existing filing practices (e.g., current reliance on electronic document preparation; current experience with using EDGAR; use of in-house staff, brokers, or outside counsel for the filing of Form 144; number, types, and cost of in-house staff involved in the paper

¹⁰³ This estimate does not account for filers who previously filed via EDGAR but who currently submit via email pursuant to the staff no-action position, and may therefore include filers who would not incur new costs. Based on staff review of Form 144 submissions in 2020 by filers with filings both before and after April 10th, approximately 50 percent of filers who previously used EDGAR opted to submit their Form 144s via email after April 10, 2020.

¹⁰⁴ See 17 CFR 232.10(b); see also *supra* Section I.C.2.a.

¹⁰⁵ Specifically, we observe that approximately 23 percent of calendar year 2019 Form 144 filers also submitted Form 4 filings in EDGAR, while a remaining two percent without Form 4 filings in EDGAR submitted a miscellany of other forms related to beneficial ownership.

¹⁰⁶ This estimate represents an extreme upper bound because it assumes that each named individual who filed at least one Form 144 in calendar year 2019 who is not currently associated with a unique CIK would need to file a Form ID. To the extent that some Form 144 filers are affiliates of issuers who may use the issuer's CIK to file via EDGAR, the estimate likely overstates the required number of new Form IDs required and the burden hours associated with such applications.

¹⁰⁷ 44 U.S.C. 3501 *et seq.*

¹⁰⁸ See *infra* Section III.C.2.

¹⁰⁹ See *supra* Section I.C.2.c. Based on filings in calendar year 2019, we estimate that approximately 23 percent of Form 144 filers are also Form 4 filers.

¹¹⁰ See *supra* Section II.B.2.

¹¹¹ This estimate is based upon the average number of Form 144s submitted pertaining to such securities as a proportion of total Form 144 submissions in each of the four prior calendar years (2016–2019).

¹¹² See *supra* Section II.C.2.a.

filing of Form 144; actual hours and printing and mailing costs required for paper filing today), and the amount of time required for filers to be trained in the use of EDGAR and any required related processes, and the amount of time to resolve any technical issues related to electronic filing on EDGAR.

4. Efficiency, Competition, and Capital Formation

The proposed amendments are expected to increase the efficiency and decrease the costs of filing Form 144 and retrieving information from Form 144 filings. Electronic filing and the revised filing deadline in the proposed amendments are expected to make the filing process more efficient by making it easier and less costly for filers to assure timely receipt of the filing. Likewise, for investors currently using information from paper filings, the costs of accessing these filings are expected to be significantly reduced. In addition, replacing paper filing with electronic filing is expected to result in filer savings of labor, printing, and mailing costs.

The proposed amendments should facilitate the efficient and rapid incorporation of price-relevant information in Form 144 filings into the market and enhance the sum of information available to investors. To the extent that there is value-relevant information in Form 144 filings, prices may become more efficient, which should help to facilitate capital formation (e.g., by enhancing valuation quality).

However, the proposal may reduce some investors' or market information aggregators' competitive advantages. Particularly, market information aggregators whose present role includes converting paper filings of Form 144 to an electronic information source may find that this service is less attractive to data users due to those users' ability to access these filings directly due to the proposed rule changes. These information aggregators' loss of competitive advantage in converting paper filings of Form 144 to an electronic information source may reduce their revenue and thus may affect their ability to offer other ancillary services that are valuable to data users.

Aligning the reporting timeline of Form 144 with that of Form 4 could cause up to a two-day delay in reporting, and thereby potentially delay the incorporation of information into markets. However, at the same time, the proposed electronic filing mandate could accelerate the incorporation of that information into the markets

compared with the current system. We do not have adequate data with which to estimate the net effect of these two proposed changes. Since data users currently observe this delay with respect to filings of Forms 144 and 4 that are both publicly available immediately upon submission, such as via EDGAR, we have limited data with which to form an expected value of having Form 144 information in advance of a Form 4 filing, and consequently what related costs might be incurred by synchronizing submissions. We are therefore requesting comments and the submission of data or other information that would inform our estimates.

We do not expect marked effects on either competition or capital formation as a result of allowing Forms 4 and 5 filers to check a box to indicate that a sale or purchase of securities was made pursuant to Rule 10b5-1(c). As discussed above, due to the discretionary nature of the checkbox inclusion, we expect filers to do so only when they perceive it will increase efficiency. As a result, there may be modest increases to efficiency for both such filers and data users who access their submissions.

5. Reasonable Alternatives

Eliminating the Form 144 Filing Requirement

One alternative that we could have proposed is the elimination of the current Form 144 filing requirement for sales of securities by affiliates of issuers that are subject to Exchange Act reporting. Such an alternative would eliminate compliance costs for such affiliates. However, such an alternative would also prevent investors and various other data users from obtaining any information on such sales of securities. We are soliciting comment on the continued utility of Form 144 filings.

Email Submissions

Given the significant number of submissions via email in response to the temporary staff no-action position, we could have proposed making this manner of filing a permanent option for Form 144 filers. Such an alternative would allow filers to avoid the direct costs of transitioning to filing electronically using EDGAR. Such an alternative, however, would result in issuers incurring expenses in scanning the forms and emailing them to the Commission. Additionally, issuers would forgo potential direct benefits in the form of reduced time required to file forms electronically. Such costs could

be higher for filers who make multiple submissions of Form 144 per year and for Form 144 filings with multiple pages.

Data users might also incur higher costs under this alternative since the site used to access Form 144 email submissions is distinct from EDGAR.¹¹³ Specifically, under this alternative, a data user interested in obtaining the information from all Form 144 filings pertaining to a given issuer would be required to search both EDGAR and the daily folders posted to the Form 144 website. Furthermore, Form 144 data submitted via email submissions is not structured, therefore analysis that would require aggregating data from multiple submissions would be more difficult or most costly to perform.

Format Requirements

While the proposed rule does not expressly prescribe a specific format for Form 144 that would be required for filing in EDGAR, Form 144 would be made available as an online fillable form, similar to other fillable forms such as Forms D, 3, 4, and 5.¹¹⁴ As an alternative, we could require Form 144 to be filed in the Inline eXtensible Business Reporting Language ("Inline XBRL") format, a derivation of XML that is designed for financial reporting and is both machine-readable and human-readable. Compared to the proposal, the Inline XBRL alternative for Form 144 would provide more sophisticated validation, presentation, and reference features for filers and data users. However, the Inline XBRL alternative would also impose initial implementation costs (e.g., learning how to prepare filings in Inline XBRL, licensing Inline XBRL filing preparation software) upon filers that do not have prior experience structuring data in the Inline XBRL format. By contrast, because the proposal would allow filers to submit Form 144 using an online fillable Form, filers that lack experience structuring data in a custom XML format would not incur implementation costs.

D. Request for Comment

33. What are the economic effects of the proposed amendments to Form 144, Form 4, and Regulation S-T? To the extent possible, please provide any data, studies, or other evidence that would allow us to better quantify or otherwise qualitatively assess the costs and benefits of the proposed amendments to affected parties.

¹¹³ See *supra* note 97.

¹¹⁴ See *supra* Section I.B.2.c.

34. We expect that the proposed amendments may benefit Form 144 data users by facilitating easier access to Form 144 data, potentially reducing the incentive to purchase such data from third-party data providers. At the same time, the proposed changes may affect the timing of the availability of such information. What are the economic effects of the proposed timing and format changes to Form 144? To the extent possible, please provide any data, studies, or other evidence that would allow us to better quantify or otherwise qualitatively assess the impact of these proposed changes, including the benefits and costs.

35. We seek comment on the ways that Form 144 information is used by affected parties. In particular, what data uses of Form 144 data do not coincide with information available via Form 4? Are there currently any uses of Form 144 data in advance of Form 4 filings, and if so, would there be any costs incurred by losing such information in advance?

36. Are there other methods or databases by which Form 144 data users currently access such information? If so, please provide information about those methods, including how many Form 144 filings may be accessed via those methods and how soon they are made available after they are filed with the SEC. To what extent might the availability and use of these alternative databases affect our analysis of the anticipated benefits and costs to our proposed amendments? Please provide data, studies, or other evidence.

37. Should we adopt any of the alternative approaches outlined above instead of the proposed amendments, including requiring the use of XBRL for electronic submissions of Form 144? We considered requiring the use of XBRL as a possible alternative approach but have not proposed it for the reasons stated above. In addition or instead of XBRL, should the form provide for use of a format based on a new derivation of XML or another machine readable format that the Commission may determine is appropriate in the future? If so, what would be the attendant costs and benefits of such flexibility?

38. Are there any other potential alternative approaches we should consider and what are their economic effects?

39. Because we are proposing to allow Form 4 and Form 5 filers, at their discretion, to check a box to indicate that a sale or purchase of securities was made pursuant to Rule 10b5-1(c) we expect that filers will only elect to do so when their anticipated benefits of doing so exceed their related costs. Are

there other anticipated benefits, costs, or economic effects related to this proposal that we should consider?

III. Paperwork Reduction Act

A. Summary of the Collections of Information

Certain provisions of our rules and forms that would be affected by the proposed amendments contain “collection of information” requirements within the meaning of the PRA.¹¹⁵ We are submitting the proposal to the Office of Management and Budget (“OMB”) for review in accordance with the PRA.¹¹⁶ An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information requirement unless it displays a currently valid OMB control number. Compliance with the information collections is mandatory. Responses to the information collections are not kept confidential and there is no mandatory retention period for the information disclosed. The titles for the collections of information are:

- Form ID (OMB Control Number 3235–0328);
- Form 144 (OMB Control Number 3235–0101);
- Form 4 (OMB Control Number 3235–0287);
- Form 5 (OMB Control Number 3235–0362)¹¹⁷

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. Form 144 is used by security holders to disclose the proposed sale of securities by the holder and to indicate that the holder is not to be engaged in the distribution of the securities and therefore not an underwriter. Form 4 is used by an issuer’s insiders to report the insider’s changes in beneficial ownership of the issuer’s equity securities. A description of the proposed amendments, including the need for the information and its proposed use, as well as a description of the likely respondents, can be found in Section I

¹¹⁵ See *supra* note 107.

¹¹⁶ See 44 U.S.C. 3507(d); see also 5 CFR 1320.11.

¹¹⁷ We do 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. Therefore, we are not adjusting any burden or cost estimates in connection with the check box for the proposed amendments.

above, and a discussion of the economic effects of the proposed amendments can be found in Section II above.

As described in more detail above,¹¹⁸ we are proposing to amend Rule 144 to provide that the holding period for securities acquired upon the conversion or exchange of certain, specific securities that are market adjustable and issued by unlisted issuers would not begin until the time of conversion or exchange.¹¹⁹ Also, as described above,¹²⁰ we are proposing to mandate electronic filing of Form 144 with respect to securities issued by companies subject to Exchange Act reporting requirements, eliminate the requirement to file a Form 144 for resales of securities of issuers that are not subject to Exchange Act reporting, amend the filing deadline for Form 144 to coincide with the filing deadline for Form 4,¹²¹ and amend Form 4 to include a check box that would provide the filer with the option to indicate if securities were sold or purchased pursuant to a plan intended to satisfy the affirmative defense conditions of Exchange Act Rule 10b5-1(c).

B. Summary of the Proposed Amendments’ Effects on the Collections of Information

We anticipate 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. As discussed above, we estimate that approximately 12,250 filers would be required to switch from paper filings of their Form 144 to electronic filings of

¹¹⁸ See *supra* Section I.B.

¹¹⁹ Although the proposed amendments to the holding period are expected to reduce the number of market-adjustable securities transactions, we do 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 these securities generally do not meet the definition of affiliate in our regulations and therefore are not required to file Form 144.

¹²⁰ See *supra* Section I.C.

¹²¹ We do 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. The information in the form that must be filed would not change as a result of this amendment, so changing the filing deadline would not substantively modify existing collection of information requirements or otherwise affect the overall burden estimates associated with Form 144. Therefore, we are not adjusting any burden or cost estimates in connection with the deadline change for the proposed amendments.

that form.¹²² Of those 12,250 filers, however, we estimate that 25 percent have already filed a Form ID through other EDGAR filing obligations,¹²³ so only approximately 75 percent of Form 144 filers would need to file a Form ID.¹²⁴ As a result, we estimate 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 144.¹²⁵ We estimate that respondents require 0.15 hours to complete the Form ID and, for purposes of the PRA, that 100 percent of the burden of preparation for Form ID

is carried by the respondent internally. Therefore, we estimate that this proposed amendment would result in an incremental increase of 1,378 annual burden hours for Form ID.¹²⁶

We expect 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 the form. As discussed above, we estimate that 313 filers would no longer be subject to

filing Form 144.¹²⁷ We estimate that each notice on Form 144 imposes a burden for PRA purposes of one hour and, for purposes of the PRA, that 100 percent of the burden of preparation for Form 144 is carried by the respondent internally. Therefore, we estimate that this proposed amendment would result in an incremental decrease of 313 annual burden hours for Form 144.

PRA Table 1 summarizes the estimated effects of the amendments on the paperwork burdens associated with the affected collections of information listed in Section III.A.

PRA TABLE 1—ESTIMATED PAPERWORK BURDEN EFFECTS OF THE AMENDMENTS

Proposed amendments and effects	Proposed affected collections of information	Estimated net effect
Form ID: <ul style="list-style-type: none"> 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. 	<ul style="list-style-type: none"> Form ID 	<ul style="list-style-type: none"> Increase of 0.15 hour compliance burden per response to the new collection of information.
Form 144: <ul style="list-style-type: none"> Eliminate the requirement to file a Form 144 for resales of securities of issuers that are not subject to Exchange Act reporting. 	<ul style="list-style-type: none"> Form 144 	<ul style="list-style-type: none"> Decrease of 1.0 hour compliance burden per response to the new collection of information.

C. Incremental and Aggregate Burden and Cost Estimates

Below we estimate the incremental and aggregate changes in paperwork burden as a result of the amendments. These estimates represent the average burden for all issuers, both large and small. In deriving our estimates, we recognize that the burdens will likely vary among individual issuers based on

a number of factors, including the nature of their business. We believe that the amendments will change the frequency of responses to the existing collections of information and the burden per response.

PRA Table 2 below illustrates the incremental change to the total annual compliance burden of affected forms, in hours and in costs, as a result of the

amendments' estimated effect on the paperwork burden per response. The number of estimated affected responses shown in PRA Table 2 is based on the number of responses in the Commission's current OMB PRA filing inventory adjusted to reflect the change in the number of responses we estimate as a result of the proposed amendments.¹²⁸

PRA 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	Current burden hours	Current cost burden	Proposed change in annual responses	Proposed change in burden hours	Proposed change in professional costs	Proposed annual affected responses	Proposed Burden Hours for Affected Responses	Proposed Cost Burden for Affected Responses
	(A)	(B)	(C)	(D)	(E)	(F)	(G) = (A) + (D)	(H) = (B) + (E)	(I) = (C) + (F)
Form ID	46,842	7,026	\$0	9,188	1,378	\$0	56,030	8,404	\$0
Form 144	33,725	33,725	0	(313)	(313)	0	33,412	33,412	0

D. Request for Comment

We request comments in order to evaluate: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including

whether the information would have practical utility; (2) the accuracy of our estimate of the burden of the proposed collection of information; (3) whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (4) whether there are

ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques

¹²² See *supra* note 96.

¹²³ See *supra* note 105.

¹²⁴ See *supra* note 106.

¹²⁵ $22,250 \times 0.75 = 9,187.5$.

¹²⁶ $9,188 \times 0.15 = 1,378.2$, which is rounded to 1,378.

¹²⁷ See *supra* note 96.

¹²⁸ The OMB PRA filing inventory represents a three-year average.

or other forms of information technology.¹²⁹

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing the burdens. Persons who desire to submit comments on the collection of information requirements should direct their comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and send a copy of the comments to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549, with reference to File No. S7–24–20. Requests for materials submitted to the OMB by us with regard to these collections of information should be in writing, refer to File No. S7–24–20 and be submitted to the Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington DC 20549. Because the OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, a comment to the OMB is best assured of having its full effect if the OMB receives it within 30 days of publication.

IV. Initial Regulatory Flexibility Act Analysis

This Initial Regulatory Flexibility Analysis (“IRFA”) has been prepared in accordance with the Regulatory Flexibility Act (“RFA”).¹³⁰ It relates to proposed amendments that would: (1) Amend Rule 144(d)(3)(ii) to provide that the holding period for securities acquired upon the conversion or exchange of certain, specific securities that are market adjustable and issued by unlisted issuers would not begin until the time of conversion or exchange; (2) mandate electronic filing of Form 144 with respect to securities issued by companies subject to Exchange Act reporting requirements; (3) eliminate the requirement to file a Form 144 for resales of securities of issuers that are not subject to Exchange Act reporting; (4) amend the filing deadline for Form 144 to coincide with the filing deadline for Form 4; and (5) amend Forms 4 and 5 to include a check box that would provide the filer with the option to indicate if a transaction intended to satisfy the affirmative defense conditions of Exchange Act Rule 10b5–1(c). In addition, if we adopt the

proposed amendments, we plan to simplify and streamline the electronic filing of Form 144 and Form 4.

A. Reasons for, and Objectives of, the Proposed Action

One purpose of the proposed amendments is to mitigate the risk of unregistered distributions in connection with sales of market-adjustable securities. The proposed amendments are also intended to facilitate more efficient transmission, dissemination, and analysis, of certain forms, and to reduce the costs of storing and retrieving documents that are currently filed in paper.

B. Legal Basis

We are proposing the amendments under the authority set forth in Sections 4, 6, 7, 8, 10, 19(a) and 28 of the Securities Act, and Sections 3, 16, and 23(a) of the Exchange Act.

C. Small Entities Subject to the Proposed Rules

The proposed amendments would affect small entities that issue securities as well as those that hold securities. The RFA defines “small entity” to mean “small business,” “small organization,” or “small governmental jurisdiction.”¹³¹ For purposes of the RFA, under our rules, a registrant, other than an investment company, is a “small business” or “small organization” if it had total assets of \$5 million or less on the last day of its most recent fiscal year and is engaged or proposing to engage in an offering of securities that does not exceed \$5 million.¹³² An investment company, including a business development company,¹³³ is considered to be a “small business” if it, together with other investment companies in the same group of related investment companies, has net assets of \$50 million or less as of the end of its most recent fiscal year.¹³⁴ We estimate that there are 1,056 issuers that file with the Commission, other than investment companies, which may be considered small entities and are potentially subject to the final amendments.¹³⁵ In addition, we

estimate that there are 37 investment companies that would be subject to the proposed amendments that may be considered small entities.¹³⁶

D. Proposed Reporting, Recordkeeping, and Other Compliance Requirements

As noted above, the proposed amendment to Rule 144(d)(3)(ii) would provide that the holding period for securities acquired upon the conversion or exchange of certain, specific securities that are market adjustable and issued by unlisted issuers would not begin until the time of conversion or exchange. We expect the proposed amendment to reduce the number of market-adjustable securities transactions. As noted in Section III, we do not anticipate that the proposed amendments would affect the reporting or compliance burdens associated with Form 144, including those for small entities, because the requirement to file the form only applies to affiliates of the issuer and the investors in these securities generally do not meet the definition of affiliate in our regulations. Affected parties may decide to adjust their recordkeeping methods if needed to account for the change in the start date for the holding period.

Additionally, the proposed amendments would mandate electronic filing of Form 144 with respect to securities issued by companies subject to Exchange Act reporting requirements. We anticipate that this proposed amendment would cause a number of filers, including small entities, using EDGAR to file their Form 144 electronically who do not currently do so, thereby modestly increasing their compliance obligations.

Further, the proposed amendments would 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. As a result, some filers, including small entities would no longer be required to file Form 144, which would reduce their compliance obligations.

The proposed amendments to revise the filing deadline for Form 144 and to include an optional check box in Forms 4 and 5 would not change the reporting, recordkeeping, or compliance requirements or otherwise affect the overall compliance burden for small entities.

Compliance with the proposed amendments may require the use of

¹³¹ 5 U.S.C. 601(6).

¹³² See 17 CFR 240.0–10(a).

¹³³ Business development companies are a category of closed-end investment company that are not registered under the Investment Company Act [15 U.S.C. 80a–2(a)(48) and 80a–53–64].

¹³⁴ 17 CFR 270.0–10(a).

¹³⁵ This estimate is based on staff analysis of issuers, excluding co-registrants, with EDGAR filings of Form 10–K, 20–F and 40–F, or amendments filed during the calendar year of January 1, 2019 to December 31, 2019. This analysis is based on data from XBRL filings, Compustat, and Ives Group Audit Analytics.

¹³⁶ This estimate is based on staff review of Forms N–CEN filed with the Commission as of November 5, 2020 and is based on the definition of small entity under Investment Company Act Rule 0–10. See 17 CFR 240.0–10.

¹²⁹ We request comment pursuant to 44 U.S.C. 3506(c)(2)(B).

¹³⁰ 5 U.S.C. 601 *et seq.*

professional skills, including legal skills.

Section I discusses the proposed amendments in detail. Sections II and III discuss the economic impact, including the estimated costs and benefits, of the proposed amendments to all affected entities.

E. Duplicative, Overlapping, or Conflicting Federal Rules

The proposed amendments would not duplicate, overlap, or conflict with other Federal rules.

F. Significant Alternatives

The RFA directs us to consider alternatives that would accomplish our stated objectives, while minimizing any significant adverse impact on small entities. In connection with the proposed amendments, we considered the following alternatives:

- Establishing different compliance or reporting requirements or timetables that take into account the resources available to small entities;
- Clarifying, consolidating or simplifying compliance and reporting requirements under the rules for small entities;
- Using performance rather than design standards; and
- Exempting small entities from all or part of the requirements.

We are proposing to amend Rule 144(d)(3)(ii) to provide that the holding period for the securities acquired upon conversion or exchange of certain market-adjustable securities issued by unlisted issuers would not begin until conversion or exchange. We recognize that the proposal could disproportionately affect small issuers because it is those entities that typically issue market-adjustable securities¹³⁷ but we believe this proposal would benefit issuers and investors by mitigating the risk of unregistered distributions in connection with sales of market-adjustable securities. The features of certain market-adjustable securities, combined with the tacking provisions of Rule 144, can undermine one of the key premises of Rule 144, 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 and, therefore, is not an underwriter. We could propose to exempt the securities of small entities from the proposed amendment or establish a different holding period for their securities, but doing so would not address the risk that holders may participate in unregistered distributions

of the market-adjustable securities of these issuers.

The proposed amendments to mandate the electronic filing of Form 144 clarify and streamline the filing requirements for the form and should benefit all filers, as well as benefit users of the information in Form 144 by facilitating easier access to, and faster retrieval of such information. We do not believe that it is necessary to partially or completely exempt small entities from the proposed amendments to require the electronic filing of Form 144 because the amendments are expected to result in cost benefits on an ongoing basis compared to paper filing, and increased efficiencies for all filers who would be required to file Form 144, including small entities that are filers. We preliminarily believe that it is not necessary to establish different compliance timetables for small entities or to further clarify, consolidate, or simplify the proposed amendments' requirements. But we are proposing a six-month transition period after the effective date of the amendments to Regulation S-T to give Form 144 paper filers who would be first-time electronic filers, including any small entities, sufficient time to apply for codes to make filings on EDGAR. In addition, we solicit comment on whether we should provide a different timetable for paper Form 144 filers to transition to electronic filing.

We have used design rather than performance standards in connection with the proposed filing revisions to Form 144 in order to promote uniform filing requirements and also to facilitate a simpler and less costly filing method for Form 144 filers.

G. Request for Comment

We encourage the submission of comments with respect to any aspect of this Initial Regulatory Flexibility Analysis. In particular, we request comments regarding:

- The number of small entity issuers that may be affected by the proposed amendments;
- The existence or nature of the potential impact of the proposed amendments on small entity issuers discussed in the analysis;
- How the proposed amendments could further lower the burden on small entities; and
- How to quantify the impact of the proposed amendments.

Please describe the nature of any impact and provide empirical data supporting the extent of the impact. Such comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposed

amendments are adopted, and will be placed in the same public file as comments on the proposed amendments themselves.

V. Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"),¹³⁸ the Commission must advise OMB as to whether the proposed amendments constitute a "major" rule. Under SBREFA, a rule is considered "major" where, if adopted, it results, or is likely to result, in:

- An annual effect on the economy of \$100 million or more (either in the form of an increase or a decrease);
- A major increase in costs or prices for consumers or individual industries;
- or
- Significant adverse effects on competition, investment or innovation.

We request comment on whether the proposed amendments would be a "major rule" for purposes of SBREFA. We solicit comment and empirical data on: (a) The potential effect on the U.S. economy on an annual basis; (b) any potential increase in costs or prices for consumers or individual industries; and (c) any potential effect on competition, investment or innovation. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

VI. Statutory Authority

The amendments contained in this release are being proposed under the authority set forth in Sections 4, 6, 7, 8, 10, 19(a), and 28 of the Securities Act, and Sections 3, 16, and 23(a) of the Exchange Act.

List of Subjects in 17 CFR Parts 230, 232, 239, and 249

Reporting and recordkeeping requirements, Securities.

Text of the Proposed Amendments

For the reasons set out in the preamble, the Commission is proposing to amend Title 17, chapter II of the Code of Federal Regulations as follows:

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

- 1. The authority citation for part 230 continues to read as follows:

Authority: 15 U.S.C. 77b, 77b note, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z-3, 77sss, 78c, 78d, 78j, 78l, 78m, 78n, 78o, 78o-7 note, 78t, 78w, 78ll(d), 78mm, 80a-8, 80a-24, 80a-28, 80a-29, 80a-30, and 80a-37, and Pub. L.

¹³⁸ Public Law 104-121, Title II, 110 Stat. 857 (1996).

¹³⁷ See *supra* note 73 and accompanying text.

112–106, sec. 201(a), sec. 401, 126 Stat. 313 (2012), unless otherwise noted.

■ 2. Amend § 230.144 by:

- a. Removing the Preliminary Note;
- b. Adding introductory text and paragraph (b)(3);
- c. Revising paragraphs (d)(3)(ii) and (h); and
- d. Adding Notes 1 through 5 to § 230.144.

The additions and revisions to read as follows:

§ 230.144 Persons deemed not to be engaged in a distribution and therefore not underwriters.

A Notes section appears at the end of this rule to assist in understanding its provisions.

* * * * *

(b) * * *

(3) *Not part of a scheme to evade:* Section 230.144 (Rule 144) is not available to any person with respect to any transaction or series of transactions that, although in technical compliance with this § 230.144, is part of a plan or scheme to evade the registration requirements of the Act.

* * * * *

(d) * * *

(3) * * *

(ii) *Conversions and exchanges.* If the securities sold were acquired from the issuer solely in exchange for other securities of the same issuer, the newly acquired securities shall be deemed to have been acquired at the same time as the securities surrendered for conversion or exchange, even if the securities surrendered were not convertible or exchangeable by their terms, unless:

(A) The newly acquired securities were acquired from an issuer that, at the time of 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 Exchange Act (15 U.S.C. 78f); and

(B) 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.

Note 1 to paragraph (d)(3)(ii). 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 the amendment of the

surrendered securities to permit cashless conversion or exchange, then the newly acquired securities shall be deemed to have been acquired at the same time as such amendment to the surrendered securities, so long as, in the conversion or exchange, the securities sold were acquired from the issuer solely in exchange for other securities of the same issuer.³

* * * * *

(h) *Notice of sale or proposed sale.* (1) If the issuer is, and has been for a period of at least 90 days immediately before the sale, subject to the reporting requirements of section 13 or 15(d) of the Exchange Act and the amount of securities to be sold in reliance upon this rule during any period of three months exceeds 5,000 shares or other units or has an aggregate sale price in excess of \$50,000, a notice on Form 144 (§ 239.144 of this chapter) shall be filed electronically with the Commission.

(2) The Form 144 shall be signed by the security holder and shall be filed before the end of the second business day following the day on which the subject transaction has been executed. Provided however, if the transaction satisfies the affirmative defense conditions of § 240.10b5–1(c) of this chapter, and the security holder does not select the date of execution, the date on which the executing broker, dealer or plan administrator notifies the security holder of the execution of the transaction is deemed the date of execution for a transaction. Neither the filing of such notice nor the failure of the Commission to comment on such notice shall be deemed to preclude the Commission from taking any action that it deems necessary or appropriate with respect to the sale of the securities referred to in such notice. The security holder filing the notice required by this paragraph shall have sold or have a bona fide intention to sell the securities referred to in the notice within a reasonable time after the filing of such notice.

Note 1 to § 230.144. Certain basic principles are essential to an understanding of the registration requirements in the Securities Act of 1933 (the Act or the Securities Act) and the purposes underlying Rule 144. If any person sells a non-exempt security to any other person, the sale must be registered unless an exemption can be found for the transaction. Section 4(a)(1) of the Securities Act provides one such exemption for a transaction “by a person other than an issuer, underwriter, or dealer.” Therefore, an understanding of the term “underwriter” is important in

determining whether or not the Section 4(a)(1) exemption from registration is available for the sale of the securities.

Note 2 to § 230.144. Section 2(a)(11) of the Securities Act defines the term “underwriter” broadly 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. 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.” An investment banking firm which arranges with an issuer for the public sale of its securities is clearly an “underwriter” under that section. However, individual investors who are not professionals in the securities business also may be “underwriters” if they act as links in a chain of transactions through which securities move from an issuer to the public.

Note 3 to § 230.144. Since it is difficult to ascertain the mental state of the purchaser at the time of an acquisition of securities, prior to and since the adoption of Rule 144, subsequent acts and circumstances have been considered to determine whether the purchaser took the securities “with a view to distribution” at the time of the acquisition. Emphasis has been placed on factors such as the length of time the person held the securities and whether there has been an unforeseeable change in circumstances of the holder. Experience has shown, however, that reliance upon such factors alone has led to uncertainty in the application of the registration provisions of the Act.

Note 4 to § 230.144. The Commission adopted Rule 144 to establish specific criteria for determining whether a person is not engaged in a distribution. Rule 144 creates a safe harbor from the Section 2(a)(11) definition of “underwriter.” A person satisfying the applicable conditions of the Rule 144 safe harbor is deemed not to be engaged in a distribution of the securities and therefore not an underwriter of the securities for purposes of Section 2(a)(11). Therefore, such a person is deemed not to be an underwriter when determining whether a sale is eligible for the Section 4(a)(1) exemption for “transactions by any person other than an issuer, underwriter, or dealer.” If a sale of securities complies with all of the applicable conditions of Rule 144: Any affiliate or other person who sells

restricted securities will be deemed not to be engaged in a distribution and therefore not an underwriter for that transaction; any person who sells restricted or other securities on behalf of an affiliate of the issuer will be deemed not to be engaged in a distribution and therefore not an underwriter for that transaction; and the purchaser in such transaction will receive securities that are not restricted securities.

Note 5 to § 230.144. Rule 144 is not an exclusive safe harbor. A person who does not meet all of the applicable conditions of Rule 144 still may claim any other available exemption under the Act for the sale of the securities.

PART 232—REGULATION S—GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

■ 3. The general authority citation for part 232 continues to read as follows:

Authority: 15 U.S.C. 77c, 77f, 77g, 77h, 77j, 77s(a), 77z–3, 77sss(a), 78c(b), 78l, 78m, 78n, 78o(d), 78w(a), 78ll, 80a–6(c), 80a–8, 80a–29, 80a–30, 80a–37, 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

■ 4. Amend § 232.101 by adding paragraph (a)(1)(xxii), and removing and reserving paragraphs (b)(4) and (c)(6), to read as follows:

§ 232.101 Mandated electronic submissions and exceptions.

(a) * * *
(1) * * *

(xxii) Form 144 (§ 239.144 of this chapter), where the issuer of the securities is subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act (15 U.S.C. 78m or 78o(d), respectively).

* * * * *

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

■ 5. The general authority citation for part 239 continues to read as follows:

Authority: 15 U.S.C. 77c, 77f, 77g, 77h, 77j, 77s, 77z–2, 77z–3, 77sss, 78c, 78l, 78m, 78n, 78o(d), 78o–7 note, 78u–5, 78w(a), 78ll, 78mm, 80a–2(a), 80a–3, 80a–8, 80a–9, 80a–10, 80a–13, 80a–24, 80a–26, 80a–29, 80a–30, and 80a–37; and sec. 107, Pub. L. 112–106, 126 Stat. 312, unless otherwise noted.

■ 6. Amend § 239.144 by revising paragraphs (a) and (b) to read as follows:

(a) Except as indicated in paragraph (b) of this section, each person who intends to sell securities in reliance upon § 230.144 of this chapter shall file this form in electronic format by means of the Commission's Electronic Data, Gathering, Analysis, and Retrieval system (EDGAR) in accordance with the EDGAR rules set forth in Regulation S–T (17 CFR part 232 of this chapter).

(b) This form need not be filed if the amount of securities to be sold during any period of three months does not exceed 5,000 shares or other units and the aggregate sale price does not exceed \$50,000.

* * * * *

■ 7. Amend Form 144 (referenced in § 239.144) by:

■ a. Removing the title text “NOTICE OF PROPOSED SALE OF SECURITIES PURSUANT TO RULE 144 UNDER THE SECURITIES ACT OF 1933” and add in its place “NOTICE OF SALE OR PROPOSED SALE OF SECURITIES PURSUANT TO RULE 144 UNDER THE SECURITIES ACT OF 1933”;

■ b. Removing the text “ATTENTION: Transmit for filing 3 copies of this form concurrently with either placing an order with a broker to execute sale or executing a sale directly with a market maker.” and add in its place “ATTENTION: This form must be filed in electronic format by means of the Commission's Electronic Data Gathering, Analysis, and Retrieval system (EDGAR) in accordance with the EDGAR rules set forth in Regulation S–T (17 CFR part 232). For assistance with technical questions about EDGAR or to request an access code, call the EDGAR Filer Support Office at (202) 551–8900.”;

■ c. Removing the text “INSTRUCTION: The person filing this notice should contact the issuer to obtain the I.R.S. Identification Number and the SEC. File Number.” and add in its place “INSTRUCTION: The filer should contact the issuer to obtain the SEC. File Number.”;

■ d. Removing the data field box “1(b)”;

■ e. Redesignating the data field boxes 1(c) through 1(e) as 1(b) through 1(d);

■ f. Removing the data field box “2(c)”;

■ g. Removing Instructions 1(b) and 2(c);

■ h. Redesignating Instructions 1(c) through 1(e) as 1(b) through 1(d); and

■ i. Removing “(d) Aggregate market value of the securities to be sold as of a specified date within 10 days prior to the filing of this notice” and add in its place “(d) Aggregate market value of the securities to be sold as of a specified date within 10 days prior to the filing of this notice. For completed sales, provide instead the total sales proceeds (amount of securities sold multiplied by the price per share)”.

Note: The text of Form 144 does not and this amendment will not appear in the Code of Federal Regulations.

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

■ 8. The general authority citation for part 249 continues to read as follows:

Authority: 15 U.S.C. 78a *et seq.* and 7201 *et seq.*; 12 U.S.C. 5461 *et seq.*; 18 U.S.C. 1350; Sec. 953(b) Pub. L. 111–203, 124 Stat. 1904; Sec. 102(a)(3) Pub. L. 112–106, 126 Stat. 309 (2012), Sec. 107, Pub. L. 112–106, 126 Stat. 313 (2012), and Sec. 72001 Pub. L. 114–94, 129 Stat. 1312 (2015), unless otherwise noted.

* * * * *

■ 9. Amend Form 4 (referenced in § 249.104) by:

■ a. Adding new General Instruction 10; and

■ b. Adding text and a check box at the top of the first page immediately below the text “Check this box if no longer subject to Section 16. Form 4 or Form 5 obligations may continue. *See* Instruction 1(b).”

The additions to read as follows:

Note: The text of Form 4 does not, and this amendment will not, appear in the Code of Federal Regulations.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

Washington, DC 20549

FORM 4

* * * * *

General Instructions

* * * * *

10. Optional Rule 10b5–1(c) Transaction Indication

If a transaction was made pursuant to a contract, instruction or written plan for the purchase or sale of equity securities of the issuer that satisfies the conditions of Rule 10b5–1(c) under the Exchange Act [§ 240.10b5–1(c) of this chapter], a reporting person may elect to check the Rule 10b5–1 box appearing on this Form. Additional information, such as the date of a Rule 10b5–1 plan, may be provided at the filer's option in the “Explanation of Responses” portion of the Form.

* * * * *

☐ Check this box to indicate that a transaction was made pursuant to Rule 10b5–1(c). *See* Instruction 10.

* * * * *

10. Amend Form 5 (referenced in § 249.105) by:

a. Adding new General Instruction 10; and

b. Adding text and a check box at the top of the first page immediately below the text “Form 4 Transactions Reported”.

The additions to read as follows:

Note: The text of Form 5 does not, and this amendment will not, appear in the Code of Federal Regulations.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

Washington, DC 20549

FORM 5

* * * * *

General Instructions

* * * * *

10. Optional Rule 10b5-1(c) Transaction Indication

If a transaction was made pursuant to a contract, instruction or written plan for the purchase or sale of equity securities of the issuer that satisfies the conditions of Rule 10b5-1(c) under the Exchange Act [§ 240.10b5-1(c) of this chapter], a reporting person may elect to check the Rule 10b5-1 box appearing on this Form. Additional information, such as the date of a Rule 10b5-1 plan, may be provided at the filer's option in the "Explanation of Responses" portion of the Form.

* * * * *

☐ Check this box to indicate that a transaction was made pursuant to Rule 10b5-1(c). See Instruction 10.

* * * * *

By the Commission.

Dated: December 22, 2020.

Vanessa A. Countryman,
Secretary.

[FR Doc. 2020-28790 Filed 1-15-21; 8:45 am]

BILLING CODE 8011-01-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R09-OAR-2020-0523; FRL-10017-10-Region 9]

Air Plan Approval; California; Feather River Air Quality Management District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a revision to the Feather River Air Quality Management District (FRAQMD or "District") portion of the California State Implementation Plan (SIP). This revision concerns emissions of volatile organic compounds (VOCs) from surface preparation and clean-up operations. We are proposing to approve a local rule to regulate these emission sources under the Clean Air Act (CAA or the "Act"). We are taking comments on this proposal and plan to follow with a final action.

DATES: Comments must be received on or before February 18, 2021.

ADDRESSES: Submit your comments, identified by Docket ID No. is EPA-R09-OAR-2020-0523 at <https://www.regulations.gov>. For comments submitted at *Regulations.gov*, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not

consider comments or comment contents located outside of the primary submission (*i.e.*, on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>. If you need assistance in a language other than English or if you are a person with disabilities who needs a reasonable accommodation at no cost to you, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Christine Vineyard, EPA Region IX, 75 Hawthorne St., San Francisco, CA 94105. By phone: (415) 947-4125 or by email at vineyard.christine@epa.gov.

SUPPLEMENTARY INFORMATION:

Throughout this document, "we," "us" and "our" refer to the EPA.

Table of Contents

- I. The State's Submittal
 - A. What rule did the State submit?
 - B. Are there other versions of this rule?
 - C. What is the purpose of the submitted rule revision?
- II. The EPA's Evaluation and Action
 - A. How is the EPA evaluating the rule?
 - B. Does the rule meet the evaluation criteria?
 - C. The EPA's Recommendations to Further Improve the Rule
 - D. Public Comment and Proposed Action
- III. Incorporation by Reference
- IV. Statutory and Executive Order Reviews

I. The State's Submittal

A. What rule did the State submit?

Table 1 lists the rule addressed by this proposal with the date that it was adopted by the local air agency and submitted by the California Air Resources Board (CARB).

TABLE 1—SUBMITTED RULE

Local agency	Rule No.	Rule title	Amended	Submitted
FRAQMD	3.14	Surface Preparation and Clean-up	08/01/16	01/24/17

On April 17, 2017, the EPA determined that the submittal for FRAQMD Rule 3.14 met the completeness criteria in 40 CFR part 51, appendix V, which must be met before formal EPA review.

B. Are there other versions of this rule?

We approved an earlier version of Rule 3.14 into the SIP on April 23, 2015 (80 FR 22646). The FRAQMD adopted revisions to the SIP-approved version on August 1, 2016, and CARB submitted them to us on January 24, 2017.

C. What is the purpose of the submitted rule revision?

Emissions of VOCs contribute to the production of ground-level ozone, (or "smog") and particulate matter, which harm human health and the environment. Section 110(a) of the CAA requires states to submit regulations that control VOC emissions. Rule 3.14 was