



NASAA

NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.

750 First Street, NE, Suite 1140
Washington, DC 20002
202/737-0900
www.nasaa.org

March 17, 2021

Submitted By SEC Webform (<http://www.sec.gov/rules/submitcomments.htm>)

Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File Number S7-24-20 – Rule 144 Holding Period and Form 144 Filings

Dear Ms. Countryman:

On behalf of the North American Securities Administrators Association, Inc. (“NASAA”),¹ I am writing in response to U.S. Securities and Exchange Commission (“SEC” or the “Commission”) Release No. 33-10911, *Rule 144 Holding Period and Form 144 Filings*, File No. S7-24-20 (the “Proposal”).² The Proposal would increase investor protection in the resale market for restricted securities and NASAA encourages its approval.

I. Introduction

The Proposal would effect moderate changes to Rule 144 under the Securities Act of 1933 and the filing of Form 144. The most significant aspect of the Proposal is the proposed change to Rule 144(d)(3)(ii). Currently, this provision allows holders of market-adjustable convertible securities – *i.e.*, securities of an issuer that are convertible or exchangeable into equity and that contain terms which reduce or eliminate the potential risk of price declines in the underlying equity securities prior to such conversion or exchange – to count the amount of time they hold the convertible securities towards the minimum holding periods set by Rule 144 (six months for securities issued by SEC-reporting companies or one year for securities issued by non-reporting companies). The Proposal would preclude such “tacking” for market-adjustable convertible securities if they are issued by SEC-reporting companies with shares not listed on a national

¹ Organized in 1919, NASAA is the oldest international organization devoted to investor protection. NASAA’s membership consists of the securities administrators in the 50 states, the District of Columbia, Canada, Mexico, Puerto Rico, and the U.S. Virgin Islands. NASAA is the voice of securities agencies responsible for grass-roots investor protection and efficient capital formation.

² The Proposal is available at <https://www.sec.gov/rules/proposed/2020/33-10911.pdf>.

securities exchange. In addition, the Proposal would institute several changes to Form 144 filings, including requiring all Forms 144 to be filed electronically on the SEC's Electronic Data Gathering, Analysis, and Retrieval system ("EDGAR").

These changes are sound and would broadly serve the interests of investors. We support these initiatives generally, but we have responded below to certain questions raised in the Proposal to recommend certain revisions to further increase investor protection.

II. Responses to Questions Raised in the Proposal

A. *Response to Questions 1, 2, 7 and 8: The Proposed Amendments to Rule 144(d)(3)(ii) Should Be Applied to All SEC Reporting Companies.*³

The Proposal should be revised to extend the proposed amendments to Rule 144(d)(3)(ii) to listed companies. The Proposal excludes listed companies from its proposed amendments to Rule 144(d)(3)(ii) because New York Stock Exchange ("NYSE") and Nasdaq rules provide certain safeguards for investors and because very few listed companies issue market-adjustable convertible securities.⁴ The Proposal points to NYSE Listed Company Manual Section 312.03(c) and Nasdaq Rule 5635(d), which require listed companies to obtain shareholder approval before issuing securities that could be 20 percent or more dilutive to existing shareholders, as sufficient prophylactics.⁵ These rules do not provide the same degree of investor protection as revised Rule 144(d)(3)(ii), though.

A principal purpose of the Proposal is to buttress the longstanding Rule 144 requirement that an investor must hold a security at risk for an appropriate period of time before reselling the security in order to demonstrate that the investor did not purchase the security with a view to making a distribution.⁶ As the Proposal notes, investors who purchase market-adjustable convertible securities can enjoy easy profits and "have an incentive to purchase the market-adjustable securities with a view to distribution [in order] to capture the difference between the built-in discount and the market value of the underlying securities."⁷ But buttressing Rule 144 is not the only positive effect of the Proposal.

³ Proposal at 15, Question 1 ("*Should we amend Rule 144(d)(3)(ii) as proposed?*"); 15, Question 2 ("*Should the rule only apply if the issuer is an 'unlisted issuer' at the time of conversion or exchange, as proposed? . . .*"); 16, Question 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? . . .*"); and 17, Question 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? . . .*").

⁴ *Id.* at 13-14.

⁵ *Id.* at 14, n.29.

⁶ *Id.* at 5.

⁷ *Id.* at 11-12.

The proposed amendments to Rule 144(d)(3)(ii) would also raise the stakes for avaricious investors who use market-adjustable convertible securities to prey upon struggling companies. These investors give market-adjustable convertible securities the well-deserved monikers “toxic” or “death spiral” convertibles: they offer companies a bit of capital in exchange for convertible instruments that virtually guarantee a profit at the expense of other shareholders.⁸ The fact that listed companies rarely issue such toxic convertibles does not obviate the need for investor safeguards against such issues. Further, the 20 percent thresholds for the NYSE and Nasdaq rules cited above do not prevent listed companies from making smaller distributions of convertible securities.

We accordingly recommend the SEC revise the Proposal’s amendments to Rule 144(d)(3)(ii). First, proposed subparagraph “(A)” should be deleted to extend Rule 144(d)(3)(ii) to listed companies. Second, we recommend certain revisions to proposed subparagraph “(B)” in the interest of clarity.⁹ Our recommended line edits are below.¹⁰

Recommended Line Edits to Proposed Rule 144(d)(3)(ii)

(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 converted or exchangeable exchanged security securities contains contained terms, such as conversion rates or price adjustments, that could offset, in whole or in part, declines in the market value of the underlying securities occurring prior to the conversion or exchange, other than terms that~~

⁸ See Zachary T. Knepper, *Future-Priced Convertible Securities and the Outlook for ‘Death Spiral’ Securities-Fraud Litigation*, 26 WHITTIER L. REV. 359 (2004) (cited in the Proposal at page 35, n.73) for a discussion of how “toxic” or “death-spiral” convertibles can harm shareholders.

⁹ We recommend the SEC revise subparagraph (B) even if the SEC declines to amend or delete subparagraph (A).

¹⁰ In addition to these line edits, the ‘trailing 3’ at the end of Note 1 to paragraph (d)(3)(ii) should be deleted: “. . . the securities sold were acquired from the issuer solely in exchange for other securities of the same issuer. 3”. See Proposal at 75.

adjust for stock splits, dividends or other issuer-initiated changes ~~in its~~ [to the issuer's capitalization table](#).

B. Response to Question 5: The Current Rule 144 Holding Periods Are Appropriate and Should Not be Amended.¹¹

Many of the submitted comment letters support the Proposal.¹² Others oppose it, though, because of a misperception that it would increase Rule 144 holding periods or materially inhibit the ability of small companies to raise capital. NASAA respectfully disagrees with these views.

First, the Proposal would not change the current Rule 144 minimum holding periods (six months for public companies, one year for non-public companies). To the extent the Proposal impacts minimum holding periods, it does so only by restricting tacking for some market-adjustable convertible securities, which the Proposal recognizes is prone to abuse. Holding periods for these securities would begin only after these securities are converted; holders would no longer be able to simply run out the Rule 144 holding clock by sitting on their convertible securities. The practical effects of the Proposal, therefore, would be to encourage holders of market-adjustable convertible securities to exercise their conversion rights earlier in time than they otherwise would have.¹³

Second, we do not believe the Proposal would materially harm small business capital formation. As the Proposal acknowledges, it would likely make market-adjustable convertible securities marginally less attractive to potential investors, and therefore raise the costs to issuers of selling such securities.¹⁴ But this should not stop the SEC from moving forward. Securities regulations should not encourage the issuance of these “toxic” (or “death spiral”) securities, which ultimately serve to favor one group of investors at the expense of other investors. There are other ways for small companies to structure issuances.

¹¹ *Id.* at 16, Question 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? . . .”).

¹² Comment letters on the Proposal are available at <https://www.sec.gov/comments/s7-24-20/s72420.htm>.

¹³ It appears some commenters interpret the SEC’s proposed amendments to Rule 144(d)(3)(ii) as in effect *doubling* the minimum Rule 144 holding periods for market-adjustable convertible securities. These commenters appear to interpret the Proposal as implying that a holder of a market-adjustable convertible security must wait six months / one year to exercise the conversion rights on the security and then wait *an additional* six months / one year after conversion before the newly-acquired securities can be resold. This is an incorrect interpretation of the Proposal.

¹⁴ *See* Proposal at 38-40.

C. **Response to Questions 12-15 and 27: The SEC Should Mandate Electronic Filing of Form 144 for Public Companies, Eliminate the Requirement that Form 144 be Provided to Securities Exchanges, Institute Measures to Protect Against the Inclusion of Social Security Numbers or Other Personally Identifiable Information in Form 144 Filings, and Add a Rule 10b5-1 Check Box to Forms 4 and 5.**¹⁵

We support the Proposal's initiative to move all Form 144 filings onto EDGAR. Paper Form 144 filings may be useful for the SEC, but they are not readily accessible by market participants or NASAA members and, thus, have no utility for other regulators. Migrating all Forms 144 onto EDGAR would be efficient and effective.¹⁶

Making Forms 144 publicly available, though, would require the SEC take steps to prevent personally identifiable information ("PII") from knowingly or unwittingly being uploaded onto EDGAR. The only PII that should be disclosable on a Form 144 is the selling security holder's name. No other PII should be requested. Furthermore, NASAA encourages the SEC to implement controls within EDGAR (such as in the Form 144 filing instructions or through automated warnings within EDGAR) to help prevent filers from consciously or unwittingly entering social security numbers or other PII into Form 144 filings.

Finally, we support adding a check box to Forms 4 and 5 to provide security holders with a simple means of disclosing that a transaction was executed pursuant to a Rule 10b5-1 plan. Form 144 currently includes guidance for securities holders regarding how to complete the form when a transaction was made pursuant to a Rule 105-1 plan. Forms 4 and 5 are less clear, though, leading to inconsistent disclosure standards.¹⁷ Adding a Rule 10b5-1 check box to these two forms would be a simple and effective means of facilitating and standardizing these disclosures.

¹⁵ *Id.* at 22, Question 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?"); 23, Question 13 ("Should we amend Form 144 to update the form and eliminate certain information, as proposed? . . ."); 23, Question 14 ("Should we instead continue to permit a Form 144 filer to have the option of filing in paper or electronically?"); 23, Question 15 ("In the alternative, should we eliminate the Form 144 filing requirement altogether?"); and 31-32, Question 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)?").

¹⁶ As we interpret the Proposal, the SEC intends to add Form 144 filing functionality to the existing EDGAR OnlineForms Management Website.

¹⁷ *See* Proposal at 30-31.

Vanessa Countryman

March 17, 2021

Page 6 of 6

III. Conclusion

NASAA supports the Proposal and encourages its approval. We recommend certain revisions, though, as outlined above to increase the Proposal's protections for investors.

Thank you for considering these views. NASAA looks forward to continuing to work with the Commission in the shared mission to protect investors. Should you have questions, please contact either the undersigned or NASAA's General Counsel, Vince Martinez, at (202) 737-0900.

Sincerely,

A handwritten signature in black ink, appearing to read "Lisa Hopkins", written in a cursive style.

Lisa Hopkins

NASAA President

General Counsel and Senior Deputy

Commissioner of Securities, West Virginia