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March 22, 2021

Via E-mail: rule-comments@sec.gov

Securities and Exchange Commission,
100 F Street, N.E.,
Washington, DC 20549-1090.

Attention: Vanessa A. Countryman, Secretary

Re: Rule 144 Holding Period and Form 144 Filings – File No. S7-24-20

Ladies and Gentlemen:

We appreciate the opportunity to comment on the Securities and Exchange Commission's (the "Commission") proposed amendments to Rule 144 (the "Proposed Amendments").[1] We support the Commission's efforts to protect investors, modernize Rule 144 and eliminate overlapping and duplicative filings. However, we respectfully submit some recommendations to eliminate unnecessary filings, streamline existing filings and further protect investors.

1. The Commission should seriously consider eliminating the Form 144 filing requirement.

[1] Release No. 33-10911; File No. S7-24-20 (December 22, 2020) (the "Release").

The Commission eliminated Form 144 filing requirements for restricted securities in 2007.[2] We are unaware of any negative market or enforcement impact of that elimination. The Proposed Amendments eliminate Form 144 filings in respect of private companies. Given this, we believe that the Form 144 filing requirements for affiliates should be similarly eliminated.

As discussed below, we believe:

- persons subject to Section 16 should not be required to file Form 144 based on the relevant information otherwise being available;
- affiliates selling securities of foreign private issuers should not be required to file Form 144 due to the fact that Form 144 will only be filed in respect of the portion of sales made in the United States, as opposed to the home market, and thus will not be a relevant source of information to the market; and
- a number of disclosures on Form 144 should be eliminated because they are duplicative of existing disclosure requirements or the information is already readily available to the public.

These three recommended changes to the Release provide even more support for eliminating Form 144 filing requirements for affiliates.

2. Elimination of unnecessary filings

Eliminate the Form 144 filing requirement for private companies.

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[2] *See Revisions of Holding Period Requirements in Rule 144 and 145*, Release No. 33-7390 (Feb. 20, 1997); *Revisions to Rules 144 and 14*5, Release No. 33-8869 (Dec. 6, 2007).

The Proposed Amendments would eliminate the filing of Form 144 for the resale of securities of issuers that are not subject to the reporting requirements of the Securities Exchange Act of 1934 (the “Exchange Act”). We agree with the Commission that the benefits of Form 144 filing for resales of securities of entities that are not subject to Exchange Act reporting is vastly outweighed by the burdens on affiliates of private companies. Since private companies lack a public shareholder base, we do not believe the filing of Form 144 by affiliates of non-public companies benefits the public securities markets. Also, as the Commission points out in the Release, filings under Form 144 are not the sole source of information available to the Commission regarding resale transactions under Rule 144, and the other requirements of Rule 144 would still apply to such transactions.

Eliminate Form 144 reporting for persons subject to the reporting requirements of Section 16.

For individuals that are subject to the reporting requirements of Section 16 of the Exchange Act, much of the information provided in Form 144 is already included in Form 4 filings. The Proposed Amendments more closely link reporting under Section 16 of the Exchange Act and the filing of Form 144. The Proposed Amendments amend the Form 144 deadline to coincide with the Form 4 deadline of two business days and modify EDGAR to provide filers with the option to file a Form 144 and a Form 4 through a single user interface. As a result, there appears to be no reason to require the filing of *both* a Form 144 and a Form 4. As the Commission notes in the Proposed Amendments, Form 4 and Form 144 have significant disclosure overlap, including:

- The title of the class of security being sold;
- The number of shares subject to sale;
- The aggregate market value of those shares; and

- The date of the sale.

Considering that these disclosures are already provided within two business days of a reportable transaction occurring via Form 4, Form 144 is of little utility. Thus, we believe that Form 144 filings should not apply to persons subject to the reporting requirements of Section 16.

Eliminate Form 144 reporting for sales of securities of foreign private issuers.

Similar to sales of securities of issuers that are not subject to Exchange Act reporting, sales of securities of foreign private issuers should not be subject to Form 144 reporting. Foreign private issuers are not subject to the reporting requirements under Section 16 of the Exchange Act and therefore under the current rules affiliates of foreign private issuers are not required to file Forms 4 with respect to their sales of securities. Moreover, sales may occur both inside the United States pursuant to Rule 144 and outside the United States pursuant to Regulation S or another available exemption under the Securities Act of 1933, as amended (the "Securities Act"). In such a case, a Form 144 will be filed only in respect of the portion of sales made in the United States, as opposed to the home market outside the United States and thus will not be a relevant source of information to the market. Accordingly, we believe that filings by affiliates of foreign private issuers should be regulated by the home market of the foreign private issuer.

The need for this exemption is enhanced if the Commission adopts the Proposed Amendment to require all Form 144 filings to be made by EDGAR. Under the current Rule 144 reporting requirements, Form 144 filings may be made as paper filings and therefore affiliates of foreign private issuers would not have EDGAR CIK codes. The requirement in the Proposed Amendments for all Form 144 filings to be made on EDGAR will therefore be significantly more burdensome to affiliates of foreign private issuers since they are not otherwise required to make any other filings through EDGAR.

In light of these burdens, and the inconsistency between the treatment of foreign private issuers under Section 16 and the proxy rules, we believe that Form 144 reporting should not be required for resales of securities by affiliates of foreign private issuers.

3. Streamlining Form 144

The "aggregate market value of the securities" column should be deleted.

Under the current Form 144, filers must disclose the aggregate market value of the securities to be sold as of a specified date within 10 days prior to the filing of the Form 144. This appears to be a holdover from when prices of securities were not as publicly available as they are today. Today prices of securities are available instantaneously through many sources. Accordingly, we recommend eliminating the aggregate market value column.

Overlapping disclosures should be eliminated.

Form 144 has several disclosure requirement that overlap with other filings or have been removed from similar filings. These include:

- the number of securities outstanding, which information is available in regular filings with the Commission such as on Forms 10-Q and Forms 10-K;

- issuer information, including IRS identification number and address, which information is available on filer-specific pages on EDGAR and on Forms 8-K, Forms 10-Q and Forms 10-K; and

- the securities exchange on which the securities are listed, which information is available on Forms 8-K, Forms 10-Q and Forms 10-K.

The name and address of the broker should be eliminated.

Form 144, unlike any filing under Section 16(a), requires the name and address of the broker through whom the sale will be made. The provision of this information serves no apparent purpose. At best, it serves to limit competition among brokers for sales pursuant to Rule 144. Because an amendment to a Form 144 is necessary to add a broker,[3] this creates a significant disincentive for Form 144 filers to change brokers over the three month effective period of the Form 144.

At one time, very similar to the Form 144 broker disclosure requirement, an issuer had to list any broker-dealer that the issuer might utilize in an at-the-market offering in the base prospectus.[4] In our view, the Commission wisely eliminated this requirement.[5] The Commission, in our view, should do likewise here.

4. The Commission should clarify that the failure to file on Form 144 would not render a resale ineligible for the Rule 144 safe harbor.

The Introductory Note to Rule 144 provides that the subject sale must be "made in accordance with all of the provisions of the section" in order for the safe harbor to be eligible. In a 1973 release, the Commission indicated the Form 144 filing requirement was "an integral part" of Rule 144 and a failure to timely make the filing

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[3] *Securities Act Rules*, Question 136.06 (Jan. 26, 2009), https://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm.

[4] 17 C.F.R. § 230.415(a)(4)(iv) (1994) (current version at 17 C.F.R. § 230.415(a)(4)).

[5] *Securities Offering Reform*, Release Nos. 33-8591, 34-52056, pp. 214-215 (July 19, 2005) https://www.sec.gov/rules/final/33-8591.pdf ("Under our revised Rule, an issuer that is registering a primary equity shelf offering pursuant to Rule 415(a)(1)(x) can register an 'at-the-market' offering of equity securities without identifying an underwriter in its registration statement and without a limitation on the amount of the offering.").

resulted in a loss of the exemption from Section 5 of the Securities Act.[6] The Form 144 filing requirement does not in any way impact the manner in which control securities enter the market under Rule 144, nor the amount of control securities that may enter the market under Rule 144. These are the critical determinants of whether a sale is a distribution for purposes of Section 5 of the Securities Act. The filing of a Form 144 is a mere public notification of the sale and does not in any way affect the fundamental "distribution" analysis. As a result, a failure to file a Form 144 should not preclude reliance on the Rule 144 safe harbor.

Our position is consistent with the Commission's position with respect to the filing of a Form D. The Commission amended Regulation D expressly to provide that a failure to file a Form D would "no longer be a condition to any exemption under Regulation D."[7] We believe the Commission should take the same approach with Rule 144.

5. Enhancements to market-adjustable security proposal

The Proposed Amendment would amend Rule 144 to change the holding period for securities acquired upon the conversion or exchange of market-adjustable securities for unlisted companies so that the holding period would not begin until conversion or exchange. The market-adjustable securities covered under the proposed amendment are those that contain terms, such as conversion rates 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 think that whatever

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6 *The Use of Form 144*, Release No. 33-5403 (June 14, 1973).

7 *Regulation D; Accredited Investor and Filing Requirements*, Release No. 33-6825, 1 (Mar. 13, 1989).

changes the Commission makes in this regard should apply to all issuers, including public companies, but that the Commission should define "market-adjustable securities" in a manner that limits application of this provision to clearly abusive transactions.

The Proposed Amendment should apply to all issuers.

We believe that the changes to the Rule 144 holding period for market-adjustable securities should apply to all issuers, and not just private companies. We agree with the Commission's assessment that market-adjustable securities present an abuse of the registration provisions of the Securities Act. As a result, we recommend applying the new holding period requirement to all issuers. While we recognize that national securities exchanges place limits on the number of shares that may be issued upon the conversion or exchange of convertible or exchangeable securities without stockholder approval, we believe that those limitations are not designed to address the abusive characteristics of market-adjustable securities under the Securities Act, and many issuers are unlisted. As a result, we recommend that the Commission expand its Proposed Amendment to apply to all issuers, while at the same time focusing the definition of market-adjustable securities on cases of abuse.

The market-adjustable securities subject to the Proposed Amendment should not include those securities that only provide partial price protection.

In the Proposed Amendments, the Commission has not provided examples of how "in part" should be interpreted and the inclusion of securities that provide partial price protection seems inconsistent with the examples the Commission provided, and the concerns the Commission raised, in the Release. The Commission provides the example of a floating conversion rate, where the stock price of the convertible or exchangeable security dictates the amount of securities received on conversion. In this scenario, the floating conversion rate acts to completely offset market risk to investors.

To provide clarity to market participants we suggest the definition of market-adjustable security encompass only securities that offset market risk "in whole," that is, where the floating conversion rate exactly mirrors, or provides complete protection against, declines in the underlying stock price. We recommend this change to provide clarity when the security is or is not covered by the definition of market-adjustable security. As originally proposed, any amount of market price protection would trigger the new holding period requirement.

While it is possible to craft a definition that quantifies how much market risk is permissible to offset, there is no clear or simple way to craft such a definition. Instead, to the extent a market-adjustable security provides a de minimis amount of market risk, we believe the Commission would be able to treat such as case as an evasion of Rule 144, consistent with the Introductory Note to Rule 144. However, relying solely on a scheme to evade analysis could unduly reward those participants willing to take more aggressive positions on the amount of market risk that can be offset while not constituting a scheme to evade. To avoid this outcome, we recommend the Commission release guidance on how it intends to characterize a scheme to evade in the context of market-adjustable securities under Rule 144, and that market-accepted provisions should not generally be so characterized.

Clarify the anti-dilution provision in the definition of market-adjustable security.

The Proposed Amendment provides an exclusion in the definition of market-adjustable security for "terms that adjust for stock splits, dividends, or other issuer-initiated changes in its capitalization." The scope of this exception is unclear. The Commission notes that it "do[es] not intend for […] 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, we believe the

Commission's focus on "issuer-initiated" actions would not fully capture the scope of adjustments that should not cause a security to be a market adjustable security subject to the holding period provisions in the Proposed Amendment. For example, the exclusion could be viewed as not being available for adjustments for actions by affiliates or third parties that affect an issuer's capitalization, such as conversions of high vote shares into low vote shares or tender offers initiated by third parties.

Similarly, the Commission's enumerated list of exceptions of "terms that adjust for stock splits, dividends, or other issuer-initiated changes in its capitalization" focuses on what are currently ordinary course, or otherwise customary, adjustments. The limitation in the exception to only cover what are currently customary or ordinary course anti-dilution provisions threatens to damper market innovation since new anti-dilution provisions included in securities could cause those securities to become subject to the holding period provisions in the Proposed Amendment.

We believe that anti-dilution adjustments should instead be evaluated based on whether they would constitute a scheme to evade Rule 144. Such an approach would provide for greater flexibility in permitting other anti-dilution provisions in securities which, while new or innovative, would not be indicative of a holder that is engaged in a distribution of the underlying security and not bearing the economic risk of an investment. For comparison, Rule 144A does not address anti-dilution provisions in its determination of whether a convertible or exchangeable security is of the same class as a security listed on a national securities exchange. Consequently, basing any anti-dilution analysis within the scheme to evade framework would provide the Rule 144 safe harbor with similar treatment as other safe harbors for exemptions to the registration requirements under the Securities Act.

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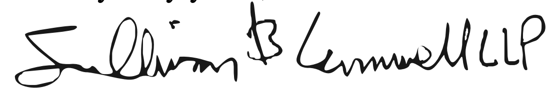
If you would like to discuss our letter, please feel free to contact Robert W. Reeder III at [redacted] or Sarah P. Payne at [redacted].

Very truly yours,



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