



March 22, 2021

Via Online Submission

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

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

OTC Markets Group¹ is pleased to submit this comment letter in response to the Securities and Exchange Commission's (the "SEC" or the "Commission") proposed amendments to Rule 144 and the Form 144 filing requirements (the "Proposal").²

The Proposal seeks to revise the holding period applicable to securities acquired in connection with the conversion or exchange of certain market-adjustable securities of non-exchange listed issuers. This proposed amendment would eliminate the "tacking" provisions of Rule 144 applicable to these transactions such that the holding period would not begin until the securities are acquired upon the conversion or exchange of the market-adjustable security.

With respect to Form 144 filing requirements, the Proposal would: (i) mandate electronic filing of Form 144 for SEC reporting issuers; (ii) amend the filing deadline for Form 144 to coincide with the filing deadline for Form 4; (iii) streamline the filing process in cases where both Form 4 and Form 144 are required to report the same transaction; and (iv) eliminate the Form 144 filing requirement for resales of securities of non-SEC reporting issuers.

We operate public markets that serve the needs of many types of companies and their investors, including U.S. based, SEC reporting companies; large, foreign issuers relying on exemptions from registration pursuant to Rule 12g3-2(b) under the Exchange Act; and smaller non-reporting companies that maintain a public trading market in reliance on Rule 144. Many investors and employees in these companies rely on Rule 144 to access liquidity and sell their holdings in the public market. A well-functioning Rule 144, and accessible, machine-readable Form 144 information, are essential to the Commission's goals of investor protection, capital formation and the maintenance of fair, orderly and efficient markets.

We support the Commission's efforts to modernize Rule 144 and the related Form 144 filings, particularly with respect to the streamlined filing requirements that would facilitate more current and electronic disclosure. However, we are concerned that the application of these

¹ [OTC Markets Group Inc.](https://www.otcmkt.com) operates the OTCQX[®] Best Market, the OTCQB[®] Venture Market and the Pink[®] Open Market for 11,000 U.S. and global securities. Through OTC Link[®] ATS and OTC Link ECN, we connect a diverse network of broker-dealers that provide liquidity and execution services. We enable investors to easily trade through the broker of their choice and empower companies to improve the quality of information available for investors. OTC Link ATS and OTC Link ECN are SEC regulated ATSs, operated by OTC Link LLC, member FINRA/SIPC.

² Rule 144 Holding Period and Form 144 Filings, Release Nos. 33-10911; 34-90773; File No. S7-24-20 (Dec. 22, 2020), available at: <https://www.sec.gov/rules/proposed/2020/33-10911.pdf>.

requirements only to securities of exchange-listed or SEC reporting issuers creates an uneven regulatory regime and reduces the amount of information available to investors.

Proposed Amendment to the Holding Period Applicable to Market-Adjustable Securities Under Rule 144(d)(3)(ii)

The stated purpose of the amendments to the holding period applicable to non-listed market-adjustable securities is to mitigate the risk of unregistered distributions in furtherance of the Commission's investor protection goals. We share the Commission's concern regarding toxic "death spiral" financing associated with such convertible debt instruments and have taken steps to ensure that companies on our OTCQX and OTCQB markets adhere to our policies to identify and avoid manipulative market practices.³ However, we believe that the rules intended to deter this type of activity should apply broadly across all U.S. equity markets.⁴

The holding period amendments are limited to non-exchange listed securities on the basis that (1) exchange rules requiring shareholder approval for issuances over 20 percent of a company's common stock would prevent the types of dilutive issuances involved in convertible debt financing, and (2) exchange-listed issuers generally do not engage in these types of transactions.⁵ This reasoning assumes that because these practices have occurred more frequently in OTC securities, that they do not, or will not, occur in exchange-traded stocks. The recent retail-driven trading frenzy in New York Stock Exchange listed GameStop Corp. (NYSE: GME) and other stocks listed on exchanges⁶ underscores that market manipulation is not venue-specific and can take place both on and off exchanges.

Accordingly, in response to Request for Comment No. 7, the amendment to Rule 144(d)(3)(ii) should cover market-adjustable securities of both listed and unlisted issuers, rather than only those of unlisted issuers.

The Commission should also explore alternative means to deterring manipulative lending practices and toxic financing, such as requiring fixed (rather than adjustable) conversion rates for publicly traded equities or exempting transactions whether the conversion price is consistent with the public trading price.⁷

³ See OTC Markets Group Stock Promotion Policy: Best Practices for Issuers at pg. 2 (Nov. 2017), available at: https://www.otcmarkets.com/files/Best_Practices_for_Issuers_Stock_Promotion.pdf; see also OTC Markets Group Policy on Stock Promotion (Nov. 2017), available at: https://www.otcmarkets.com/files/OTC_Markets_Group_Policy_on_Stock_Promotion.pdf; see also OTC Markets Group Caveat Emptor Policy, available at: <https://www.otcmarkets.com/learn/caveat-emptor>.

⁴ We have similarly advocated that 13F reporting requirements should apply to all publicly traded equities, rather than just those on an exchange. See OTC Markets Group Comments to File No. S7-08-20 (Sept. 30, 2020), available at: <https://www.sec.gov/comments/s7-08-20/s70820-7864222-224031.pdf>.

⁵ Proposal, pg. 13.

⁶ AMC Entertainment Holdings Inc (NYSE:AMC), Koss Corporation (NASDAQ: KOSS) and several other exchange-listed stocks have also seen a meteoric rise in price due, in part, to promotional activities on social media message boards.

⁷ Another way to curb manipulative trading schemes and make online information sources safer is to amend and modernize Securities Act Section 17(b) to require additional disclosure from paid stock promoters. See our

Proposed Amendments to the Form 144 Filing Requirements

We support the proposed amendments to mandate electronic filing of Form 144s and to align the Form 144 and Form 4 deadlines and filing processes. However, **eliminating the Form 144 filing requirements for non-SEC reporting companies will do a great disservice to minority investors and diminish market transparency by ‘shutting out the lights’ with respect to insider transactions in these companies.**

In response to the Proposal’s Request for Comment Nos. 10, 20 and 21, **the information required to be disclosed in a Form 144 is valuable to investors, issuers and other market participants.** If this information is not required to be made publicly available, investors and market participants are left in the dark concerning significant share issuances that can be dilutive or signify larger changes at the company. Eliminating Form 144 requirements for non-reporting issuers puts investors in these companies at an informational disadvantage and makes it more difficult for brokers, transfer agents and clearing firms to safely process transactions in these securities on behalf of investors.

The Proposal notes that “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.”⁸ Brokers rely, in part, on the information contained in Form 144 filings to conduct their “reasonable inquiry” to detect and prevent unlawful distributions. Brokers often do not have a relationship with the issuer, making it difficult, if not impossible, to determine whether a Section 5 violation has occurred. **Eliminating the Form 144 requirements for non-reporting issuers would reduce the amount of available information and inhibit the growth of a transparent public market.**

Form 144 information also has implications for transactions conducted in reliance on Rule 144(c)(2) and the information required under Rule 15c2-11. In response to Request for Comment No. 22, certain information required under Rule 144(c)(2) is not required to be made publicly available and is not otherwise available via other sources, hindering the ability for investors in certain non-SEC reporting companies to deposit and transfer their shares.

Paragraph (c)(2) of Rule 144 sets forth the information requirements for share transfers in non-reporting issuers, requiring the publication of certain information specified in Exchange Act Rule 15c2-11, the rule that governs a broker’s ability to publish quotations in non-exchange traded securities. However, certain information that is required to be made publicly available under Rule 144(c)(2) is *not* required to be made publicly available under Rule 15c2-11. This misalignment results in many brokers employing compliance policies that make it unnecessarily difficult or impossible to process transactions on behalf of investors in non-SEC reporting companies, despite the subject company otherwise providing complete publicly available disclosure under Rule 15c2-11.

Petition for Commission Action to Protect the Investing Public from Unlawful and Deceptive Securities Promotions (April 24, 2006), available at: www.sec.gov/rules/petitions/petn4-519.pdf.

⁸ Proposal, pg. 25.

Paragraph (b)(5)(i) of Rule 15c2-11 specifies sixteen items of public disclosure required for the securities of non-reporting companies to be publicly quoted. The first thirteen items concern information about the issuer, such as the names of officers and directors, the total number of shares outstanding, a description of the issuer's business, products and facilities, and financial information. The last three items set forth in subparagraphs (N), (O) and (P) do not concern the issuer, but rather seek information about the *quotation*, including the issuer's relationship with the broker-dealer facilitating the transaction and the person submitting the quotation.⁹ This information is *not* required to be made publicly available under Rule 15c2-11, yet the items in subparagraphs (N) and (P) *are* required to be publicly available under Rule 144(c)(2). As a result, brokers' compliance officers are often unsure of their ability to satisfy the informational requirements under Rule 144(c)(2), and many maintain policies inhibiting their ability to process transactions in non-SEC reporting companies.

This problem can be solved in two ways. The first is through additional disclosure. Requiring the contemporaneous public disclosure of Form 144 information in *all* publicly traded companies would help brokers satisfy the information requirements under Rule 144 and align with the recent amendments to Rule 15c2-11. The Proposal notes that less than 1 percent of Form 144s submitted during 2019 concerned securities of non-SEC reporting issuers.¹⁰ The fact that this information is not being disclosed should not be a determining factor in whether it *should* be disclosed. **The Commission could facilitate the disclosure of this information by permitting investors, company insiders and affiliates to publish Form 144 information on the website of the qualified interdealer quotation system where the security trades.**¹¹

This approach would help brokers and clearing firms develop appropriate policies to serve investors in these securities.

Alternatively, in response to Request for Comment No. 23, amending Rule 144(c)(2) to require the Rule 15c2-11(b)(5)(i)(N) and (P) information be available on request, instead of publicly available, would also likely allow brokers and clearing firms to develop streamlined policies with respect to transactions in these securities.

Conclusion

A transparent and efficient public market depends on a robust and fair regulatory environment. Ensuring that the holding period and disclosure requirements under Rule 144 are evenly applied to all publicly traded issuers will improve the efficiency of our public markets, protect investors and support capital formation.

⁹ Specifically, subparagraph (N) concerns “[w]hether the broker or dealer or any associated person of the broker or dealer is affiliated, directly or indirectly, with the issuer”; subparagraph (O) concerns “[w]hether the quotation is being published or submitted on behalf of any other broker or dealer and, if so, the name of such broker or dealer”; and subparagraph (P) asks “[w]hether 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.” 17 CFR 240.15c2-11(b)(5)(i)(N)-(P).

¹⁰ Proposal, pg. 18.

¹¹ The recent amendments to Rule 15c2-11 introduce the new regulatory status of a “qualified interdealer quotation system” that makes publicly available determinations as to whether an issuer has met the information requirements under Rule 15c2-11. OTC Link ATS will act a “qualified interdealer quotation system” under Rule 15c2-11.

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Please contact Dan Zinn, General Counsel ([REDACTED]), or Cass Sanford, Associate General Counsel ([REDACTED]) with any questions or to request additional information.

Very truly yours,



Daniel Zinn
General Counsel
OTC Markets Group Inc.



Cass Sanford
Associate General Counsel
OTC Markets Group Inc.