



March 22, 2021

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

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

Dear Ms. Countryman:

The Securities Industry and Financial Markets Association (“SIFMA”)<sup>1</sup> respectfully submits this letter to the U.S. Securities and Exchange Commission (“SEC” or “Commission”) to comment on the above-referenced proposal (“Proposal”) that would, among other things, mandate electronic filing of Form 144 with respect to securities issued by issuers subject to reporting requirements under the Securities Exchange Act of 1934 (“Exchange Act”), amend the filing deadline for Form 144 to coincide with the filing deadline for Form 4, and streamline the filing process in cases where both Form 4 and Form 144 are required to report the same transaction.<sup>2</sup> SIFMA is fully supportive of the Commission’s goal in the Proposal to move away from paper Form 144 filings to electronic filings. However, because broker-dealers file the majority of Form 144s, the Commission’s proposed approach to make separate Form 144 filings through the Electronic Data Gathering, Analysis, and Retrieval system (“EDGAR”) each time one is required presents significant logistical challenges for them.<sup>3</sup> We therefore offer below an alternative approach that would be in addition to the one included in the Proposal and would still employ EDGAR but in a more scalable manner for broker-dealers that frequently need to file multiple forms on behalf of clients at the same time. We further recommend that the Commission not adopt the proposed update to the Form 144 instructions to include completed sales for the reason discussed below. Finally, we believe that regardless of the final Form 144 filing approach the Commission adopts, Form 144 filers should be given more than six-months to transition to the new filing approach.

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<sup>1</sup> SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry’s nearly 1 million employees, we advocate for legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit <http://www.sifma.org>.

<sup>2</sup> See Release No. 33-10911 (December 22, 2020), 86 FR 5063 (January 19, 2021).

<sup>3</sup> In the Proposal, the Commission indicates that they receive approximately 33,725 Form 144 filings annually. *Id.* According to data from the Washington Service Bureau, broker-dealers filed 20,864 of the Form 144 filings in 2020.

## **I. The Proposal**

Under the Proposal, executives and other affiliates of an Exchange Act reporting issuer 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. 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. The Proposal also would 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 modify their business processes and apply for codes to make filings on EDGAR. In addition, the Proposal would amend the Form 144 filing deadline to coincide with the Form 4 filing deadline. Specifically, the Commission is proposing 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 execution 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.

## **II. Discussion**

As noted, SIFMA broker-dealer members are fully supportive of the Commission's goal in the Proposal to move away from paper Form 144 filings. For firms, one of the lessons learned from the COVID pandemic is the continuing need to shift to electronic filings under the federal securities laws whenever possible. Former SEC Chair Jay Clayton similarly noted in connection with the issuance of the Proposal that "the proposed shift to electronic filing of Form 144 provides a necessary update to reflect today's markets, particularly given the benefits – and the feasibility – of electronic filing our experience over the past nine months has demonstrated."<sup>4</sup> In this regard, we greatly appreciate the transition to the Form 144 email submission process that the Commission staff has allowed since the onset of the COVID pandemic. This process has worked well for broker-dealers, though we recognize that it may be placing a burden on the SEC staff. It is in the spirit of fostering more efficient electronic filings of Form 144 that we offer below the alternative Form 144 filing approach in addition to the one included by the Commission in the Proposal.

In proposing the electronic filing approach included in the Proposal, the Commission may not have been fully apprised about the role that broker-dealers play in submitting Form 144 filings. Brokerage firms frequently have as clients corporate executives and other affiliates that are required to file Form 144s. Very often, these clients do not handle regulatory filings, and the firms file Form 144s for them as a client service offering. While the obligation to file a Form

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<sup>4</sup> See (<https://www.sec.gov/news/press-release/2020-336>).

144 ultimately is on the affiliate, the experience of our member firms is that affiliates subject to Form 144 filing obligations who are clients of brokerage firms have opted to allow the firms to handle these filings for them.

This allocation to firms makes sense from a practical perspective as well as a compliance perspective. In this regard, corporate executives and other affiliates subject to Rule 144 filing obligations typically have little to no experience in filling out and filing Form 144s. Brokerage firms, on the other hand, have significant experience and developed processes to file the forms. These processes are designed to ensure that the forms are completed accurately and on-time.<sup>5</sup> Brokerage firms also have sophisticated legal and compliance departments who counsel other departments in the firms and can address questions that may arise in connection with filing the forms. Moreover, it is very often the case that the firms submitting the forms on behalf of clients also will be conducting the sales pursuant to Rule 144, and thus can ensure that the fields on the form, such as the aggregate market value of the sales, are completed accurately. Furthermore, from an SEC perspective, having broker-dealers handle Form 144 filings on behalf of clients has the added benefit of promoting compliance with Rule 144 and the Form 144 filing obligations by ensuring that the sales are conducted pursuant to the conditions of the rule and the forms are completed consistently and accurately and submitted on-time.

By way of background, some brokerage firms providing Form 144 filing services to clients operate a centralized process for filing the forms on behalf of clients. They use a centralized group at the firm to populate the forms and mail them to the SEC and the listing exchange, employing a batch mailing process in which the forms to be submitted on a day are printed and mailed in bulk to the SEC. Other firms providing this service operate a more decentralized process for filing Form 144s in which the firms allow branches and financial advisers at those branches to print and mail filings after a centralized review and approval of the filings.

If adopted, the Proposal would mandate that separate Form 144s be filed electronically through the EDGAR system each time one is required. In practice, this would mean that, for a corporate executive subject to Rule 144 filing obligations who already has EDGAR access credentials, the executive or an agent would need to log-in to EDGAR using those credentials each time a Form 144 filing is required. For a corporate executive or other affiliate subject to Rule 144 filing obligations who does not have EDGAR access credentials, the affiliate would first need to apply for and receive EDGAR access credentials prior to filing Form 144s. Once

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<sup>5</sup> Managing the submission of clients' Form 144s is not a ministerial process, as some of the questions asked on the form require inquiry or research. A broker-dealer employee must inquire about the acquisition date of the securities, how they were acquired, and how they were paid for. The form also requires the filer to compile information about securities sold within the past three months (and some of those transactions could be taking place elsewhere). Accordingly, making these filings is more than just a mechanical task.

those credentials are received, the affiliate or an agent also would need to log-in to EDGAR using those credentials each time a Form 144 is required.

While this process may make sense if the affiliate is the one filing the Form 144, it becomes problematic in situations in which brokerage firms are submitting the filings on behalf of clients. As noted, brokerage firms submitted 20,864 out of the approximately 33,375 Form 144 filings with the SEC last year. In addition, the brokerage firm submitting the most Form 144 filings last year according to the Washington Service Bureau submitted 9,370 out of those 20,864 Form 144 filings. This is a significant number of filings to process for a firm, particularly if they occur at the same time due to the overlapping trading windows for many public companies, and would be very difficult to accomplish in a timely manner under the approach in the Proposal.

In this regard, brokerage firms will have significant challenges in adapting to the new filing model under the Proposal. For instance, it will require firms to log-in and log-out using a Form 144 filer's EDGAR credentials each time a filing is required, which will be extremely time-consuming and labor-intensive particularly in situations in which many filings are being submitted at the same time. It also will require firms to develop and maintain processes to collect, securely store, and properly update all of the EDGAR access credentials for each of the Form 144 filing clients for whom they provide these filing services.<sup>6</sup> Developing these new processes will be extremely challenging for all firms, but particularly so for those that currently follow a more decentralized filing process.

Given these challenges, brokerage firms may make the decision to cease providing Form 144 filing services for clients. Firms may decide that the costs and burdens associated with logging into EDGAR each time a filing is required and maintaining and updating EDGAR access credentials for each client are too great. The Commission's Proposal thus may have the unintended effect of shifting Form 144 filings away from brokerage firms to the affiliates themselves. Issuers may be willing to file Forms 144 for affiliates with whom they have relationships (e.g., current officers and directors), but affiliates who do not have such relationships, such as officers and directors who sell under Rule 144 within three months of their retirement, would be forced to comply with the filing obligations on their own. Such an outcome may in turn have negative downstream effects on compliance with Rule 144 and Form 144 filings obligations because it would shift the compliance functions away from brokerage firms, which as noted are well-equipped to handle such functions, to the Form 144 filers and/or their respective issuers.

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<sup>6</sup> In addition, both the Stored Communications Act and the Computer Fraud and Abuse Act raise concerns for an agent logging in to a computer system on behalf of a principal; it might be necessary for the EDGAR system to authorize log-ins by agents under its terms of use, or for agents to seek authorization under state laws such as the Revised Uniform Fiduciary Access to Digital Assets Act.

We therefore recommend that the Commission adopt an alternative filing approach in addition to the one included in the Proposal that would allow broker-dealers that provide Form 144 filing services to clients to bulk file Form 144s on a daily or every other business day basis (or whatever time period the Commission considers to be appropriate). The alternative approach we are recommending contemplates that such a broker-dealer would access EDGAR each day Form 144 filings are required to be submitted for clients and then submit in bulk all of the Form 144 filings that are required to be submitted that day. As part of this alternative approach, the Commission could require broker-dealers to include certain information that they already have on file, such as a Central Index Key (CIK) for a Form 144 filer that the firm may have collected, that would allow the Commission to match through its systems a Form 144 filing submitted on behalf of a client with other Form 144 filings submitted for that client. We understand that EDGAR already has functionality to allow certain service providers to bulk file forms required under the federal securities laws. We therefore request that this functionality be employed to allow broker-dealers to bulk file Form 144s under the alternative approach we are recommending.

Overall, we believe our alternative approach is consistent with the protection of investors and the public interest because it would provide a mechanism for brokerage firms to continue to provide Form 144 filing services for clients, thus promoting compliance with Rule 144 and Form 144 filing obligations. We similarly believe that our alternative approach would foster the electronic filing of Form 144s consistent with the Commission's goal in issuing the Proposal.

To the extent the Commission only adopts the Form 144 filing approach included in the Proposal, we are further concerned that its potential effect of shifting Form 144 filings away from broker-dealers, coupled with the plan to move the Form 144 filing deadline such that it coincides with the Form 4 filing deadline, could have the effect of potentially delaying Rule 144 sales and imposing additional costs on broker-dealers effecting such sales. In this regard, broker-dealers effecting Rule 144 sales for clients could be in the position of having to track down Form 144s from clients so that they are able to demonstrate proper reliance on Rule 144. Absent a Commission statement to the effect that broker-dealers could reasonably rely on statements from Form 144 filers that they filed the forms, this process of tracking down and obtaining the Form 144s from clients may have the effect of broker-dealers delaying Form 144 sales until they have the forms in hand. Furthermore, with regard to Rule 144 sales involving restricted shares with legends, broker-dealers often borrow shares without legends to make delivery on T+2 to meet their settlement obligations under Commission rules pending the transfer agent's removal of the legends on the affiliate's shares and delivery to the broker-dealer. Under the Proposal, a Form 144 filer's election to file the form on T+2 could result in a delay of the delivery of clean shares to the broker-dealer for numerous reasons (e.g., company counsel may be unwilling to issue an opinion on transferability of the shares under Rule 144 until the Form 144 has been filed), which

could obligate broker-dealers to borrow shares for a longer period of time than they otherwise would have if the form was filed on the trade date, thus causing them to incur additional borrowing costs. These additional considerations further indicate that the Commission should adopt the alternative approach we suggest above.

In addition, in connection with proposing to move the Form 144 filing date such that it coincides with the Form 4 filing date, the Commission is proposing to amend the Form 144 instructions to require reporting on not just prospective sales, but also completed sales up to the time of filing. Brokerage firms note that gathering information on completed sales, particularly on the day that the form is due, could be challenging in scenarios where the desk responsible for Form 144 sales is not also the group responsible for submitting the Form 144 filings, which is frequently the case. Furthermore, as the information on completed sales already is required on Form 4, it is only additive in the Form 144 context for those Form 144 filers who are not Form 4 filers. In this context, such Form 144 filers are likely not going to be working with company counsel to prepare the filings, thus creating a greater risk of non-compliance as they may not have processes or resources in place to ensure at end of trading day they receive completed sales information that would allow them to accurately fill in the form. We therefore recommend that the Commission not adopt the proposed approach of including completed sales in the Form 144 filing and instead retain the current approach in which the reporting is only on prospective sales.

While we strongly urge the Commission to include our alternative approach discussed above in the final rule, even if it is not included, brokerage firms would need more time than the proposed six-month transition period contemplated in the Proposal to move to a new filing approach. If the Commission only adopts the filing approach in the Proposal, to the extent a firm decides to continue to provide Rule 144 filing services to its clients, it will need at least a 12-month period to transition to the new filing model. This period would be necessary to allow the firm to collect EDGAR filing credentials from each of its Form 144 filing clients and to establish adequate new processes governing the filing of the forms and the maintenance of EDGAR credentials to ensure compliance with the new electronic filing requirements. If the Commission decides to include our alternative approach in the final rule, firms would still need at least 12-months to complete a technology build that would allow them to have new systems in place to be able to bulk file Form 144s on behalf of clients. Despite the cost and resources associated with completing this technology build, firms prefer the alternative approach to the filing approach included in the Proposal.

Finally, regardless of whether the Commission decides to include our alternative approach in the final rule, we further request a carve-out from the new filing requirements for Rule 10b5-1 plans that were executed before the final rule's effective date but are still in effect after the effective date. Because Rule 10b5-1 plans can have terms of 12 months or more, it is possible that there will be plans where a broker-dealer assumes the obligation of filing the Form

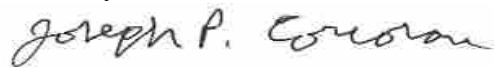
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144s on behalf of sellers pursuant to the rules in place at time the plan was executed. For plans established prior to the final rule's effective date, we propose that Form 144 filers be grandfathered and allowed to continue file forms under the Form 144 filing requirements existing at the time they entered into the plans, which would include the ability to submit paper filings and to email filings to the Commission assuming that the Commission's emergency relief has not been rescinded prior to the effective date of the new rule.

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SIFMA greatly appreciates the Commission's consideration of our comments above and would be pleased to discuss them in greater detail. As noted, we believe that including the alternative approach in the final rule will further the Commission's goal of promoting electronic filing of Form 144s and continue to foster compliance with Rule 144 and the Form 144 filing obligations. If you have any questions or need any additional information, please contact me at 202-962-7383 or [jcorcoran@sifma.org](mailto:jcorcoran@sifma.org).

Sincerely,



Joseph P. Corcoran  
Managing Director & Associate General Counsel  
SIFMA