

January 8, 2021

VIA ELECTRONIC MAIL

John Fieldsend
Sean Harrison
Office of Rulemaking
Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Re: File No. S7-24-20

Dear Messrs. Fieldsend and Harrison:

We appreciate the opportunity to comment on the Securities and Exchange Commission's proposed amendment to Rule 144. *See Rule 144 Holding Period and Form 144 Filings*, Securities Act Release No. 10,911, Exchange Act Release No. 90,773, 2020 WL 7701214 (Dec. 22, 2020). We write, however, to raise our concern that the Commission has not yet complied with its obligations under the Administrative Procedure Act, seriously undermining the public's ability to participate in this important rulemaking, and to respectfully urge immediate corrective action.

As you know, the APA requires that an agency give notice of a proposed rule by setting forth "either the terms or substance of the proposed rule or a description of the subjects and issues involved," 5 U.S.C. § 553(b), and "give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments," *id.* § 553(c). "Integral" to the public's right to participate in this process "is the agency's duty 'to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules.'" *Solite Corp. v. EPA*, 952 F.2d 473, 484 (D.C. Cir. 1991) (quoting *Conn. Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 530 (D.C. Cir. 1981)). A failure to reveal the "'studies and data' upon which the agency relies," *Chamber of Commerce v. SEC*, 443 F.3d 890, 899 (D.C. Cir. 2006), is a "serious procedural error" imperiling the entire proceeding, *Solite Corp.*, 952 F.2d at 484.

The Commission is poised to make just such a serious procedural error here. The agency acknowledges that the "economic baseline for the proposed amendment includes unlisted issuers that issue, or may seek to issue, market-adjustable securities." 2020 WL 7701214, at *18. And it offers various statistical analyses of "106 [such] . . . issuers" based

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on a review of their “207 disclosures” (Form 8-Ks) filed in 2019 “regarding convertible securities issued that included a floating conversion rate feature.” *Id.*; *see also id.* at *18 n.79. But the Commission fails to disclose the underlying “data” on which it relied. *Chamber of Commerce*, 443 F.3d at 899. The public has no way of knowing which “106” issuers the agency identified and which “207 disclosures” it reviewed. 2020 WL 7701214, at *18. Without that information, the public cannot check the Commission’s work, or put forth its own arguments concerning the issuers and disclosures forming the basis of the agency’s analysis of the relevant “economic baseline.” *Id.*

We therefore respectfully urge you to immediately post to the public comment file the data on which the Commission relied—specifically, information sufficient to identify the 106 issuers and 207 disclosures cited in the proposal. *See* 2020 WL 7701214, at *1 (acknowledging that “[s]tudies, memoranda, or other substantive items may be added . . . to the comment file”).

Sincerely,

/s Helgi C. Walker
/s Barry Goldsmith

Helgi C. Walker
Barry Goldsmith

cc: Shelley Parratt, Acting Director, Division of Corporation Finance
Comment File (No. S7-24-20)