Michael A. Adelstein

Kelley Drye & Warren LLP
101 Park Avenue
New York, NY 10178

Tel: (212) 808-7540
Fax: (212) 808-7897

February 12, 2021

By Email

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

Re: File Number S7-24-20

Gentlepersons:

We are submitting this comment letter in response to the request for comments in the proposed rule release (the "**144 Proposed Rule Release**") from the Securities and Exchange Commission (the "**Commission**"), Release Nos. 33-10911; 34-90773; File No. S7-24-20 – Rule 144 Holding Period and Form 144 Filings.

As discussed in the 144 Proposed Rule Release, the Commission is proposing to amend Rule 144 ("**Rule 144**") promulgated under the Securities Act of 1933, as amended (the "**1933 Act**") to revise the holding period determination for securities acquired upon the conversion or exchange of certain market-adjustable securities of issuers that do not have securities listed on a national securities exchange.

As we will explain more fully below and in our responses to the questions from the 144 Proposed Rule Release, we strongly recommend against the adoption of the proposed amendments to Rule 144(d)(3)(ii) (the "**144 Proposed Amendments**"). In an era of pandemics and stay-at-home orders that have shuttered business around the world, with many companies struggling to survive, the last things small businesses need are additional regulations that will have a chilling effect on investors and investments in private placements of public equity and debt. We recognize that the Commission is concerned with the abuses with so called "toxic" securities and we agree that avoiding "death spiral" securities is a worthwhile endeavor. However, we do not believe that the time is ripe for such extraordinary changes to Rule 144, the principles of which investors have been taught and relied upon for decades. Our securities markets need stability and as few changes as possible to keep our country from an extended recession.

Nevertheless, assuming the Commission decides to move forward and address these matters at this time, we still believe there are significant flaws in the analysis of the Commission in the 144 Proposed Amendments and a failure to appreciate both the perspectives of the various types of

issuers, the extensive variety of market-adjustable securities used in the marketplace (of which, a "toxic" market-adjustable security is only one type) and the risks associated therewith.

A. Types of Issuers

As noted in the 144 Proposed Rule Release, the types of issuers that are being targeted with this regulation are primarily public companies that do not have equity listed on a national exchange. These issuers also have limited availability to register the issuance or resale of securities under a registration statement under the 1933 Act. See General Instruction I.B.6 to Form S-3 (the "**Baby Shelf Rules**") and Rule 415 promulgated under the 1933 Act. Furthermore, since issuers that are not listed on a national exchange do not have the benefits from the National Securities Market Improvements Act of 1996, these offerings are also subject to state blue sky regulations, including, among other things, blue sky filing obligations, regulatory processes and limitations. As these issuers often also have a small public float, issuing a meaningful amount of securities under a registration statement may not be a reasonable option for them and a continuous resale offering of shares underlying a convertible security may not be permissible under applicable 1933 Act rules. As a result of these rules and regulations, for many small issuers, private placements of public equity and debt are their only potential sources of meaningful capital. In situations where investors are not willing to make large investments in common equity or warrants, issuers consider the various types of market-adjustable securities. See Section B below for our discussion of the common types of market-adjustable securities.

When analyzing the effect of these rules on issuers, we believe the Commission needs to ask the following questions: First, what are the financial needs of the particular issuer and, second, why is such issuer considering a market-adjustable security in lieu of other financial options. In our experience, there are three categories of issuers that primarily look to market-adjustable securities - the young, the desperate and the serial users.

The typical young issuer, perhaps after going public too early or having a capital intensive business model, needs more capital to grow than it can reasonably obtain from registered offerings in the public markets. Young issuers don't go into the marketplace looking to issue market-adjustable securities. Young issuers choose market-adjustable securities because they are the only available source of financing (whether due to the Baby Shelf Rules, their small public float, low trading volume or otherwise). A market-adjustable security provides needed capital to grow a business at the beginning of the life cycle of these small issuers. As such, if an issuer properly uses the capital obtained in these offerings, they grow out of the need for market-adjustable securities. Over time, they are able to more regularly obtain moderately sized fixed price offerings or, once the Baby Shelf Rules no longer apply, sizable underwritten and registered direct offerings.

The desperate issuer, on the other hand, is trying to stay listed on a national exchange or, at worst, is simply trying to keep the lights on. For the issuers that are on a national exchange, a market-

adjustable security (in particular, amorts (as defined below) and resets (as defined below)) may bridge the gap to help them stabilize their business during troubling periods in their business plan and allow them to move forward with less dilutive securities offerings in the future. If the 144 Proposed Amendments are adopted, these issuers would face an increased risk of delisting and potentially losing Rule 144 availability, which would lead to an increased cost of capital or potential unavailability of any source of financing for such issuers. At the same time, a similar analysis applies to issuers that are in financial hardship. As it is commonly phrased: "dilution is better than extinction". Any stockholder being given the option of losing his or her entire investment and being severely diluted will always take dilution. A market-adjustable security can save entire businesses and thousands of jobs, as well as some or all of the value of investments already made into such businesses. If the Commission takes away the availability of Rule 144 to an offering and an investor does not invest due to the risk of delisting or bankruptcy, the desperate issuer would have no options and would likely end up bankrupt.

A serial issuer is an issuer that enters into deals for toxic market-adjustable securities (often floaters (as defined below)) for "quick and easy money" on a routine basis. We would categorize issuers that do more than one market-adjustable security in a six month period as a serial issuer. These serial "toxic" issuances are often followed by reverse stock splits, which allow further toxic issuances. If these issuers sought stockholder approval of these offerings, they would likely fail. We believe this category of issuer is the primary reason the Commission proposed the 144 Proposed Amendments.

Any amendment to Rule 144 to deal with the problems of "toxic" variable priced transactions should be flexible enough to differentiate between the needs of issuers. As a society we want to promote investments in young issuers and give a helping hand to issuers that face problems (COVID or otherwise) in this difficult environment. The current 144 Proposed Amendments are rigid and unable to differentiate between situations when market-adjustable securities are being abused and when they are the best or only option for an issuer. By making Rule 144 unavailable to investors, the Commission is simply closing off access to capital to all issuers of these types without providing any reasonable alternative.

B. Types of Market-Adjustable Securities

The 144 Proposed Amendments define a market-adjustable security as a security which:

> contains terms, such as conversion rate 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. See 144 Proposed Rule Release at 14.

We would interpret this definition to include various different types of market-adjustable securities: (i) floaters, (ii) amorts, (iii) resets, (iv) forced convertibles and (iv) default convertibles. It is

useful to note that some market-adjustable securities have features of one or more of these types. We believe that one of the largest flaws of the 144 Proposed Amendments is that they don't differentiate between the different types of market-adjustable securities, each of which have profoundly different effects on an issuer and its capitalization. For the purpose of this letter, we have not considered issues with respect to full ratchet, weighted-average or other similar antidilution adjustments as we are interpreting "issuer-initiated changes in its capitalization" to include such subsequent issuances, which only occur as a result of actions initiated by an issuer and, as such, would not be the subject of the 144 Proposed Amendments.

i. The Floater

A "floater" is the classic type of market-adjustable security in which the conversion, exercise or exchange prices "floats" at the market price or a discount to the market price of the common equity of an issuer. The holder can convert, exercise or exchange the security at its option at any time and sell the underlying security into the marketplace. This type of security, when abused, can become a "toxic" or "death spiral" security.

ii. The Amorts

An "amort" or "amortizing" security, is a security that has a fixed conversion price, but provides the issuer with the option to elect each month (or other amortization period) whether to pay, in whole or in part, in cash or in stock at a discount to market. In these types of market-adjustable securities, the holder has no control as to whether each amortization payment will be paid in stock or in cash. In these situations, the issuer has control and the ability to judge based on inside information when to trigger these rights to result in the least amount of dilution or otherwise act in the best interest of the existing stockholders. Many issuers use amorts as part of an overall financing plan, with subsequent refinancing from the proceeds of public offerings of equity or debt. Since an amort deal can be consummated in days or weeks and a registered offering may take months to be consummated, quick consummation of amort transactions allows issuers the ability to meet capital needs without sacrificing control over potential dilution and provides the issuer a bridge to future registered offerings.

iii. Reset Convertibles

A security with a "reset" is a fairly limited market-adjustable security in which the conversion, exercise or exchange prices only resets to the market price or a discount to the market price of the common stock of an issuer on a specific reset date (which could be based upon the passage of time or the occurrence of an event that may or may not ever occur). The existence of a reset in a security provides an incentive for a holder to hold the security until at least the reset date occurs, rather than selling at an earlier date. Resets also provide protections against the occurrence of events the risk of which would otherwise kill a potential offering. Rather than an investor deciding not to invest from such

concerns, the investor would only receive such reset if such event transpires. Resets are a valuable tool in the structuring of securities and allow more deals to be consummated at fixed prices (subject only to such reset upon the occurrence of such specified events).

iv. The Forced Convertible

A "forced convertible" is any security that gives an issuer the right to force the conversion, exercise or exchange of a security into the underlying security at a price determined at the time of the conversion, exercise or exchange. Forced convertibles are particularly useful as a tool to provide more flexibility to an issuer. An issuer that is subject to covenant restrictions from a security (such as restrictions on the incurrence of indebtedness or liens) can eliminate those restrictions by forcing the conversion of the security. As with amorts, the issuer has control and the ability to judge based on inside information when to trigger these rights to result in the least amount of dilution or otherwise act in the best interest of the existing stockholders.

v. Default Convertibles

A "default convertible" is a type of market-adjustable security in which the conversion, exercise or exchange price "floats" at the market price or a discount to the market price of the common stock of an issuer only upon the occurrence of certain defaults or events of default. The existence of these default conversion rights encourages an investor to refrain from accelerating or otherwise demanding redemption in cash of the security for such default, which could result in the bankruptcy of the issuer. If an investor was prohibited from having default variable price conversion rights, the investor would need to sue to obtain a monetary recovery, accelerate against assets of the issuer, seek an involuntary bankruptcy and/or commence other similar alternatives. Any such lawsuit, acceleration, bankruptcy and/or other similar alternative would likely decimate the value of the stock of the issuer more than any loss from dilution from variable rate issuances.

C. Criticism of the Premises of the 144 Proposed Amendments

The Commission stated that:

> The discounted conversion or exchange features in market-adjustable securities typically provide holders with protection against investment losses that would occur due to declines in the market value of the underlying securities prior to conversion or exchange. As a result, these holders are not exposed to the market risk associated with holding the underlying security prior to conversion or exchange; they are only exposed to that market risk during the time that they hold the underlying security after the conversion or exchange. In these circumstances, holders that convert and promptly resell the underlying security in order to secure a profit on the sale based on the built-in discount

> have not assumed the economic risks of investment of the underlying security. Therefore, under Rule 144's current formulation, holders are able to purchase market-adjustable securities with a view to distribution while still satisfying the holding period requirements and tacking period provisions of Rule 144. See 144 Proposed Rule Release at 12.

The root premise of the Commission is that having any feature with a market price that varies at any time, in whole or in part, insulates a holder from market risk, is a distribution that makes such holder an underwriter and is inherently damaging to stockholders and the market. We would like to discuss the 144 Proposed Amendments by looking at (i) risks from volume, price and control of timing of conversions, (ii) acting with a view to a distribution, (iii) business and investment risks and (iv) exchange policies, in each case, with respect to the various types of market-adjustable securities described in Section B above.

i. Risk from Volume, Price and Control of Timing of Conversions

The Commission's statement that having a variable price will guarantee some amount of profit relies on the existence of sufficient market volume in a stock and pricing provisions that guarantee profitability, neither of which necessarily exist with respect to many market-adjustable securities.

A floating price only benefits a holder of a security if there is a market with enough volume to permit the sale of such securities. For example, if a $5 million convertible note was issued to an issuer with a stock trading at $0.10 with a volume of 100,000 shares per day, it would take years before a holder of the security would be able to exit in the market. In situations where there isn't significant volume in a stock (as is very common for securities that are not listed on a national securities exchange), the holder of the security will always have significant risk of the loss of the investment. Meanwhile, many investments in market-adjustable securities are made by holders of securities that never expect or intend to convert or exchange their securities absent an event or significant change in the trading of the securities of the issuer. The most common types of these securities are amorts and forced convertibles, each of which typically have minimum volume conditions. If the volume conditions are never met or the issuer never elects to require the conversion or exchange, the securities will not have any variable price being used for such issuances.

The timing of pricing is also a factor as many variable prices in these securities are based upon an average of prices over a period or several days in a period. Consequently, there is no guarantee as of any moment of determination that the applicable variable price will be below the market price as of the date of a conversion or exchange. While it is possible in some instruments for some profit to be "locked in," variable price definitions, frankly, "vary" and do not necessarily result in such an outcome. At the same time, as the control of the timing of availability or conversion is often out of the control of the investor (using the nomenclature of this letter, in all cases but the "floater"), there is significant risk to an investor as to whether they will ever have a variable price available to them, whether they will

convert at a fixed price, whether they will be repaid in cash or whether they will lose their entire investment. See also Subsection (iii) below.

ii. Acting with a View to a Distribution

The Commission has stated that:

> initial purchasers or subsequent holders have an incentive to purchase the market-adjustable securities with a view to distribution of the underlying securities following conversion to capture the difference between the built-in discount and the market value of the underlying securities. See 144 Proposed Rule Release at 11-12.

In this statement, the Commission is assuming that every holder of a market-adjustable security will immediately sell or "dump" the stock into the marketplace to obtain the applicable built-in discount and that these deals are structured to encourage such "dumping." In our observations of the marketplace, this statement is only true in the rarest of circumstances. The typical sophisticated investor is a trader that looks at the market every day and evaluates on a minute-by-minute basis whether to trade or not trade in the stock of an issuer. These investors are often large net worth individuals, hedge funds or investment funds that routinely take large positions in stock, both with market-adjustable securities, short sales and/or derivatives to create a comprehensive trading plan to maximize the potential return on their investment. To put it bluntly, the "built-in discount" that the Commission is focusing on is, frankly, insufficient for most investors to even consider investing into an issuer in the market the Commission is addressing with the 144 Proposed Amendments. It is a minimum return that would be obtained only if there is no other option or, in other words, it is merely the cost of capital for that investor. It would be against the financial interests of most investors to even consider just immediately selling into the marketplace to obtain such built-in discount. The more sophisticated and educated investor waits for good news and/or market changes and trades strategically, often without regard to these discounts. The potential for better returns (far in excess of the "built-in discount") are substantially higher in situations where an investor trades over time strategically. We do not believe that these types of investors would ever be considered by a court to be "engaged in a distribution" or an "underwriter" and many of these investors have been routinely selling securities over months, if not years, after the existing Rule 144 six-month (or 12-month) holding period.

Respected sophisticated investors often receive deals primarily because they have a reputation for trading strategically and with discipline. These investors may purchase market-adjustable securities, but they are not looking to "dump" the stock. They act strategically, as described in the prior paragraph, and maximize their investment while minimizing harm to the stock of the issuer. Capital intensive businesses may raise money in many different ways and multiple times in any given calendar year. If an investor takes too big of a profit on one deal, it may not be invited to participate in future investments (whether public, private, fixed, variable or otherwise). Acting in the manner that the

Commission is describing is essentially an investor "killing the golden goose." Such investor may make a profit with one issuer, but it will lose the next opportunity with such issuer and the reputational effect may reduce its ability to obtain such deals elsewhere in the future. In our experience, the sophisticated investor on a market-adjustable security deal in January may very well end up the lead investor on a common stock and warrant fixed price registered direct offering in December. As drafted, the 144 Proposed Rule Amendments are incapable of differentiating between these "good actors" and the "bad actors" that are abusing the market with "toxic" instruments. We believe, rather than changing Rule 144, the Commission should continue its enforcement actions against these "bad actors" and allow the other investors to continue to support our economy and the securities marketplace.

iii. Business and Investment Risk

The Commission also stated in the 144 Proposed Rule Release that due to the "built-in discount [investors] have not assumed the economic risks of investment of the underlying security" when investing in market-adjustable securities. We interpret the Commission's statement that they believe that the mere existence of a discount of any type results in a risk free investment by an investor. We firmly disagree with this statement for the following reasons:

Time Value of Money Risks. On the most basic level, the Commission's statement ignores the concepts of "time value of money" and "present value." Any amount of money at the time of an initial investment is worth significantly more than six months after the investment (the current Rule 144 holding period for non-affiliates of reporting issuers). For example, the present value of $5 million after six months (assuming monthly compounding interest and a 7% interest rate – resulting in a present value interest factor of 0.965704) is approximately $4.8 million. In other words, the mere passage of time devalues that worth of the cash used in an investment. Assuming the number of shares to be issued in a deal is based upon a fixed principal of a convertible note or fixed stated value of a convertible preferred stock divided by the applicable market price (without any discount), an investor in a transaction after six months will have lost money that it would have been able to obtain in comparable non-stock investments if it receives 100% of its principal or stated value from the sale of the securities in such transaction. The investor needs some discount to at least "break-even." The longer the Commission sets the Rule 144 period, the larger the discount is necessary to convince an investor to buy securities in an issuer.

Inadequate Volume Risks. Even with a "floater" with a significant discount to the market price, investments in issuers are hardly risk-free. Smaller issuers are notoriously volatile both in price and volume of stock trading. If there isn't a sufficient volume of the stock to trade, no amount of discount will be meaningful. If a discount can't be monetized due to poor volume, it can't reduce risks in an investment. Furthermore, if it would take months or years for a holder to sell the shares underlying a security, such holder shouldn't be presumed to have been engaged in a distribution and it is difficult to imagine any court would consider such holder to be an underwriter.

Penny Stock Risks. As the volume of stock sold increases, basic rules of supply and demand state that the price of the stock should eventually go down. From a practical standpoint, however, many investors have problems finding any broker willing to trade in penny and sub-penny stocks. Unless an issuer has sufficient votes by its stockholders to have a reverse stock split, the stock of these types of issuers will likely only trade in limited quantities (if at all) with significant transaction costs and/or brokerage fees. Consequently, the mere existence of a market-priced security with a discount has no real impact on the risk of such an investment to the investor.

DTC Chill Risks. Any large volume of issuances by an issuer further runs the risk of a "chill" or "freeze" by The Depository Trust Company ("**DTC**"). A "DTC chill or freeze" restricts DTC's services, including limiting the ability to receive tradable shares of common stock upon conversion of market-adjustable securities. A DTC chill or freeze may be imposed for a few days or an extended period of time depending on the nature of the problem and whether the issuer or transfer agent is able to rectify it. In the case of large volumes of issuances as a result of a "toxic" market-adjustable security, DTC may, among other things, question the legal or regulatory exemptions related to the issuances and often will require evidence supporting the legality of those issuances and each other issuance during the relevant measuring period. In the case of reset convertibles and amort convertibles, the pricing period may elapse and months may pass before the DTC chill or freeze is removed. In these cases, the mere fact that an adjustment was available is meaningless as it wasn't used close enough to pricing to lock in any profit or return.

Deregistering, "Going Dark" and Bankruptcy Risks. Perhaps the most fundamental risks of an issuer are business risks that result in such issuer's stock ceasing to trade or having any meaningful value. With the COVID pandemic, we have seen many issuers go bankrupt based upon the changes in customer needs and desires during this era. While some issuers have been able to adjust and change their business plans, others saw the demand for their products and business dry up practically overnight. If an issuer has survived six months in this market, that is an accomplishment and a "risk averted" from the perspective of investors. No recovery would ever have been made, regardless of the existence of a market-adjustable pricing, for an issuer that has gone bankrupt. Investors also fear issuers will "go dark" or terminate their registration under the Securities Exchange Act of 1934, as amended. Some issuers weigh the cost of being a public issuer verses its immediate capital needs and decide to cease filings with the Commission. In such cases, Rule 144 is unavailable and the potential to monetize any discount in the conversion price of such securities ceases to exist.

iv. Exchange Policies

In the 144 Proposed Rule Release, the Commission is excluding issuers that are listed on a "national securities exchange registered pursuant to Section 6 of the Exchange Act (15 U.S.C. 78f)" For ease of discussion, we will focus on the rules and policies of the Nasdaq National Market in this paragraph (most other national exchanges have similar rules and provisions).

Under Nasdaq Rule 5635(d), which we refer to herein as the "**20 Percent Rule**", if a domestic issuer desires to issue securities below the lower of a five trading day average price and the prior trading day price of an issuer's listed securities (such lower price, the "**Market Price")**, the issuer may only issue 20% of such listed securities in any six month period unless it has obtained the approval of its stockholders to such issuance. An issuer can issue an unlimited number of listed securities at prices at or above the Market Price.

For distressed issuers that need to access capital markets immediately or when the viability of the business is danger, Nasdaq Rule 5635(f)(1) further provides that if (x) the delay in securing shareholder approval would "seriously jeopardize the financial viability" of the issuer; and (y) reliance on the exception is expressly approved by the audit committee or comparable body of the board of directors of the issuer, the issuance can be permitted without regard to the limitations of the 20 Percent Rule.

We believe that the 144 Proposed Amendments are particularly unfair to non-listed issuers by prohibiting the availability of Rule 144 in market-adjustable securities that, if done on a national exchange, would be permitted without restriction either at the 20% level under the 20 Percent Rule or at any time with stockholder approval. At-market issuances under market-adjustable securities should not result in the unavailability of Rule 144. We are also troubled that exchange financial viability exceptions for distressed issuers protects listed companies, but there is no equivalent protection of distressed non-listed companies under the 144 Proposed Amendments.

D. Conclusions

As stated throughout this letter, we believe that the 144 Proposed Amendments are overbroad and demonize all market-adjustable transactions. We recognize that the Commission is familiar with investors that purchase "toxic" market-adjustable securities from serial issuers and "dump" the stock as a business plan (the Commission has prosecuted several of them over the past few years for these violations). We simply do not believe that all market-adjustable securities are "bad" and subject to abuse. In any event, legislating to prevent the abuses by a few "bad actors" in this market should not result in the elimination of the benefits provided by these structures to the vast majority of issuers and investors that properly use Rule 144 and market-adjustable securities.

Again, one of the principal flaws of the 144 Proposed Amendments is that they necessarily assume that anyone that receives any discount is just looking to monetize such discount and immediately sell the stock. It ignores the time value of money, the available volume of such securities, the type of market-adjustable security, the type of investor, whether the discount is even available at such time or applicable to such issuance or whether such conversion was forced by an issuer or voluntary. Even if a share of common stock was issued upon conversion of a security at a fixed price, the existence of non-applicable adjustable provisions in the instrument (if a reset has yet to occur in a reset convertible or a

default hasn't occurred in a default convertible) would result in the prohibition of the use of Rule 144 as written in the 144 Proposed Amendments. The proposed rule should at least be revised to reflect that the availability of Rule 144 should be based upon the actual issuance price, not the mere existence of variable provisions in an instrument (which may or may never be triggered).

Meanwhile, there are various types of market-adjustable securities that are not "toxic" in nature (amorts, reset convertibles, forced convertibles and default convertibles) and there are situations, such as with Nasdaq's financial viability exception, that even a floater should be permissible to protect the stability of issuers and preserve some value for existing stockholders. As stated earlier, "dilution is better than extinction" and existing stockholders will lose their entire investment if an issuer ceases to exist. Taking away the protections of the safe harbor of Rule 144 from any security is a draconian action that should only be made for very good reason. Treating all investors purchasing market-adjustable securities as criminals and every market-adjustable security identically will only result in more bankruptcies, less financing being available for issuers and a significant increase in the cost of capital for issuers.

As we stated at the beginning of this letter, we believe that the timing is not yet ripe for these types of changes and we do not recommend the adoption of the 144 Proposed Amendments by the Commission.

E. Alternative Proposal

If the Commission does not accept our recommendation to wait on any such amendments and decides to address toxic market-adjustable securities at this time, we propose the following in lieu of the 144 Proposed Amendments:

§230.144 Persons deemed not to be engaged in a distribution and therefore not underwriters.

* * * *

(d) * * *

(3) * * *

(ii)<u>Conversions and exchanges</u>. 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 such newly acquired securities do not satisfy the requirements of clause (B) of this Section 144(d)(3)(ii); or

(B) either (x) the newly acquired securities were issued at a conversion, exercise or exchange rate or other price that is not based upon and/or varies with the trading prices of or quotations for the newly acquired securities at any time after the date of initial issuance of such related convertible or exchangeable securities of the same issuer; or

(y) the newly acquired securities were acquired from an issuer pursuant to terms that, if such issuer was listed on a national securities exchange registered pursuant to Section 6 of the Exchange Act (15 U.S.C. 78f), would be permitted to be issued in accordance therewith (including, without limitation, after obtaining any requisite stockholder approval, if required for such issuance) without violating the rules and regulations of such national securities exchange as reasonably determined by the board of directors of the issuer.

We believe there are four main benefits to our proposal. First, every issuer is treated equally, whether or not listed on an exchange. Our proposal, in essence, would encode both the 20 Percent Rule and the financial hardship exceptions into Rule 144, as reasonably determined by the board of directors of the issuer. Second, rather than looking at the security itself and whether it contains any market-adjustable provisions, the new proposed rule will evaluate each individual issuance as to whether such issuance relied on such provisions. If a newly acquired security was issued at a fixed conversion price, the mere existence of unused market-adjustable provisions would not preclude the availability of Rule 144. Third, we believe that using the rules and regulations of exchanges, such as the Nasdaq National Market, will provide certainty to the market. Any new rule or regulation can have a chilling effect on investments. On the other hand, there is already considerable available guidance from the Nasdaq National Market and the other exchanges with respect to permissible issuances with market-adjustable provisions in most situations and fact patterns. It would be considerably less traumatic under our proposal to just apply such available guidance to additional issuers rather than adjusting to the SEC's proposed new framework under the 144 Proposed Amendments, which will need to be analyzed, digested and understood by the marketplace with respect to each new situation and fact pattern. Fourth, we believe that this amendment will target the truly "toxic" offerings more effectively without eliminating the availability of market-adjustable provisions that are both useful and necessary to the continued growth and survival of smaller issuers in the market.

F. Responses to Request for Comments:

1. *Should we amend Rule 144(d)(3)(ii) as proposed?*

We do not believe the amendments as proposed should be adopted. Please see our reasoning above.

2. *Should the rule only apply if the issuer is an "unlisted issuer" at the time of conversion or exchange, as proposed? Or should the determination of whether an issuer is unlisted be made at the time the holder buys the market-adjustable security, the time of the resale of any of the underlying equity securities, or some other time? Should the determination be made both at the time of the purchase of the market-adjustable security and at the time of the conversion or exchange, or some other combination of times?*

We believe this determination should only be made at the time of conversion or exchange.

3. *Is the description of market-adjustable securities in proposed Rule 144(d)(3)(ii) sufficient to achieve the purpose of the proposal? If not, how should we modify the description?*

As stated above, the definition of market-adjustable securities is overly broad and covers many categories of securities that are not "toxic" in nature and many are not even voluntary issuances at the direction of the holder of such securities. Furthermore, the mere existence of such a market-adjustable provision in a security does not mean that it is available for any particular issuance. Consequently, our proposal is to evaluate each newly issued security as to whether it was issued pursuant to a variable price, rather than under a generic overly-broad category of market-adjustable securities.

4. *Should we define the securities that would be subject to the proposed rules more narrowly or more broadly? If so, how? We do not intend for adjustments for recapitalizations, stock or cash dividends, or other 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, are there specific additional factors or clarification that we should provide in the rule to indicate when a transaction may be considered a market-adjustable securities transaction?*

Please see discussion of types of market-adjustable securities in Section B above. We believe that when you discussed market-adjustable security in the context of the rule, you were actually aiming to describe floaters and not necessarily all other potential types of market-adjustable securities.

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? Should we amend Rule 144(d)(1)(i) to increase the holding period to one year (or some other period) for these market-adjustable securities in addition to amending Rule 144(d)(3)(ii) as proposed?

We do not believe there is any need to increase the holding periods. If anything, the Commission should consider reducing the holding periods to the Canadian four month period for these types of investments.

6. *Are there alternative approaches that we should consider that would better mitigate the risk of unregistered distributions of securities acquired upon the conversion or exchange of market-adjustable securities?*

Please see our alternative proposal in Section E above.

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? Do an exchange's listing criteria provide sufficient safeguards against the type of transaction that the proposal seeks to address? If not, are there alternatives that we should consider?*

We believe that exchange rules and safeguards are more than sufficient to prevent these abuses. We do not see any reason to expand these amendments to listed issuers.

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?*

We do not see any reason to differentiate between types of listed securities. The potential for abuses and the rules governing them on the exchange are similar enough to prevent the abuses being addressed by the Commission.

9. *Are there any additional amendments or changes to the proposed amendments that we should consider that would help achieve the purposes of the proposal*?

Please see our alternative proposal in section E above.

We would like to thank the Commission for the opportunity to comment on the 144 Proposed Amendments and we look forward to future changes that may further address these matters.

Best regards,

Michael A. Adelstein
Partner
Kelley Drye & Warren LLP