

May 18, 2021

VIA E-MAIL

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Jennifer Riegel  
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Office of the Advocate for Small Business Capital Formation  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

Re: Proposed Rule 144 Amendments (File No. S7-24-20)

Dear all:

Thank for you for taking the time to meet with us to discuss the Small Public Company Coalition and its mission, as well as its members' concerns regarding the proposed Rule 144 amendment, which, by prohibiting "tacking" of the time between the loan and conversion, would have significant adverse effects on the availability of capital to unlisted small public companies.

Among other concerns regarding the proposed amendment, we discussed that the longer required holding period, by increasing the risk to lenders, would likely raise the cost of convertible loan financing to many small public companies, or, even more likely, cut off this "last resort" funding to them entirely. And because women and minority-run small public companies often do not have the same level of access as others to more traditional sources of capital, the harmful impact of the proposed amendment is likely to fall disproportionately on those groups.

Indeed, as explained in your Office's most recent annual report, "minority and women-owned businesses... [have] less access to capital than their peers," as well as "significantly less capital when starting a business compared with new white-owned businesses." Office of the Advocate for Small Business Capital Formation Annual Report for Fiscal Year 2020 ("2020 Report") at 84. The report further explained that "[m]inority-owned businesses continue to face challenges accessing financing and are more likely to be financially constrained," including more likely to use personal funds to finance their businesses, and to be denied credit. *Id.* at 54. In addition, "[w]omen and minority founders in particular often have networks that are less likely to be high net worth, which can create additional barriers to

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entry as an entrepreneur.” *Id.* at 68. And as your Office explained in its 2019 annual report, compared to white entrepreneurs, “[m]inority entrepreneurs report profitability is disproportionately impacted by lack of access to capital.” Office of the Advocate for Small Business Capital Formation Annual Report for Fiscal Year 2019 at 31. The disparate impact of lack of access to capital is compounded by the fact that new entrepreneurs are more likely to be minority than are established business owners. *See* 2020 Report at 52.

In light of these facts, it is no surprise that, of the 65 small public company CEOs and other executives that signed a comment letter opposing the proposed Rule 144 amendment, and/or submitted their own comment in opposition to the proposed rulemaking, at least 18 (almost 30%) were women or minorities based on publicly available information. *See, e.g.*, Comment of 62 Small Public Companies That Rely On Market-Adjustable Convertible Notes. This is approximately **twice** the percentage of women and minorities that are CEOs of Fortune 500 companies. *See* David F. Larcker and Brian Tayan, *Diversity in the C-Suite: The Dismal State of Diversity Among Fortune 100 Senior Executives*, Stanford Closer Look Series (April 1, 2020) (“Diversity efforts at the CEO level have been less successful, with women holding only 7 percent and ethnically diverse executives only 9 percent of CEO positions among Fortune 500 companies.”).<sup>1</sup>

Available data therefore unmistakably indicates that, by potentially eliminating convertible loan financing for small public companies, the proposed Rule 144 amendment will disproportionately impact women and minority-run small public companies. And, as we noted when we met, Chairman Gensler recently expressed a strong interest in using the SEC’s rulemaking powers to *expand* access to capital for women and minorities. The proposed Rule 144 amendment would therefore directly contradict Chairman Gensler’s stated goal.

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<sup>1</sup> As we discussed, we too wish more data on these issues were available. Accordingly, we have twice asked the Commission to post to the rulemaking docket the 106 unlisted reporting issuers the agency identified (*see* 86 Fed. Reg. 5063, 5073 (Jan. 19, 2021)) as having received market-adjustable convertible loans in 2019. *See* Letter from Helgi C. Walker, Partner & Barry Goldsmith, Partner, Gibson, Dunn & Crutcher LLP, to John Fieldsend & Sean Harrison, Office of Rulemaking, Div. of Corp. Fin., SEC (Jan. 8, 2021); Comments of the Small Public Company Coalition on the Proposed Amendment to Rule 144 (March 22, 2021). Although the Commission is obligated to share the “data” analyzed in the rulemaking process, *see Chamber of Commerce v. SEC*, 443 F.3d 890, 899 (D.C. Cir. 2006), it has not posted this issuer data. Critically, this has prevented us (and other commenters) from conducting analyses which we believe would further demonstrate the disproportionate impact the proposed rule would have on women and minority-run small public companies. We would greatly appreciate any help your Office could provide in urging your colleagues to post the data they already have relating to these 106 issuers to the rulemaking docket.

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Now, as our country emerges from the COVID-19 pandemic, would be an especially bad time for the SEC to take steps to limit women and minority-run small public companies' access to capital. As your Office found, "Women- and minority-owned businesses are more likely to be negatively impacted by COVID-19 because of their industry sector, company resources, and scale of business." 2020 Report at 59.

Please feel free to call or email us should you have any questions or wish to discuss further. We look forward to continuing to work with your Office on this and other issues of importance to the Small Public Company Coalition.

Sincerely,

*/s/ Helgi C. Walker*

Helgi C. Walker

*/s/ Barry Goldsmith*

Barry Goldsmith