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[redacted]

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VIA E-MAIL (rule-comments@sec.gov)

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

Re: Rule 144 Holding Period and Form 144 Filings (RIN 3235-AM78)
File No. S7-24-20

Dear Ms. Countryman:

We write on behalf of the Small Public Company Coalition (SPCC) to further address the proposed amendment to Rule 144 to eliminate "tacking" in calculating the holding period for unlisted issuers' market-adjustable convertible securities. *See* Rule 144 Holding Period and Form 144 Filings, 86 Fed. Reg. 5063 (Jan. 19, 2021). Over the last few months, we have had virtual meetings with the Office of the Advocate for Small Business Capital Formation and the Division of Corporation Finance, as well as with a number of the Commissioners. We now seek to supplement our prior comments[1] in light of these discussions and respectfully request that the Commission include this supplemental comment in the record and take it into consideration, consistent with the Commission's usual practice.[2]

As we previously explained, the proposed amendment (if adopted) would have a disastrous effect on capital formation. The Commission itself has repeatedly acknowledged—as recently as a few days ago[3]—that smaller companies turn to market-adjustable convertible

[1] *See* Letter from Helgi C. Walker and Barry Goldsmith (May 19, 2021), *available at* https://www.sec.gov/comments/s7-24-20/s72420-8815743-238023.pdf; Comments of the Small Public Company Coalition (Mar. 22, 2021), *available at* https://www.sec.gov/comments/s7-24-20/s72420-8530449-230302.pdf ("SPCC Comments"); Letter from Helgi C. Walker (Jan. 8, 2021), *available at* https://www.sec.gov/comments/s7-24-20/s72420-8221273-227702.pdf.

[2] *See, e.g.*, Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8, 85 Fed. Reg. 70,240, 70,268 n.312 (Nov. 4, 2020) (considering "comments submitted after a comment period closes but before adoption of a final rule, consistent with the Commission's Informal and Other Procedures").

[3] *See* Complaint ¶ 22, *SEC v. Carebourn Capital, LP*, No. 21-cv-2114 (D. Minn. Sept. 24, 2021) (alleging that the recipients of market-adjustable convertible loans "usually were unable to obtain financing from banks").

notes "as a 'last resort' form of financing," 86 Fed. Reg. at 5074; these companies generally are "unable" to raise capital through other channels, *id.* at 5072. The proposed rule change, however, would likely "eliminate [this] vital source of funding," SPCC Comments 1,[4] "completely stifl[ing]" the "growth prospects" of countless firms, Report of James A. Overdahl, Ph.D., at 7 (Mar. 20, 2021) ("Overdahl Report") (Exhibit A to SPCC Comments).[5] The societal cost—the value of firms that would have grown into "large, listed companies," but, because of the rule change, did not—is astronomical. *Id.*

Recent data collected from SPCC member firms help illustrate the sheer magnitude of this loss.[6] Looking at just a small subset of convertible-note transactions from some of SPCC's members easily reveals more than ***$4 billion*** in current market capitalization that would likely not exist today had an earlier Commission gone down the same misguided path that the present Commission proposes. The public companies listed below all relied on market-adjustable

[4] *See also, e.g.*, Comment of Sec. Transfer Ass'n 2 (Feb. 22, 2021), *available at* https://www.sec.gov/comments/s7-24-20/s72420-8395207-229438.pdf ("[The] amendment may effectively eliminate market-adjustable securities, leaving many microcap issuers without necessary funding . . . ."); Comment of 62 Small Public Companies 2 (Jan. 25, 2021), *available at* https://www.sec.gov/comments/s7-24-20/s72420-8525296-230250.pdf ("By prohibiting tacking of the time between loan and conversion in calculating when the Rule 144 holding period has been satisfied, as the SEC proposes for loans to unlisted issuers, the SEC would significantly increase the risk to convertible lenders of making such loans. . . . Many convertible lenders would likely cease lending entirely . . . .").

[5] *See also, e.g.*, Comment of 62 Small Public Companies 1 ("Without these convertible loans, we absolutely would not have been able to grow our companies."); Comment of Mark L. Kay, CEO, StrikeForce Techs., Inc. (Jan. 27, 2021) ("Without these type of deals we would have not survived and thank God they existed and therefore kept us alive."); Comment of James Donnelly, CEO, CurAegis Techs., Inc. (Feb. 5, 2021) ("Our company will not survive without this type of alternative financing."); Comment of Sri Vanamali, CEO, GEX Mgmt. (Feb. 12, 2021) ("As stated in our prior filings, our ability to continue as a viable business is highly dependent on our access to much needed working capital to fund our growth strategy. Without access to these loans, small reporting companies such as ours will find it extremely difficult to survive, especially in a pandemic fueled recession environment."); Comment of Alex K. Blankenship, President/CEO, AngioSoma, Inc. (Feb. 5, 2021) (without access to market-adjustable convertible loans "we will close the doors and write off the 5 years of investment by many people who have devoted their time and money to [our] success"); Comment of David Lee, CEO, BioSolar, Inc. (Feb. 8, 2021) ("potentially losing this valuable financing tool would mean the death sentence to certain companies"); Comment of William E. Beifuss, Jr., President & CEO, Digital Locations, Inc. (Feb. 10, 201) ("Without these convertible loans we would absolutely not have been able to maintain our business."); Comment of Joseph E. Kurczodyna, CFO-COB, Blackstar Enter. Grp., Inc. (Feb. 3, 2021) ("Our company would not survive without this type of alternative financing.").

[6] *See* Overdahl Report 7 ("The Commission should consider the possibility that the proposed rule change will impose a high cost on developmental-stage firms whose growth prospects would be completely stifled if the proposed rule change is finalized and implemented. By documenting these successful firms, the Commission would then be able to identify the success-story 'babies' that will in the future be tossed out along with the 'bath water' contained in the proposed rule change.").

convertible loans to grow their businesses—and all of those firms have since uplisted to national stock exchange with valuations in the tens, if not hundreds of millions (or even billions), of dollars.

Ticker[7]	Post-Convertible Note Success[8]	Current Market Capitalization (as of Sept. 28, 2021) (in millions)
GROM	Uplist to Nasdaq (June 2021)	$22
OSAT	Uplist to Nasdaq (May 2021)	$33
GMBL	Uplist to Nasdaq (April 2020)	$156
GOED	Uplist to NYSE (May 2021)	$348

[7] For a description of some of the convertible notes, see, for example, Grom Social Enterprises, Inc., Quarterly Report 19–12 (Form 10-Q) (Nov. 23, 2020) (GROM); Orbital Tracking Corp., Annual Report at F-38 (Form 10-K) (Mar. 29, 2019) (OSAT); Esports Entertainment Group, Inc., Annual Report at F-17 (Form 10-K) (Oct. 1, 2021); 1847 Goedeker Inc., Current Report 1 (Form 8-K) (Mar. 25, 2021) (GOED); Worksport, Quarterly Report 10 (Form 10-Q) (Nov. 16, 2020) (WKSP); Greenbox POS, Quarterly Report 15 (Form 10-Q) (May 28, 2020) (GBOX); FuboTV, Prospectus at F-92 to F-93 (Form 424B3) (Feb. 12, 2021) (FUBO).

[8] For relevant press releases, see *Grom Social Enterprises, Inc. Announces Nasdaq Uplisting and Pricing of $10.0 Million Public Offering* (June 16, 2021), https://www.globenewswire.com/en/news-release/2021/06/16/2248580/0/en/Grom-Social-Enterprises-Inc-Announces-Nasdaq-Uplisting-and-Pricing-of-10-0-Million-Public-Offering html (GROM); *Orbstat Corp Announces Pricing of Upsized $14.4 Million Underwritten Public Offering and Uplisting to Nasdaq* (May 28, 2021), https://www.yahoo.com/now/orbsat-corp-announces-pricing-upsized-103000722.html (OSAT); *Esports Entertainment Group Announces Closing of Above Market $8.4 Million Public Offering and Uplisting to Nasdaq* (Apr. 16, 2020), https://www.globenewswire.com/en/news-release/2020/04/16/2017539/0/en/Esports-Entertainment-Group-Announces-Closing-of-Above-Market-8-4-Million-Public-Offering-and-Uplisting-to-Nasdaq html (GMBL); *1847 Goedeker Announces Pricing of $205 Million Public Offering* (May 27, 2021), https://www.businesswire.com/news/home/20210527005936/en/1847-Goedeker-Announces-Pricing-of-205-Million-Public-Offering (GOED); *Worksport Announces Nasdaq Uplisting in Connection with Public Offering* (Aug. 4, 2021), https://www.globenewswire.com/news-release/2021/08/04/2274569/0/en/Worksport-Announces-Nasdaq-Uplisting-in-Connection-with-Public-Offering html (Aug. 4, 2021) (WKSP); *GreenBox POS to Ring Nasdaq Opening Bell on April 9, 2021* (Apr. 5, 2021), https://www.globenewswire.com/en/news-release/2021/04/05/2204394/0/en/GreenBox-POS-to-Ring-Nasdaq-Opening-Bell-on-April-9-2021 html (Apr. 5, 2021) (GBOX); *Sports Streaming Platform FuboTV Prices Upsized IPO at $10 Midpoint* (Oct. 7, 2020), https://www nasdaq.com/articles/sports-streaming-platform-fubotv-prices-upsized-ipo-at-%2410-midpoint-2020-10-08 (FUBO).

WKSP	Uplist to Nasdaq (Aug. 2021)	$73
GBOX	Uplist to Nasdaq (Feb. 2021)	$389
FUBO	Uplist to Nasdaq (Oct. 2020)	$3,415

As the Commission's former Chief Economist put it, these are the exact type of "success-story 'babies' that will in the future be tossed out along with the 'bath water' contained in the proposed rule change." Overdahl Report 7.

It does not need to be this way. The rule the Commission proposes is unnecessary, as we have previously explained. *See* SPCC Comments 16–35. Regardless, the Commission could address its concerns with a number of far less draconian, reasonable alternatives. We outline two here.

1. Disclosure. The SEC "is a disclosure-based agency." Paul. S. Atkins, Comm'r, U.S. SEC, Recent Experience with Corporate Governance in the USA (June 26, 2003), *available at* 2003 WL 21515877, at *5. As Chairman Gensler recently explained, "President Franklin Roosevelt and Congress established a basic bargain" in "response to the Great Depression": "Investors get to decide what risks they wish to take," and companies that are raising money "must make full and fair disclosure." Gary Gensler, *SEC Chair: Chinese Firms Need to Open Their Books*, Wall St. J. (Sept. 13, 2021).[9] "This bargain has been a source of America's economic success for 90 years," *id.*, and underlies virtually all of the Commission's major regulatory initiatives to date.

Enhanced disclosure would alleviate any concerns the Commission might have here. The Commission already conditions Rule 144 on the availability of "[a]dequate current public information" about the borrower, 17 C.F.R. § 230.144(c), including "all required reports under section 13 or 15(d) of the Exchange Act," *id.* § 230.144(c)(1)(i). If there is more information that investors need, the Commission could say what it is and require firms to disclose it in a timely manner. Most borrowers *already* disclose market-adjustable convertible loans "at the time the loans are made." Comment of 62 Small Public Companies 2. The Commission could require these disclosures within specified time periods (whether in a Current Report on Form 8-K or in a periodic Exchange Act Report) to furnish to shareholders and market participants the information the Commission deems material regarding the issuance of market-adjustable convertible securities, such as any conversion discount and risks of dilution.

[9] https://www.wsj.com/articles/china-accounting-standards-shell-company-vie-investment-sarbanes-oxley-sec-gensler-11631563524.

The Commission has already done this with respect to specific market-adjustable convertible note transactions:

> With respect to the number of authorized shares reserved for issuance, we note that your outstanding convertible notes are convertible into common stock based upon a discount to the market price of your common stock at the time of conversion. Therefore, the number of shares into which the notes are convertible varies with the market price of your common stock. So that shareholders may better understand the uncertain and dilutive effect of these notes, please disclose the following:
>
> - The amount of outstanding convertible debt;
> - The range of discounts from the market price that are used to determine the various conversion prices;
> - That the lower the stock price at the time of conversion, the more shares the noteholders will receive upon conversion;
> - Whether or not there is a floor to the conversion price and, if not, that there is no limit on the number of shares you may have to issue upon conversion;
> - A table that shows the number of shares that could be issued upon conversion based upon a reasonable range of market prices that include market prices 25%, 50% and 75% below the most recent actual price; and
> - If different, the number of authorized shares you are required to reserve for conversion of the notes under the note agreements.

Letter from Division of Corporation Finance to Richard Hylen, CEO, Simlatus Corp. 2 (Aug. 1, 2019).[10] The Commission could add the same or substantially similar requirement for market-adjustable convertible securities—"[s]o that shareholders may better understand . . . these notes"—as a condition to Rule 144. *Id.*

2. The Holding Period. We understand from our meetings that the Commission is concerned that market-adjustable convertible note lenders do not face economic risk. Respectfully, that contention is not only incorrect, *see* SPCC Comments 19–21, it cannot be squared with the agency's treatment of other risk-mitigation measures, such as hedging, that the

[10] https://www.sec.gov/Archives/edgar/data/1399306/000000000019011957/filename1.pdf.

Commission itself claims are "designed to shift the economic risk of investment away from the security holder." Revisions to Rules 144 and 145, 72 Fed. Reg. 71,546, 71,551 (Dec. 17, 2007).[11] In any event, if holding greater "economic risk" is really what the Commission wants, 86 Fed. Reg. at 5073, it could extend the holding period from six months to nine months. The record does not support the conclusion that holding a convertible note for ***nine months*** with a company "in the subpopulation of issuers who are unable to issue additional equity or fixed-rate convertibles, such as financially distressed firms, other low- or no-revenue firms, and those approaching bankruptcy," *id.* at 5072, is somehow immune from economic risk. The longer holding period increases a number of risks, including the risk that the issuer will default, enter insolvency, declare bankruptcy, fail to deliver shares, or delist its shares.

In our meetings, the Staff suggested that instead of waiting six or nine months and converting, lenders could immediately convert the note into stock. Even under the proposed rule, the argument goes, that would start the waiting period right away, and the lender would not need to rely on tacking. The problem with this is that it would functionally eliminate the conversion option, and *the borrowers* value the conversion option. The whole point of the convertible structure is to provide the borrowers—the small public companies—the flexibility they crave. They can decide at the time of repayment—not months earlier—whether they "value the cash proceeds" more than the stock. Overdahl Report 15 n.7. This optionality is enormously valuable to fast-growing, early-stage companies. Perhaps there is a customer service the borrower needs financing to expand. Or maybe it needs cash to repair a prototype. In either case, the borrower will appreciate having the choice after addressing its short-term financing needs whether to repay the loan in cash or "opt[ ] to pay back [its] loan through conversion." *Id.*[12] Simply put, instant conversion in many cases wouldn't make any sense, and is not something borrowers would want or allow.[13]

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[11] *See* Overdahl Report 6 ("I fail to see why one risk management feature is viewed by the Commission as a failure to assume economic risk while other risk management features are not viewed that way . . . .").

[12] *See also, e.g.*, Comment of Brad J. Moynes, CEO, Digatrade Fin. Corp. (Feb. 4, 2021) (explaining that convertible loans "are an efficient method for small businesses to access working capital quickly while providing the option to repay the loan or have the lender convert into equity"); Comment of Anshu Bhatnagar, CEO, Verus Int'l, Inc. (Feb. 9, 2021) ("Raising funds through a convertible note allows us an option to pay off the note within 6 months, which we often do.").

[13] Such a market, to the extent it existed, would force lenders to offer smaller loans. Rule 144 restricts the activities of affiliates of the issuer. For that reason, no lender will be willing, at any one time, to possess ten percent or more of an issuer's stock. In the current market, that is not an issue. Suppose a borrower needs $10,000 to fund its operations each month, and further suppose that $10,000 would convert into roughly 200,000 shares. If the borrower has 3,000,000 shares outstanding, the lender can easily loan $10,000 each month and, as each holding period expires, acquire and sell the 200,000 shares. But if the lender must convert right away, such that it immediately acquires shares, the lender will become an affiliate by the second month, when it will be holding 400,000 shares. To avoid this, the lender will offer a substantially smaller loan each month. This will drastically

The Staff questioned whether *all* market-adjustable convertible loans provide the borrower the option to prepay the loan in cash before the six-month holding period expires. We cannot speak to every loan, but that is certainly the typical case. *See* Comment of 62 Small Public Companies 1. And borrowers in practice often prepay the loan in cash, as the record in this matter makes clear. *See, e.g.*, Comment of Anshu Bhatnagar, CEO, Verus Int'l, Inc. (Feb. 9, 2021) ("Raising funds through a convertible note allows us an option to pay off the note within 6 months, which we often do."); HealthLynked Corp., Quarterly Report 26 (Form 10-Q) (Nov. 14, 2019) (paying convertible loan in cash); FuboTV, Inc., Prospectus, at F-92 (Form 424B4) (Oct. 9, 2020) (same). If the Commission is concerned that *some* loans might not offer that optionality or that, in some instances, prepayment costs may dissuade borrowers from exercising the prepayment option, the Commission could initiate a rulemaking relating to prepayment options. In short, the Commission should directly address whatever it thinks the problem is—not take a sledgehammer to an entire industry, when a scalpel would do.

* * *

For all the reasons documented in the record, the Commission should withdraw this unpopular, misguided proposal, and instead reaffirm its longstanding commitment to supporting our nation's smallest public companies as they seek the capital they need to serve their customers and their shareholders. At the very least, however, the Commission should look to one of the many less restrictive alternatives available to it, such as those described above. Market-adjustable convertible notes are a valuable financing tool, and the Commission should not effectively eliminate them.

Respectfully submitted,

/s/ Helgi C. Walker

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reduce capital formation—the exact opposite of what the Commission has been trying to do for years. *Cf.* 72 Fed. Reg. at 71,564 (removing volume-of-sale limitations so that lenders could recoup any size loan, thereby drawing in larger loans—all to "promote capital formation, particularly for smaller companies").