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

RE: File Number S7-24-20. Rule 144 Holding Period and Form 144 Filings

Dear Ms. Countryman:

Hamilton & Associates, a boutique securities law firm in Boca Raton, Florida, would like to take this opportunity to comment on the Commission's proposed amendments to Rule 144 that would, among other things, revise the holding period for certain market-adjustable securities.

The proposed changes would alter the landscape of the OTC marketplace dramatically. As the Commission notes, while the amendments may to some extent impede capital formation for OTC companies, they will strengthen badly-needed investor protections in this area. Additionally, the proposals will protect issuers from predatory lenders.

We believe the Commission's proposed amendments to Rule 144 will benefit the OTC marketplace in ways both expected and unexpected. It should eliminate many fraudulent transactions, and perhaps some bad actors as well. It may encourage retail investors who have soured on OTC investments because of the risk of out-of-control dilution and consequent plummeting stock prices to return and try again.

Small public companies need all the protections they can get. They are often undercapitalized and have difficulty attracting the financing necessary to grow their businesses. Consequently, many turn in desperation to lenders who impose conditions on their loans that are likely to result in considerable dilution. Management of these companies is often unsophisticated and inexperienced. Some fail entirely to understand the possible consequences of accepting financing involving market-adjustable securities. The Commission's proposals will prevent much of the damage caused by these securities, but they will do nothing to enable these small companies to obtain the effective and legitimate financing they need.

"Market-adjustable securities" are also known as "toxic convertibles." These may be promissory notes, warrants, or preferred stock. They are convertible into the issuer's common shares or other equity securities at a hefty discount to the market and they are "floorless," meaning having no minimum conversion price specified in the relative financing agreement. Providers of financing involving toxic convertibles often acquire more shares of stock than the issuers have outstanding, yet they avoid the resale limitations imposed on affiliates by using tricks of the trade, such as "equity blocker" clauses. Because transfer agents rely on legal opinion letters provided by the

lenders, the issuance and sale of these securities are unchecked. Two small law firms in California and Florida have served as gatekeepers and legal advisors for an estimated 500 conversions on behalf of at least 15 notable toxic lenders.

Equity blocker clauses are used to avoid "affiliate" and/or "control person" status by limiting the amount of stock the toxic lender will own at one any one time to no more than 9.99 percent (or sometimes 4.99 percent) of the issuer's equity securities. For example, a lender could sell up to 9.99% of an issuer's securities on Monday, then receive a new issuance of 9.99 percent on Tuesday, and sell those shares. Because the issuances and public sales are done on a rolling basis, there is inevitable downward pressure on the issuer's securities. The new conversion price "adjusts" to reflect the lower stock price that is a result of every round of selling, and the price inevitably sinks into the sub-pennies. The effect is sometimes magnified by anti-dilution clauses in the financing agreements of multiple lenders. Thus, these types of variable rate financings are known as "death spiral" financings.

One of the central provisions of Rule 144 is that a selling security holder must own the securities in question for a specified period of time before reselling them into the market. The rationale for this concept is that requiring the lender to hold the securities he purchased at risk for a certain period will demonstrate that he did not buy them with a view to distribution, and therefore is not an underwriter. For the stock of companies subject to the reporting requirements of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), the holding period is six months; for non-reporting issuers, it is one year. The Rule also contains "tacking" provisions that allow holders of restricted securities to "tack" an earlier holding period, applicable to prior owners or to different securities, to their own current holding requirements.

Thanks to Rule 144(d)(3)(ii), convertible securities—the original promissory notes, warrants, or preferred stock—have been considered "different securities": securities that are not the same as the common stock into which they are ultimately converted. And so, as the Commission explains, the Rule "allows securities acquired solely in exchange for other securities of the same issuer to be deemed to have been acquired at the same time as the securities surrendered for conversion or exchange." In practical terms, that meant a single holding period was applied to each financing agreement as soon as the lender conveyed money to the issuer. Once it expires six months or one year later, the lender can then begin a series of conversions. The company's transfer agent would then issue the stock in question without a restrictive legend based upon the toxic lender's attorney's legal opinion, after which the shares would therefore be sold into the open market immediately.

That generally works in what the Commission calls a "conventional convertible security transaction" because the conversion price is fixed at the time the convertible security is sold, the price is not adjustable depending on the underlying security's market price going forward. But transactions involving market-adjustable convertible securities are different. The lender's discount to market upon conversion, and the adjustable feature of the conversion price, largely eliminate market risk from the transaction.

The SEC's proposal is simple: it would amend Rule 144(d)(3)(ii) by providing that the holding period for the lender's market-adjustable securities would not begin until the conversion has taken place. As noted above, often the financing agreements between lender and issuer call for equity

blockers to be put in place to ensure that the lender does not become a company affiliate. This is important because if the lender qualified as an affiliate, he would be unable to sell more than the equivalent of 1 percent of the issuer's shares outstanding every 90 days. Thanks to the equity blocker clauses, lenders can convert and sell a number of times. Under the proposed rule, a new holding period would begin with each conversion. That would mean lenders could convert and resell no more often than once every six months, or, for non-filers, once a year, for each financing agreement. Currently, the lenders can convert and resell continuously; their ability to do so is what makes buying convertible debt so lucrative to the lender and devastating to the issuers whose shares are sold. Under the proposed rule, lenders would be exposed to market risk and because each conversion would prompt new holding periods.

We applaud the Commission's initiatives in this matter. For the past six or seven years, the SEC's Enforcement Division has sought to prevent or lessen the havoc wreaked by toxic funders. It has tried suing clearing firms and transfer agents for failure to submit Suspicious Activity Reports (SARs) when they act on potentially fraudulent documents supplied to them in connection with conversions of promissory notes, warrants, preferred stock, or similar instruments. It has had some success charging the lenders themselves with acting as unregistered dealers. But these kinds of lawsuits *at best* can only address a limited number of transactions and actors and *do* little to stop what seems to be an ever-increasing number of funders eager to buy promissory notes convertible at variable rates. We note a considerable increase in the activity of these lenders since the COVID-19 global pandemic.

Convertible instruments of this type are, as the SEC contends, damaging to investors. They also devastate small businesses that accept the loans offered to them. While the Commission believes issuers may benefit from opportunities for capital formation, in our experience, the damage caused by adjustable-rate lenders far exceeds the benefits received by the issuers. Many of these small companies eventually find themselves involved with a half-dozen or more toxic funders. Massive dilution is inevitable and shares outstanding climb into the billions as the stock price falls into the hundredths of pennies. Eventually, issuers are forced to reverse split their stock, often more than once. In the end, many of these companies go out of business. The ones that survive are unable to locate acceptable financing on reasonable terms due to the market impact from the lender's sale of the adjustable-rate securities. The public entity may be sold to new owners by management, or it may simply be abandoned and, subsequently, become the subject of a custodianship application that will result in its purchase by a buyer who wishes to effect a reverse merger transaction with a private company he or she controls.

Representatives of several small companies have commented unfavorably on the proposed amendments to Rule 144; they would no doubt take issue with our perceptions of the dangers posed by market-adjustable securities. Their view is that for tiny development stage companies unable to pay for operations and make payroll, convertible financing is better than no financing at all. The SEC is mindful of these concerns, and in recent years has worked to make Regulation A offerings easier to use and more likely to succeed. It has also created Regulation Crowdfunding with an eye to the needs of startups that have yet to go public. Perhaps more efforts of this kind would prevent issuers from falling victim to adjustable-rate convertible financings.

The small companies whose management has commented on the SEC's proposals insist that

investors are not harmed by these transactions, because the financing agreement is announced at signing, and, if the company is subject to Exchange Act reporting obligations, it is posted in the company's Edgar filings. While true, this is a disingenuous defense. Most penny stock investors are unsophisticated; many have never read an Edgar filing let alone understand one well enough to make an informed and responsible decision. Financing agreements involving convertible securities are often complex, lengthy, and, for non-professionals, opaque and nearly impossible-to understand. More importantly, few SEC filings properly disclose the risks attendant on adjustable-rate convertible note financings. Investors are not protected unless they are able to understand what they are reading, because unless they are able to understand SEC filings they will remain unaware of the possible negative outcomes of their investments.

As yet, none of the many well-known toxic funders has commented on the Commission's proposals, though at least one law firm representing notable funders has done so. In fact, a few firms have entered into the toxic lending business alongside their clients. While the lenders cannot be happy with this attempt to regulate their business of buying and then reselling convertible securities. It is a cash cow they and their attorneys do not wish to give up.

They are almost certainly already hard at work finding loopholes to avoid any problems a new Rule 144 might cause for them. Some will no doubt attempt to make use of state exemptions from registration; others may rely on Sections 3(a)(9) and 3(a)(10) of the Securities Act. Perhaps they will use exemptions that have not yet been widely explored. It is likely some will simply convince issuers to sign multiple identical financing agreements at the same time, so that they, the lenders, will be able to engage in continuous conversions without triggering a new holding period as contemplated by the SEC's proposals.

No matter what the lenders may do next, one thing is certain: anyone wishing to make use of any exemption from registration will need the help of an attorney willing to write tradability opinions. Many lawyers specialize in that work; we would submit that they are insufficiently regulated. Several years ago, we suggested that transfer agents should be required to post every opinion on which they act at Edgar. As it is, the SEC only sees them if it makes a specific request; the investing public—who is perhaps more interested in these matters than the Commission realizes—would like access to them as well. Transfer agents, we believe, often feel torn between the issuers who employ them (and may even sue them if they refuse to obey orders) and the securities laws. Such a filing requirement would relieve the pressure they may feel by making the posting of tradability opinions routine. That alone would likely instantly reduce the number of questionable opinions claiming reliance on exemptions that are not available.

The Commission's proposals concerning Forms 144 are for the most part uncontroversial. It makes sense to require electronic filing of fillable forms, which will be easier to deal with for both the company affiliates who file them and the SEC, for which storage and retrieval would become more convenient. The amendment to the filing deadline for Forms 144, and the suggestion of a combined Form 144 and Form 4, for individuals who need to file both, also makes sense.

We are, however, puzzled by the Commission's suggestion that the Form 144 filing requirement be eliminated for investors selling securities of non-reporting issuers. The proposal notes that "staff estimates that approximately one percent of the Form 144 filings made during the 2019 calendar

year related to the resale of securities of issuers that are not subject to Exchange Act reporting." The conclusion appears to be that those issuers do not have insiders selling large amounts of stock.

It seems to us that those individuals do not file Forms 144 because they do not believe they need to file them. After all, officers, directors, and greater-than-5-percent shareholders in non-reporting issuers never file Forms 3, 4, and 5, simply because they are not required to do so. Neither are the insiders of Securities Act registrants that have never registered a class of stock, of which there are quite a few trading as Pinks. It might be a good idea to compel affiliates of these companies to file Forms 144 when they sell because otherwise there might be no information at all about their trading activities and the large blocks of stock issued to them.

The proposal refers to financing agreements involving convertible securities as a "last resort" for OTC companies. That is true, but a great many OTC issuers that are not community banks or ADRs do resort to them and return to the well frequently. As we have noted, over time, that rarely results in success for the issuers and their medium to long-term investors. What is needed are new ideas about financing that could work for these companies that do not also lead to their destruction.

Thank you for your consideration of our comments.

Sincerely,
/s/ Brenda Hamilton
Brenda Hamilton, Esq.