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March 26, 2014

U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File No. S7-11-13/Proposed Rule Amendments for Small and Additional Issues Exemptions Under Section 3(b) of the Securities Act, Release Nos. 33-9497; 34-71120; 39-2493

Ladies and Gentlemen:

We are pleased to submit this letter in response to the request of the Securities and Exchange Commission (the "SEC") for comments relating to the SEC's proposing release referenced above (the "Proposing Release").[1] The Proposing Release provides a useful framework for Regulation A offerings. We believe that if Regulation A is properly implemented, it will provide an important capital-raising alternative for companies in many sectors, including, but not limited to, healthcare, technology and real estate. For certain companies, a Regulation A offering, perhaps combined with or followed by a listing on a national securities exchange, may be an alternative to a more traditional registered initial public offering. There will be many potential applications for Regulation A offerings, provided, that appropriate thought is given to the development of a secondary market for the securities of companies that complete such offerings. This letter offers a few suggestions that the SEC should consider in adopting the final rules.

Eligible Issuers

We believe the SEC should maintain the existing categories of Regulation A issuer eligibility requirements with a few changes. The exemption should not be available to issuers that are SEC-reporting companies. Initially, at least, the exemption should be available only to companies organized in the United States or Canada. After the market is allowed to develop, the SEC could review whether it would be appropriate to make the exemption available to other foreign issuers. It may be helpful to clarify that the exemption will be available to Canadian companies that have securities listed on a Canadian securities exchange, such as the Toronto Stock Exchange's Venture Exchange.

[1] 78 Fed. Reg. 3926 (Jan. 23, 2014).

The SEC should expressly permit use of the exemption by business development companies, or BDCs, that are not reporting companies. BDCs provide an important source of capital for private companies and can be of importance in job creation. Shortly after adoption of the JOBS Act, the SEC Staff issued interpretative guidance confirming that BDCs would be eligible to be considered "emerging growth companies." This view was premised on the belief that BDCs provide funding for their eligible portfolio companies. In recent years, BDCs have become more significant providers of capital. As a result, we can think of no public policy argument to exclude BDCs. Currently, BDCs only would have available to them Regulation E, which has a very low dollar threshold and, as a result, may be of limited utility and private placements. A Regulation A offering might permit an entity that intended to elect BDC status to raise funds to acquire interests in portfolio companies before it was of a size where the BDC would be an appropriate candidate for a registered initial public offering. If BDCs were to be included as eligible issuers, we believe it would be prudent to include specialized disclosure requirements for these issuers. These should reference the disclosure requirements contained in Form N-2 and may include the fees and expenses disclosures, distributions disclosures, disclosures relating to the BDC's adviser, its portfolio companies, the terms of the advisory arrangements, and determination of net asset value.

We do not believe that the exemption should be available to issuers that are blank check companies, shell companies, or issuers in offerings of penny stock.

We agree that REITs should be considered eligible issuers. The disclosure requirements for REITs should incorporate certain of the items contained in Industry Guide 5 and Form S-11.

Offering Limitations and Secondary Sales

We support the elimination of the last sentence of Rule 251(b), which prohibits affiliate resales unless the issuer has had net income from continuing operations in at least one of its last two fiscal years. This limitation would not be appropriate for technology and healthcare companies that devote substantially all of their resources to research and development.

We suggest that the SEC modify the proposed limitation on sales of securities by selling security holders in Tier 2 offerings. We believe that Regulation A will be broadly deployed only if a Regulation A offering is viewed by market participants as providing the issuer with the opportunity to raise substantial capital and resulting in a robust secondary market for the issuer's securities. While we appreciate that the proposed rules would apply the proportionate offering size limitations contained in current Regulation A to Tier 2 offerings, we believe that the SEC should reconsider imposing such a limitation in the context of Tier 2 offerings.

We understand that at least superficially it may appear that facilitating sales by security holders does not further the objectives of the JOBS Act; however, we suggest that it is essential to promoting capital formation. A venture capital or private equity investor will be more likely to invest in an emerging business if it views a Regulation A offering as an attractive liquidity opportunity. Every venture-backed or private-equity backed company may not be an appropriate candidate for a registered initial public offering. Also, the IPO market window may not always be open for companies in certain industries. Nonetheless, a venture or private equity investor may want to obtain some liquidity through a Regulation A offering. A Regulation A offering might result in a "public" or "market" price for the securities of the issuer and facilitate the appropriate valuation of the investor's interests in the company. It also may facilitate the distribution of securities to the limited partners of the venture or private equity fund. The offering proceeds received by a venture capital or private equity selling security holder will be "recycled" into other worthwhile emerging companies.

Also, an issuer contemplating a Regulation A offering may not have an immediate need for $50 million in proceeds, but it may be prudent for the issuer to undertake a larger offering by including a significant selling security holder component. Institutional investors often express concerns about investing in companies where the securities will be closely held and will be illiquid. A larger offering, which includes a significant selling security holder component, may be more appealing to potential investors and also to financial intermediaries, whose participation will be critical to the growth and increasing significance of Regulation A offerings. Institutional investors also may be reluctant to have their proposed investment represent too large a percentage of the offering. Again, in this instance, the issuer would benefit from a larger offering.

It is not apparent that there would be any investor protection goal served by limiting the participation of existing security holders. The offering statement requires disclosures relating to the use of proceeds, the existing ownership of the company's securities, and related party transactions. A potential investor will have an opportunity to review this information and make a decision regarding the offering. It is worth noting that over time the market's view of selling security holder participation in registered IPOs has changed. Now, it would not be unusual for there to be some selling security holder participation in a registered IPO. Given all of these considerations, we believe that the market is best positioned to determine the appropriate level of participation by selling security holders rather than imposing an arbitrary percentage limit.

If the SEC believes it is appropriate to include a percentage limit on sales by selling security holders, then we suggest that the limit be set at a level that is higher than the limit that has been proposed, and that the limit should subject to periodic review by the SEC.

Investment Limitation

The Proposing Release incorporates an investment limit for investors in Tier 2 offerings. This was not contemplated by the proposed legislation to amend current Regulation A that preceded the JOBS Act nor by the JOBS Act. It is not clear why an investment limit should be implemented, as Tier 2 offerings would require detailed and substantial disclosure requirements that would provide potential investors with the information necessary to make an informed investment decision; however, if the SEC were to retain the investment limit, we suggest that the final rules make clear that the investment limit is applicable only to natural persons and only to those that are not accredited investors. In our view, an investment limit would not be appropriate for accredited investors in Tier 2 offerings, as there is no similar restriction for accredited investors that participate in Rule 506 offerings where no disclosures are prescribed.

The Section 12(g) Threshold

The proposed rule would not exempt securities sold pursuant to Regulation A from the "holder of record" threshold set forth in Section 12(g) of the Securities Exchange Act of 1934, as amended (the "Exchange Act").

It is important to recognize that the Tier 2 market will be a new market. For an issuer the securities of which are cleared and settled through the facilities of the Depository Trust Company and held in street name, this threshold may not be particularly worrisome. However, it is not clear that most Tier 2 offerings will necessarily be undertaken with the assistance of a registered broker-dealer that assists with having the securities made eligible for settlement through DTC. If this were not the case, it is unlikely that securities sold in a Tier 2 offering completed with the assistance of a broker-dealer would be held by the broker-dealer on behalf of its customers. To the extent securities are not held in street name, it may be difficult for an issuer, even if assisted by a transfer agent, to determine when it had crossed the Exchange Act threshold. This might, in fact, have a chilling effect on Tier 2 offerings.

The investment limit and the Exchange Act threshold also seem to produce an unusual result. If one applies the investment limit to natural persons, it has the result of creating a ceiling on the total dollars that non-accredited investors can invest in a Tier 2 offering. It would then require a fairly large number of non-accredited investors, each contributing at the investment limit, to attain an issuer's desired capital raise. Non-accredited investors will "count" as holders of record for Exchange Act purposes, so if an issuer were to raise capital from non-accredited investors it would cross the Exchange Act threshold relatively quickly, setting aside the asset prong of the test. This would seem to encourage an issuer to raise money principally from accredited investors and institutional investors in order to avoid triggering the Exchange Act threshold prematurely.

We have understood the principal purpose of the Exchange Act threshold to be ensuring that there would be adequate public information available regarding issuers the securities of which were widely held. At the time that the Exchange Act threshold was conceived, there were Exchange Act reporting companies and private (non-reporting) companies. Now, through the crowdfunding proposal[2] and the proposed rules contemplated by the Proposing Release, a series of companies that are not yet Exchange Act reporting companies will be subject to certain ongoing reporting requirements. In this context, where there will be public information available regarding a Tier 2 issuer, one wonders whether the information needs have already been satisfied and whether there is the same urgency associated with crossing the Exchange Act threshold. As a result, we suggest that the SEC consider excluding securities sold in a Tier 2 offering from the holder of record count for so long as the Tier 2 issuer remains current in its ongoing reporting requirements. As an alternative, we suggest that the SEC consider deeming the Tier 2 issuer's ongoing reports, for a phase-in period until the Tier 2 issuer otherwise crosses the Exchange Act threshold, to satisfy the issuer's Exchange Act reporting obligations. This phase-in period would permit an issuer to prepare itself for compliance with more burdensome reporting and corporate governance requirements. We also suggest that the SEC provide that a Tier 2 issuer that becomes subject to the Exchange Act requirements in this manner be permitted to rely on all of the accommodations available to an issuer that qualifies as an "emerging growth company."

Disclosure Requirements

We generally support the approach taken in the Proposing Release relating to offering disclosures. We suggest, however, that the SEC consider scaled disclosure requirements based on the issuer's size and sophistication. An issuer likely will turn to a Tier 2 offering as an alternative to a registered IPO. An issuer may do so because it seeks to achieve certain cost savings or because it seeks to offer its securities broadly, including to retail investors. In any event, the issuer must be willing to incur the expenses associated with preparing the initial offering disclosures and with complying with the ongoing disclosure requirements following completion of the offering. It stands

[2] 78 Fed. Red. 66427 (Nov. 5, 2013)

to reason that a Tier 2 offering might fulfill a distinct role for companies in certain industries. It may provide companies with the opportunity to undertake a right-sized public offering. In this context, and without sacrificing investor protection, it would seem possible to craft scaled disclosure requirements based on the issuer's size and sophistication. We understand that the SEC is undertaking or proposes to undertake a review of the current disclosure requirements in connection with offering documents. The SEC might consider beginning to implement a new approach to disclosure requirements here, with Tier 2 offerings. For example, the risks might be limited to the most significant to the issuer's business. Generic risks should be excluded. As proposed, Item 9 (Management's Discussion and Analysis of Financial Condition and Results of Operations) requires that the issuer repeat certain information (such as segment information) that would appear in the notes to the financial statements. Item 10 (Directors, Executive Officers and Significant Employees) requires that biographical data be presented for five years. It is unclear why five years of informations would be necessary. Similarly, some of the executive compensation information required by Item 11 could be simplified. Item 13 (Interest of Management and Others in Certain Transactions) will require the issuer to repeat information that is included in the notes to the financial statements. We offer these only as examples of disclosure requirements that might merit a closer look. We also suggest that the instructions to the form make clear that disclosures presented in the offering statement in response to a specific item need not be repeated several times throughout the offering circular.

We do not believe it would be appropriate to require Tier 2 issuers to present their information in an interactive data format.

Market participants will demand access to regular information about Tier 2 issuers. We believe that the Proposing Release strikes an appropriate balance in requiring semi-annual reporting and current reports as to certain material developments. Again, in connection with the ongoing reports, we suggest that the SEC consider scaled disclosure requirements. The SEC should consider whether investors would require current reports relating to unregistered sales of securities. This is not likely to be viewed as a significant development by investors. At the very least, we suggest that the requirement be modified so that a current report is required only to report offerings that represent an offering of at least 10% of the issuer's pre-transaction outstanding shares. We anticipate that many issuers will disseminate quarterly financial information in order to keep their investors and the market informed. The SEC might consider providing an appropriate form for voluntary reports.

We believe it is appropriate that the audit requirements for Tier 2 issuers be limited to U.S. Generally Accepted Auditing Standards (U.S. GAAS), which would be applicable to audits of private companies. We understand, based on discussions with various accounting firms, that there may be significant savings associated with this approach. However, we also understand that an issuer that completes a Tier 2 offering and seeks to apply to have its securities listed on a national securities exchange would be required to prepare and file a Registration Statement on Form 10. This would appear to require a re-audit of the issuer's financial results if it had relied on U.S. GAAS in connection with the preparation of the financial statements for the Regulation A offering circular. As we note below, it will be important to ensure that there is a seamless "on-ramp" for those issuers that want to transition from Tier 2 offering to Exchange Act-reporting status. Consideration should be given to transitioning from private company reporting standards to U.S. GAAP.

We agree with the SEC's proposal to allow Canadian issuers to use International Financial Reporting Standards (IFRS) as issued by the International Accounting Standards Board (IASB).

Current Information Requirements under Rule 144, Rule 15c2-11 and Rule 144A

Compliance with Tier 2 reporting obligations should be deemed to furnish adequate "current information" under Rule 144(c)(2) and "reasonably current" financial information under Rule 15c2-11(g) and Rule 144A(d)(4)(ii)(A). The information that will be available to investors regarding Tier 2 issuers should be adequate to permit investors to trade in the securities of these companies. Given the importance of ensuring that there will be a liquid secondary market, the SEC should amend Rule 15c2-11(g) to provide that an issuer that is current in its Tier 2 reporting obligations under Regulation A would be deemed to have "reasonably current" financial information, even if its most current balance sheet is as of a date up to nine months old and it had not provided other updated information. Corresponding amendments should be made to the financial information requirements of Rule 144 and Rule 144A.

Exchange Act Registration

We believe that the SEC should facilitate the Exchange Act registration of the securities of an issuer contemporaneous with the completion of a Tier 2 offering.

For companies in certain sectors, a Regulation A offering may be the functional equivalent of a registered IPO. While many private companies will choose to conduct exempt offerings pursuant to Rule 506 and public offerings under Regulation A and not seek to subject themselves to Exchange Act reporting requirements, the Tier 2 offering framework should be flexible enough to facilitate the process of voluntarily listing on a national securities exchange. The JOBS Act Title I on-ramp has proven to be very helpful to many EGCs. However, the average size of registered IPOs completed in recent years remains high. For a variety of reasons, smaller IPOs are not as common as they once were in the United States. A Tier 2 offering followed by a listing on a national securities exchange may prove to be a right-sized equivalent.

The Proposing Release notes that a Tier 2 issuer that wants to apply to have its securities listed on a national securities exchange would have to prepare and file a Registration Statement on Form 10. This is a duplicative, expensive process. A Tier 2 issuer will have had its offering statement reviewed and qualified by the SEC. The Form 10 disclosure requirements are substantially similar to the requirements for the Regulation A offering statement. We suggest that the SEC consider modifying this approach. The SEC could allow Tier 2 issuers to use Form 8-A for the exchange listing and within a period of time under cover of an amended Form 8-A or on a Form 10 that would be deemed automatically effective provide any disclosure items required by that form and which were not included in the issuer's Regulation A offering statement.

Facilitating a listing would be consistent with the original intent to amend the offering threshold of current Regulation A. The higher offering threshold was determined by reference to the listing requirements of the securities exchanges. The underlying premise was that an issuer would be able to complete a Regulation A offering and voluntarily apply to list its securities on an exchange. A listing would, of course, lead to a more robust secondary market for the issuer's securities.

State Securities Law Preemption

We strongly support the SEC's proposed definition of "qualified purchaser." An offeree or investor in a Tier 2 offering will have access to an offering circular that contains detailed disclosures and that has been reviewed by and qualified by the SEC. An investor will be able to fend for itself and will have adequate information on which to base its investment decision. The disclosure framework provided for in Tier 2 offerings renders state review unnecessary.

Communications and Research Safe Harbors

The proposed rules would require that test-the-waters communications be filed with the SEC. It is not clear why test-the-waters communications would need to be filed in the context of a Tier 2 offering.

The SEC should consider formulating safe harbors for regular communications by Tier 2 issuers. A company that is contemplating a Tier 2 offering or that has completed such an offering should be able to communicate with its shareholders and with its business partners with legal certainty that these regularly released communications will not be treated as "testing the waters" communications or otherwise as offering related communications. The SEC also should implement measures that will facilitate research coverage for Tier 2 issuers. An investment bank will want to ensure that research reports published about a Tier 2 issuer will not constitute offering related communications and will want to understand the rules that will be applicable to such materials.

Conclusion

The Proposing Release advances an important initiative. We appreciate this opportunity to comment on the Proposing Release. We would be pleased to respond to any inquiries you may have regarding this letter or our views on the Proposing Release more generally. Please contact Martin Dunn at (202) 778-1611, David Lynn at (202) 887-1563, Anna Pinedo at (212) 468-8179, or James Tanenbaum at (212) 468-8163.

Very truly yours,

Morrison & Foerster LLP

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