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April 3, 2014

Via e-mail to: rule-comments@sec.gov

Kevin M. O'Neill
Deputy Secretary
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

Dear Mr. O'Neill:

This letter is submitted on behalf of the Federal Regulation of Securities Committee (the "Committee") of the Business Law Section (the "Section") of the American Bar Association (the "ABA") in response to the request for comments by the U.S. Securities and Exchange Commission (the "Commission") in its December 18, 2013 proposing release referenced above (the "Proposing Release").[1] The comments expressed in this letter represent the views of the Committee, and have also been reviewed and approved by the Middle Market and Small Business Committee. The comments expressed in this letter have not been approved by the ABA's House of Delegates or Board of Governors and therefore do not represent the official position of the ABA. In addition, these comments do not represent the official position of the Section.

Overview

Section 401 of the Jumpstart Our Business Startups Act of 2012 (the "JOBS Act")[2] added a new subsection (2) to Section 3(b) of the Securities Act of 1933, as amended (the "Securities Act"), requiring the Commission to adopt an exemption allowing companies to issue up to $50 million in securities within a twelve-month period, subject to certain conditions and requirements, in order to achieve the Congressional purpose of assisting smaller companies in raising the capital they need to spur growth and create jobs. As the Commission pointed out in the Proposing Release, "Congress enacted Section 3(b)(2) against a background of public commentary suggesting that Regulation A … should be expanded and updated to make it more useful to small companies."[3]

[1] 78 Fed. Reg. 3926 (Jan. 23, 2014).
[2] Public Law 112-106, 126 Stat. 306.
[3] Proposing Release at text accompanying note 17 (citation omitted).

We commend the Commission for the flexible and considered approach taken to implementing this Congressional mandate in its Proposing Release. By retaining and modernizing the framework of the current Regulation A and creating two offering tiers within Regulation A, we believe that the Commission has proposed an exemption that has the potential to become extremely useful to smaller companies seeking to raise the capital necessary to grow and create jobs. As we noted in our pre-rulemaking comment letter,[4] we believe that for companies in certain industry sectors, the ability to raise up to $50 million in each twelve-month period without incurring the costs associated with a traditional initial public offering or the full panoply of reporting obligations under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), will permit these companies to expand in ways that are not now available to them. As we further indicated in that comment letter, we believe that Regulation A will serve as an important midpoint between crowdfunded offerings pursuant to Title III of the JOBS Act and Rule 506 offerings on the one hand, and initial public offerings by emerging growth companies under Title I of the JOBS Act on the other hand. Real "emerging" companies need an alternative, or perhaps various alternatives, to the IPO "on-ramp" so that they are not relegated to conducting private placements with limited or no disclosure requirements, no ongoing reporting requirements and no liquid market for their securities. In our view, the Commission's proposed rules go a long way toward creating a cost-effective exempt offering process that is appropriately tailored to smaller, emerging companies.

Because we are supportive in most respects of the approach that the Commission has taken in the Proposing Release, we have limited our comments and suggestions below to certain areas that we believe could, and should, be improved. In particular, we have focused our comments on aspects of the proposed rules that could be modified so as to promote greater liquidity for the securities sold in a Regulation A offering.

Discussion

The comments set forth below are intended to provide practical and constructive suggestions to assist the Commission in promulgating its final rules. We have organized our comments below based on specific topic areas that we believe the Commission should address in its final rule.

Eligible Issuers

We believe the Commission should maintain the existing categories of Regulation A issuer eligibility requirements, with certain limited changes. At least initially, we believe it is appropriate to limit availability of the exemption to non-reporting companies organized under the laws of the United States or Canada with a principal place of business in either of these countries. This limitation has been part of Regulation A since 1953, when the Commission expanded the use of Regulation A to Canadian issuers based on its view that international laws had developed in such a way that Canadian issuers would not be outside U.S. jurisdiction in the event of fraud.[5] Although much has changed since 1953, and considerable progress has been made through the efforts of the Commission and foreign regulators, as well as through organizations like IOSCO, to harmonize

[4] Letter to the Commission, dated September 7, 2012, submitted by the Committee, available at http://www.sec.gov/comments/jobs-title-iv/jobstitleiv-13.pdf.

[5] At that time, the Commission explained that it believed it could finally adopt its first exemptive rules under Section 3(b) that extended to Canadian issues as a result of the (then) "recently ratified amendments to the extradition treaty between the United States and Canada, which [were] designed to cover fraud offenses of the type indictable in this country under Section 17(a) of the Securities Act or the Mail Fraud Statute." (SEC Release 33-3451, Aug. 16, 1952).

disclosure standards across jurisdictions, we believe it may be premature to extend the exemption to foreign issuers. We believe that it would be useful for the new Regulation A market to be allowed to develop, and for market participants to become familiar with and accustomed to the disclosure and other requirements of Regulation A, prior to making the exemption available to foreign issuers.

As we noted in our pre-rulemaking comment letter, the exemption should provide an effective capital raising approach for operating companies. In our view, the exemption should not be available for use by issuers that are blank check companies, shell companies, or issuers in offerings of penny stock. We do not believe that the Commission should adopt a definition of "operating company" that is tied to the generation of revenue in specified amounts, or the provision of goods or services. Instead, the Commission should specifically exclude "the types of blank check companies, SPACs, and shell companies that are not otherwise the intended beneficiaries of Regulation A….,"[6] along with reporting companies.

Also as noted in our pre-rulemaking comment letter, we believe that business development companies should be considered "eligible issuers." The Division of Corporation Finance (the "Division" or "Staff") guidance on the JOBS Act makes clear that a business development company may qualify as an "emerging growth company" ("EGC") for purposes of Title I. Given the Congressional policy goal of encouraging investment in growth-oriented companies, it would be consistent with this approach to permit non-Exchange Act reporting business development companies likewise to avail themselves of the new Section 3(b)(2) exemption. Business development companies usually must achieve a certain size before being able to access the public markets, which means that only business development companies backed by large private equity sponsors are able to complete IPOs. Business development companies may rely on the current Regulation E in order to raise up to $5 million in proceeds; however, the low offering threshold of Regulation E limits the utility of the exemption. Business development companies are fulfilling an increasingly important role in the U.S. economy, providing much-needed financing to smaller companies that are unable to obtain financing from traditional bank lenders. If business development companies were to be included as eligible issuers, it would be appropriate to modify certain of the disclosure requirements for these issuers and require that business development companies comply with certain of the disclosure requirements contained in Form N-2.

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

We support the Commission's proposed exclusion, as ineligible, of issuers that have not complied with the ongoing reporting requirements during the two years immediately preceding the filing of a new offering statement (or such shorter period as the issuer was required to file such reports). That said, we offer some suggestions below for modifying the proposed post-offering disclosure regime, which may be too onerous for some smaller issuers.

Eligible Securities

We agree that, as proposed, asset-backed securities should be excluded from the list of eligible securities under Regulation A. The offering exemption is intended to be used by smaller, emerging companies, and it is unlikely that such issuers would find a market for more structured

[6] Proposing Release at text accompanying note 89.

securities. We think it would be helpful to add language in the final rule that makes it clear that warrants exercisable for equity or debt securities are eligible securities.

Offering Limitations and Secondary Sales

We support the proposed 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. As discussed in our pre-rulemaking comment letter, this limitation likely is not appropriate for a broad range of companies, including technology, biotech or drug discovery companies, which may devote substantially all of their revenues to research and development efforts, and therefore may not have net income from continuing operations.

We recommend that the Commission consider modifying the proposed limitation on sales of securities by selling security holders in Tier 2 offerings. We understand that the Commission has carried forward to Tier 2 offerings the proportionate offering size limitations in current Regulation A, which provides that no more than $1.5 million of the $5 million of securities that may be sold by an issuer in any twelve-month period in reliance on Regulation A can be attributable to selling security holders. However, it does not appear that there is a compelling rationale for limiting sales by selling security holders to 30% of an overall offering maximum of $50 million within a twelve-month time span. While we acknowledge the legitimacy of concerns regarding informational asymmetry and superior negotiating power in the case of affiliated investors, we believe that the ongoing reporting requirements (which include audited financial statements), "bad actor" disqualification provisions and other safeguards, all militate in favor of allowing both affiliates and non-affiliates to rely on the new Section 3(b)(2) exemption to sell in an amount greater than 30% of the $50 million ceiling.

Section 401 of the JOBS Act requires the Commission to adopt rules providing that securities issued in reliance on the new Section 3(b)(2) exemption may be offered and sold publicly and shall not be restricted securities. In order for the exemption to be attractive to issuers seeking to reduce their cost of capital, security holders must have liquidity.

In our view, any investor protection benefits associated with arbitrarily limiting sales by selling security holders are likely to be far outweighed by the resultant impediments to small issuer capital formation under the Tier 2 exemption as now proposed. The offering statement will require that the issuer provide detailed disclosures regarding management and related party transactions, as well as the intended use of proceeds of the offering. A robust set of audited financial statements will be included in this document, which will be subject to Commission staff review prior to qualification. Market participants and potential investors will have the information needed to evaluate the terms of the offering, and a market standard will develop over time regarding the level of participation by selling security holders that is considered acceptable. Potential investors will be more likely to invest in privately held emerging companies if they have a reasonable range of post-offering liquidity opportunities, and provision can be made for Regulation A exits in connection with their initial investments. Angel, venture capital and private equity investors are likely to find Regulation A an attractive financing alternative for their portfolio companies, especially if Regulation A provides a real liquidity opportunity. Limiting the availability of the exemption for selling security holders is likely to limit the liquidity of the issuer's securities and thus the potential utility of Regulation A. Angel, venture and private equity investors that sell some of their interests in reliance on a Regulation A offering exemption will likely use these funds to make new investments in other promising companies. Unless Regulation A is viewed by these communities as a real liquidity opportunity, Regulation A will not be successful.

We also note that the success of an offering may often depend on finding an underwriter that is willing to devote the time and effort to assist in the preparation of a disclosure document and actively market an offering. Having the ability to add a substantial secondary component to an offering may be critical in order for the proposed offering to attain a size sufficient to attract a strong underwriter. Also, many institutional investors may be concerned about the after-market liquidity associated with small offerings. Certain institutional investors also may be interested in participating in offerings but may not want their percentage of the offering to be too significant relative to the total offering size. All of this would suggest that, in order for Regulation A to become a widely accepted and efficient capital-raising approach, it will be important to consider removing or adjusting the selling security holder limit.

If the Commission nevertheless determines to adopt a selling security holder limitation for Tier 2 offerings, we recommend that the Commission consider a higher percentage, such as 50%, and that the percentage and the need for this limitation be reviewed periodically.

As discussed further below, we believe that affiliated security holders of Tier 2 issuers may well rely on the Rule 144 safe harbor for resales if, as we recommend, the information contained in ongoing Tier 2 issuer filings is deemed to satisfy the current information requirements under Rule 144. As noted in the Proposing Release, the information that is required of a Tier 2 issuer would satisfy the principal Rule 144 information requirements. If existing security holders were able to rely on Rule 144, there would be alternative avenues of enhanced liquidity that -- along with the other safeguards the Commission has proposed for Tier 2 offerings -- are likely to deter abuse of the new exemption.

Investment Limitation

The proposed rules would incorporate a new investment limit for investors in Tier 2 offerings. The proposed rules would limit the permissible amount to be invested by any individual to the greater of 10% of the individual's net worth or annual income. While we understand that the Commission may have proposed an investment limitation in the context of Tier 2 offerings as an investor protection measure, we are fundamentally uncomfortable with the imposition of investment limits outside of the crowdfunding area.

The Securities Act and ongoing reporting requirements under the Exchange Act have traditionally relied on a disclosure-based framework. In other words, so long as investors are able to make fully informed investment decisions in both the primary and secondary markets, and are aware of the full panoply of remedies available to them, they should be free to make good or bad investment choices. Congress chose to impose investment limits in Title III, but did not do so with respect to Title IV. Again, the disclosures required to be contained in an offering statement, together with the ongoing disclosure requirements for Tier 2 issuers, are quite robust. And there are other safeguards not present in the case of Title III crowdfunding transactions; for example, the offering statement will be subject to review by the Division prior to qualification. Accordingly, it is not clear why it would therefore be appropriate to add an investment limitation. Either the disclosures and other safeguards proposed are sufficient in the aggregate to facilitate informed investment decisions, or they are not. In sum, because there is no evidence that Congress intended for the Commission to limit the ability of investors to participate in a Regulation A offering, and there otherwise appears to be no reasonable basis for doing so, we recommend that the Commission drop the proposed investment limit.

If the Commission were to retain the investment limit in the final rules, we would strongly encourage the Commission to clarify that the investment limit is applicable only to natural persons. The Commission also should consider eliminating the investment limit for "accredited investors" as defined for purposes of Regulation D. There is no limit on the amount that an accredited investor may invest in a Rule 506 offering. In that context, an accredited investor is presumed to be able to fend for itself. Finally, we would urge the Commission to re-examine the need for the investment limit after a specified period of time during which the Commission will have been able to evaluate the development of the Regulation A market.

Integration

We support the Commission's approach to integration safe harbors and the proposed amendment of the provisions of Rule 254(d). Given that the changes brought about by the JOBS Act have, in many respects, served to blur the lines between private offerings and public offerings and relaxed certain communications rules, we would welcome additional guidance from the Division regarding integration issues once the Commission's JOBS Act rulemaking has been completed and the various new rules under Titles III and IV become effective.

Treatment Under Section 12(g) of the Exchange Act

The proposed rule would not exempt securities sold pursuant to Regulation A from the Section 12(g) Exchange Act registration and reporting threshold.

The securities sold pursuant to the exemption are not considered "restricted securities" and may be transferred freely. If one assumes that the securities will be sold through a registered broker-dealer and that the securities transactions will be cleared and settled through the Depositary Trust Company ("DTC"), the Exchange Act threshold may not pose a significant concern because an issuer may not have very many holders of record. However, it is not necessarily the case that securities will be held in street-name form. Even with the assistance of a transfer agent, given that securities transfers are not limited, an issuer may find it challenging to track whether the holders of its securities are "accredited investors" in order to determine whether it was complying with the Exchange Act threshold. In our view, this uncertainty is likely to discourage issuers from utilizing Tier 2 despite other benefits of the exemption.

If adopted as proposed, the 10% investment limit and the Exchange Act threshold, even as raised by the JOBS Act, might interact to produce an unusual and, in our judgment, undesirable result. If one applies the investment limit to natural persons, it has the result of imposing a ceiling on the total dollars that non-accredited investors can invest in emerging-growth issuers. It would then take a fairly large number of non-accredited investors, each investing at the investment limit, to achieve an issuer's desired capital raise (unless a particular issuer is fortunate enough to be able to attract substantial investments by "accredited investors"). Of course, the 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 relevant Exchange Act threshold (500 non-accredited investors who are holders of record) relatively quickly. 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 which, in our view, would erode the traditional "public" nature of a Regulation A offering.

The purpose of the Exchange Act registration and reporting threshold, as we understand it, is to ensure that there will be adequate publicly available information about an issuer whose equity securities are widely held, and whose assets have attained a certain size (measured in terms of dollar value). The Commission proposes to impose substantial ongoing reporting requirements for an issuer that completes a Tier 2 offering, so there will be ample publicly available information about the issuer. We submit that these ongoing reports should be deemed, for a phase-in period until the Tier 2 issuer otherwise crosses the Exchange Act threshold, sufficient to satisfy the issuer's reporting obligations. For example, an issuer might be exempt from Section 12(g) for a period of 24 months or after its initial Tier 2 offering, unless the issuer crossed the Exchange Act threshold as a result of other issuances or the resale of other securities.

We believe that allowing such a phase-in period would be important to smaller companies that might otherwise be deterred from using the Tier 2 exemption, given the difficulties of full Exchange Act reporting and their inability either to count or to control the number of equity security holders acquiring shares in the secondary trading markets. Such a "phase-in" period would give Tier 2 issuers sufficient time to prepare to comply with the more burdensome Exchange Act registration and reporting requirements. A Tier 2 issuer that becomes subject to the Exchange Act registration and reporting requirements should not be subject to more onerous requirements than those that would be applicable to an EGC that has completed a traditional equity IPO. A Tier 2 issuer might transition into EGC status (assuming the issuer otherwise meets the Title I requirements for EGC status) once it becomes an Exchange Act company.

Financial Statement Requirements

We commend the Commission for proposing largely to retain the current Regulation A financial statement requirements for Tier 1 offerings. So long as the Commission does not extend a mandatory audit requirement to Tier 1 offerings (which it has not proposed to do), we believe that the addition of another year's balance sheet in the case of Tier 1 offerings should not be unduly burdensome for smaller private issuers, given the current obligation for Regulation A issuers to provide statements of income, cash flows and stockholders' equity for each of the two fiscal years preceding the date of the most recent balance sheet.

With respect to Tier 2 offerings, the proposed financial statement requirements for issuers reflect, overall, an appropriate balance between the need for investor protection and the efficient delivery of information to trading markets, on the one hand, and the difficulties that smaller companies face in preparing financial reports and obtaining an audit of their annual financial statements, on the other hand.

On average, companies that issue securities in Tier 2 offerings are likely to be smaller and to have fewer resources available to prepare financial information than smaller reporting companies, and it is therefore appropriate that the financial statement requirements for Tier 2 issuers be less burdensome than those applicable to smaller public companies. In particular, it is important that audit costs do not make Tier 2 offerings prohibitively expensive for smaller companies. For that reason, we suggest that the Commission consider allowing the smallest Tier 2 issuers the choice of hiring an independent outside auditor to conduct an audit of the prescribed financial statements under either U.S. Generally Accepted Auditing Standards (U.S. GAAS), applicable to audits of private companies, or the auditing standards promulgated by the Public Company Accounting Oversight Board (the "PCAOB"), so long as the Commission's auditor independence requirements set forth in Rule 2-01 of Regulation S-X are met. The Commission could condition such a choice on a showing of undue cost and impracticability in the offering statement, and limit the availability of this relief to the initial Tier 2 offering. For the smallest Tier 2 issuers, it also might make sense to provide that semi-annual reports do not need to be reviewed by the issuer's independent accountants, thus making it easier for those issuers to comply with the interim reporting requirements.

Although we have offered some suggestions for reducing the costs that we believe would be associated with even a GAAS-compliant audit, we concur in the Commission's judgment that the viability of the Tier 2 offering exemption is likely to depend at least in part on requiring issuers to provide adequate financial information to investors in the offering and thereafter. The proposed requirement that Tier 2 issuers obtain an independent outside audit of their financial statements will contribute to investor confidence in the reliability and integrity of such issuers' financial statements in situations where a relatively large amount of capital is being sought (i.e., up to $50 million within twelve months), and a trading market is likely to develop. In light of these considerations, the requirements contained in the proposal are reasonable and appropriate.

We also agree with the Commission's proposal to allow Canadian issuers to use International Financial Reporting Standards (IFRS) as issued by the International Accounting Standards Board (IASB). If other foreign private issuers become eligible to use Regulation A, we support allowing foreign private issuers to use IFRS as issued by the IASB. Currently, Canadian and other foreign private issuers that file a registration statement under the Securities Act, and/or file reports under Section 13(a) or 15(d) of the Exchange Act are allowed to use IFRS as issued by the IASB, in lieu of U.S. Generally Accepted Accounting Principles (U.S. GAAP), in preparing financial statements included in those registration statements or reports, without reconciliation to U.S. GAAP, so long as the auditor's report clearly states that the financial statements were prepared in accordance with IFRS as issued by the IASB. We agree with the Commission's proposal to extend the same advantages to Canadian issuers in connection with Regulation A offerings and subsequent ongoing reporting obligations thereafter, and believe it would be appropriate to extend these advantages to other foreign private issuers if they become eligible issuers under Regulation A.

While some Tier 2 issuers may struggle with semiannual financial reporting, others may wish to provide quarterly reports in order to comply with the requirements of various markets or investor expectations. An issuer could always provide the quarterly information by informal earnings release, but it might also be useful for the Commission to adapt the forms for ongoing reporting so that issuers could use them for quarterly reports if they so desired.

Ongoing Reporting Requirements

We generally support the ongoing reporting requirements proposed by the Commission, with some modifications particularly for smaller Tier 2 issuers.

We agree with the Commission that ensuring an adequate flow of information through the imposition of ongoing reporting obligations will benefit investors and foster the development of secondary trading markets for securities of Tier 2 issuers. We also agree that imposing ongoing reporting obligations on Tier 1 issuers would be unduly burdensome. We believe, however, that some reporting obligations for Tier 2 issuers should be modified or scaled, so as not to impose too great a burden on smaller issuers in Tier 2 offerings.

Current reports pose a particular challenge to smaller non-Exchange Act reporting companies, as they often lack the legal and compliance personnel who in larger companies would be able to prepare the required report within the four business day timeframe proposed by the Commission. Moreover, the reportable events are most likely to occur when the company's resources are under the greatest stress. We would recommend extending the time period for reporting from four business days to fifteen calendar days for most Tier 2 issuers, and eliminating the requirement to file current reports for the smallest issuers, based on a measure such as asset size or capitalization. We note that for Exchange Act registered companies, the Form 8-K filing deadline was either five business days or fifteen calendar days (depending on the event) prior to the adoption of the current four business-day deadline for most reportable events in 2004.

Finally, we believe that the Commission should consider amending the list of events which would trigger the filing of a current report by deleting unregistered sales of securities in an amount equal to 5% or more of an issuer's outstanding securities, or (in the alternative) increasing the threshold to 10%. We note that this type of event is much less significant than the other major life cycle events which would trigger the filing of a current report under the Tier 2 reporting system (a bankruptcy, change in control, fundamental change in the nature of the business and similar events). A small but growing company could easily be required to file multiple current reports disclosing the issuance of securities during the course of a year, resulting in additional costs to the issuer and increasing the risk of inadvertent non-compliance. Moreover, the issuance of securities would, in any event be reflected in the issuer's semi-annual reports, which might reduce or eliminate the need for separate reporting of relatively small issuances of securities.

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).

Rule 144(c)(2) defines "current information" for issuers that do not file reports under Section 13(a) or 15(d) of the Exchange Act by referring to the informational standards of Rule 15c2-11. Under Rule 15c2-11, a broker may generally initiate quotations for an unlisted security only if the broker has and makes available on request certain information, including "reasonably current" financial information as described in Rule 15c2-11(g). If the issuer's most recent publicly available balance sheet is as of a date six months or more prior to the date of the quotation, there must be a statement of profits and loss and retained earnings for the period from the balance sheet date to a date that is less than six months prior to the quotation. Compliance with the Tier 2 reporting requirements would not satisfy this requirement for part of the year, because the financial statements in the annual report could be up to nine months old before the semiannual report is due, and financial statements in the semiannual report could be up to nine months old before the annual report is due. As a result, compliance with the Tier 2 reporting requirements would not result in there being adequate current information under Rule 144(c)(2) or "reasonably current information" under Rule 15c2-11(g), except during the three months following the filing of the issuer's annual report and the filing of the issuer's semiannual report. Thus, for part of each year, affiliates could not rely on the safe harbor provided by Rule 144 in making transfers of the securities of Tier 2 issuers, and brokers would not be able to initiate quotations in that time period. Resales by affiliates to qualified institutional buyers in reliance on Rule 144A would be similarly restricted, as Rule 144A(d)(4)(ii)(A) requires updated data on profits and loss and retained earnings if the balance sheet is more than six months old.

We believe that the information that will be available regarding issuers complying with Tier 2 reporting requirements will be adequate to enable investors to make informed decisions to buy or sell Tier 2 securities throughout the year, given the obligation to provide "current" reports as discussed above and the overall quality of the information that is likely to result from the compliance with ongoing Tier 2 reporting requirements. While financial information may be up to nine months old, there will be the assurance that the initial offering circular received SEC Staff review, and the ongoing reporting requirements will be sufficiently detailed to permit informed investment decisionmaking. Overall, we believe it is likely that there will be as much or more information available concerning Tier 2 issuers as there would be concerning other non-Exchange Act registered U.S. companies complying with the financial requirement of Rule 15c2-11(g).

The Tier 2 exemption is unlikely to succeed unless the securities can actually be transferred easily in the secondary markets, and affiliates can transfer the securities throughout the year in reliance on Rule 144 or Rule 144A. This is particularly important if the Commission proceeds to adoption of the proposed Tier 2 resale limitation. Accordingly, we support amending 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, and we equally support corresponding amendments to the financial information requirements of Rule 144 and Rule 144A.

Exit from Reporting Obligations

We generally support the Commission's proposals with respect to the ability of Tier 2 issuers to exit from reporting obligations under Regulation A.

The Commission's proposals with respect to the continuation of reporting obligations after a Tier 2 offering, and the ability of an issuer to exit such reporting obligations, are generally parallel to the continuation of Exchange Act reporting obligations applicable to an issuer that has conducted a registered offering under the Securities Act. Securities issued in a Tier 2 offering may be eligible for deposit with DTC, and so might be held in street name, with individual DTC participants -- but not beneficial owners -- being counted as the record holders. In this case, the number of record holders resulting from a Tier 2 offering might be relatively small, even after significant trading in the aftermarket, and an issuer might be able to exit the reporting system after filing a single annual report. On the other hand, if the securities issued in a Tier 2 offering were not deposited with DTC, an offering could result in the addition of a large number of record holders, with additional record holders being added as a result of trading in the aftermarket, and the issuer might never be able to exit from its reporting obligations.

We do not believe that it would be appropriate to make it more difficult for an issuer to exit the ongoing reporting system under Regulation A than it is to exit the periodic reporting system under Section 15(d) of the Exchange Act. The real policy question, given the discretion Congress afforded the Commission with respect to ongoing reporting under new Section 3(b)(2), is whether there should be an accommodation to permit very small issuers to exit the Regulation A reporting system even when their Tier 2 offering has resulted in their having more than 300 record holders. The prospect of continuous reporting obligations might discourage some companies from conducting a Tier 2 offering, but the absence of such obligations might discourage potential investors. On balance, we believe that the statutory purpose of encouraging a market in smaller company securities is better served if it is not easier to exit the Regulation A (Tier 2) reporting system than it would be to exit the Exchange Act reporting system.

Exchange Act Registration of Regulation A Securities

As noted in our pre-rulemaking comment letter, we believe that the Commission should facilitate the Exchange Act registration of the securities of an issuer contemporaneous with the completion of a Tier 2 offering.

The Section 3(b)(2) exemption, as proposed to be implemented, would permit companies that choose to conduct a Tier 2 offering, but that do not trigger the increased Exchange Act Section 12(g) thresholds or list a class of securities triggering registration under Exchange Act Section 12(b), to remain exempt from Exchange Act registration and reporting. We believe, though, that there may be some companies that desire to go public by conducting a Tier 2 offering of equity securities and, contemporaneously with the closing of the transaction (or thereafter), listing a class of securities on a national securities exchange and registering the listed class pursuant to Exchange Act Section 12(b). Even with the accommodations made available to EGCs by Title I of the JOBS Act, a certain segment of companies may choose not to engage in a fully registered, underwritten initial public offering at the time of listing and Exchange Act registration. For these issuers, a Tier 2 offering with a contemporaneous Exchange Act registration may provide an appropriate, "right-sized" approach that would ensure important investor protections.

Although existing private secondary trading markets and electronic trading platforms may provide some liquidity for the unrestricted securities of an issuer that completes a Tier 2 offering and chooses not to register a class of securities pursuant to the Exchange Act, there are significant benefits associated with Exchange Act registration -- not least of which, from an investor protection perspective, is the obligation to comply with the statute's periodic reporting requirements. Significantly greater information would be available to investors about the company, its management and its financial condition, and the company's securities are more likely to be actively traded, affording investors greater liquidity.

Accommodating Exchange Act registration by non-reporting companies simultaneously with, or following a Tier 2 offering by permitting a national securities exchange listing, in our view, would be preferable pursuant to a Form 8-A rather than a Form 10, in appropriate circumstances. In response to the Commission's specific request for comment (No. 102), we believe that Form 8-A should be permitted to be used by an issuer that completes a Tier 2 offering and chooses to list its securities on a national securities exchange, so long as the issuer has used the Part I of Form S-1 narrative approach to disclosure in its offering statement. In our view, such an approach would not necessarily cause smaller reporting issuers to avoid conducting registered offerings under the Securities Act in situations where investor demand is substantial and large amounts of capital are needed to expand operations. In this connection, we note that the prospect of strict liability under Section 11 of the Securities Act is likely to have a greater deterrent effect on registered offerings once a smaller issuer has decided to "go public" pursuant to Exchange Act registration.

Another option might be to permit Tier 2 issuers to follow procedures analogous to those applicable to reverse merger acquisitions, enabling such issuers to transition from Regulation A to Exchange Act registration and reporting by providing information on an immediately effective form. Form 10 might be amended to provide for such a transition by Tier 2 issuers, absent an exchange listing pursuant to Form 8-A as discussed above.

Relationship with State Securities Law

We support the Commission's proposal to provide for the preemption of state securities law registration and qualification requirements for securities offered or sold to "qualified purchasers," defined as all offerees of securities in a Regulation A offering and all purchasers in a Regulation A Tier 2 offering. More specifically, we strongly endorse the Commission's proposal to define the term "qualified purchaser" under Section 18(b)(3) of the Securities Act to include (i) all offerees of securities in a Regulation A offering, and (ii) all purchasers in a Regulation A Tier 2 offering. We believe that this approach, in conjunction with other provisions of Regulation A as it is proposed to be amended, would provide substantial protection to offerees and investors in Regulation A offerings while easing compliance burdens and reducing transaction costs for Regulation A issuers. For these reasons, we believe that this proposal is consistent with the Commission's mandate pursuant to the JOBS Act to update and expand Regulation A to make it more useful and attractive for smaller companies seeking to raise capital without registering under the Securities Act.

The plain language of Section 18(b)(3) under the Securities Act makes it clear that the Commission has the statutory authority to define the term "qualified purchaser" differently for different categories of securities, "consistent with the public interest and the protection of investors." The disclosure regime and Commission review of offering statements for Tier 2 securities make them a category of securities with a framework of investor protection that renders state regulatory review unnecessary. In addition, there is significant public interest in facilitating the development of a market in Tier 2 securities by reducing the costs to issuers and time to market that would be associated with state and multi-state review.

The Commission's proposed amendments to Regulation A include numerous provisions specifically designed to protect investors, including:

- substantially enhanced requirements for information to be set forth in an offering statement to be reviewed and qualified by the Commission;

- the requirement to post the offering statement on EDGAR, thus making it available for review by the public;

- a requirement for issuers in a Tier 2 offering to include audited financial statements in their offering statements;

- a requirement for all Regulation A issuers to file balance sheets for the two most recently completed fiscal year ends (or for such shorter time that they have been in existence);

- ongoing reporting requirements for Tier 2 issuers;

- an update of the restrictions on issuer eligibility to exclude from Regulation A those issuers that have not filed with the Commission the ongoing reports required by the proposed rules during the two years immediately preceding the filing of an offering statement; and

- an update of the "bad actor" disqualifications to be consistent with the disqualifications under Rule 506(d) under the Securities Act.

We believe that these proposed amendments to Regulation A, among others, will provide for that level of investor protection that would render state blue sky review and registration unnecessary. We believe this is true without the proposed investment limit, as the fundamental protection is the initial and ongoing disclosure regime to which Tier 2 issuers will be subject. We do not believe that having one or more separate reviews by state securities commissioners would contribute materially to investor protection.

As the Commission notes in the Proposing Release, a recently issued U.S. Government Accountability Office ("GAO") report to Congress on the impact of state laws regulating securities offerings on offerings conducted under Regulation A (the "GAO Report") indicates that various "central" factors may have negatively influenced past use of Regulation A, including, among other things, state securities law compliance and the cost-effectiveness of Regulation A relative to other exemptions.[7] These two factors are particularly significant for smaller companies seeking to raise capital. The GAO Report also concludes that benefits associated with Rule 506 of Regulation D, another exemption available to non-reporting issuers which generally preempts blue sky registration requirements, have also played a role in limiting the use and effectiveness of Regulation A to date, and that small and growing companies will likely continue to favor Regulation D offerings over Regulation A, unless Regulation A is amended to provide for an exemption from blue sky laws.[8]

Smaller companies have limited budgets for capital raising and, in our experience, the cost of state securities law registration and review is often prohibitive. In addition, smaller private companies need flexibility and simplicity in the offering process because raising capital is generally more difficult for them (due, for example, to the lack of qualified legal and financial personnel). The challenges posed by the necessity of responding to both federal and state reviews and coordinating overlapping but potentially inconsistent comments and approvals have helped to make the existing Regulation A scheme unworkable for most smaller companies. Without relief from the onerous state registration requirements that otherwise would apply to Tier 2 offerings, we believe that early-stage companies will continue to find Regulation A an unattractive and largely useless exemption.

As the Commission notes in the Proposing Release, it would be possible to require investors to meet a minimum net worth standard or to satisfy other tests of financial sophistication in order to be "qualified investors" under Regulation A. We agree with the Commission, however, that a key feature of Regulation A is that offerings can be made and sold to the public in general and not just to accredited investors. The heightened disclosure system contained in Regulation A as it is proposed to be amended to implement the Tier 2 exemption, is sufficient to protect investors without imposing an individual investor income or net worth test.

Furthermore, we agree with the Commission's judgment that, in order to make Regulation A a workable mechanism for smaller companies to raise capital, issuers should be able to distribute "testing-the-waters" solicitation materials to potential investors via the Internet, social media and other online platforms without concern that such solicitation will trigger registration requirements under blue sky laws. By defining "qualified purchaser" to include all offerees in a Regulation A offering, the proposed rule would allow such communication with potential investors and, as a result, would provide issuers another source of cost savings in their pursuit of capital.

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[7] *See* Proposing Release at note 35 and accompanying text (citing the GAO Report, "Factors that May Affect Trends in Regulation A Offerings," GAO-12-839 (July 2012), available at http://www.gao.gov/assets/600/592113.pdf).

[8] GAO Report at 19.

As the Commission notes, the North American Securities Administrators Association ("NASAA") has proposed a coordinated review process for Regulation A offerings that would permit issuers to file Regulation A offering materials with the states using an electronic filing depository system currently in development by NASAA as a way to potentially synchronize the state law disclosure and compliance obligations of Regulation A issuers.[9] Under this proposal, the program administrator would select a state commissioner to serve as lead merit examiner, and a state commissioner to serve as lead disclosure examiner from among the states in which registration is sought. If the issuer is not applying for registration in a state that applies merit standards, then only a lead disclosure examiner would be selected. The lead examiners would be responsible for drafting and circulating a comment letter to the participating jurisdictions. Individual states could still suggest additional comments and ask for the inclusion of comments specific to that state's laws, but each individual state would not be required to draft duplicative comments on the same issue. Issuers would have the option of withdrawing from select states or from the coordinated review program altogether.

This proposed process is an improvement over separate reviews by up to fifty states, and we applaud NASAA for proposing to extend the benefits of coordinated review to Regulation A offerings. The proposed process is still too cumbersome, however, as issuers must still undergo both federal and state reviews, and must wait while the states coordinate with each other in the review and approval process. In addition, unless offers were exempt from state registration requirements, issuers would not reap the benefits of distributing solicitation materials to potential investors via the Internet and other mass communication platforms without concern that such solicitation will trigger registration requirements under state blue sky laws. Furthermore, as the Commission also notes, blue sky laws might impose limitations and requirements on issuers not otherwise imposed by Regulation A, thereby increasing compliance costs for issuers and discouraging them from utilizing Regulation A.

The NASAA proposal, as currently drafted, does not eliminate the lack of consistency and transparency in state regulation. In our view, the NASAA Statements of Policy do not reflect a fully developed or up-to-date disclosure or offering regime, and have not been uniformly adopted or interpreted by the states, resulting in considerable regulatory discretion and significant compliance costs for issuers, without countervailing benefits in terms of investor protection.

A key benefit of the proposed Regulation A exemption for Tier 2 issuers is the likelihood that the offerings of unrestricted securities will give rise to a liquid secondary trading market for these securities. For this to happen, resales of securities issued in Tier 2 offerings must be exempt from blue sky registration requirements, at least for as long as the issuer is providing ongoing reports pursuant to Regulation A or the Exchange Act. This might be accomplished by including within the definition of "qualified purchaser" both offerees and purchasers in resale transactions of securities issued in Tier 2 offerings, so long as the issuer was providing ongoing reports under Regulation A or the Exchange Act. This would be appropriate because such offerees and purchasers would have the protections of the ongoing disclosure system of Regulation A or the Exchange Act and thus would be able to fend for themselves.

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[9] *See* NASAA Release, dated October 30, 2013, "Notice of Request for Public Comment: Proposed Coordinated Review Program for Section 3(b)(2) Offerings," available at http://www.nasaa.org/27427/notice-request-public-comment-proposed-coordinated-review-program-section-3b2-offerings/.

Disqualification Provisions

Since the Commission adopted the final rule regarding the disqualification of certain "bad actors" in connection with Rule 506 offerings, a number of interpretative questions have arisen that have led to confusion. The Staff of the Commission has provided helpful guidance on various matters through three sets of Compliance and Disclosure Interpretations. However, some questions remain unanswered—such as, for example, the intended meaning of "voting securities" in this context. With respect to the term "voting securities", we believe the Commission should provide that for purposes of the bad actor disqualification provisions, including those under Regulation A, the term has the meaning ascribed to it under Exchange Act Rule 12b-2 (namely, securities the holders of which are presently entitled to vote for the election of directors (or the equivalent)).

Communications and Research Safe Harbors

The Commission should consider the need for limited safe harbors from Regulation A "testing-the-waters" filing requirements to permit regular business-related communications by Tier 2 issuers to continue. A company that is contemplating a Tier 2 Regulation A offering, or that has completed such an offering, should be able to communicate with its shareholders, suppliers and customers with some degree of legal certainty that these "regularly-released" communications will not be treated as "testing-the-waters" communications, or otherwise as offering-related communications, that may be subject to a filing requirement.

In addition, we urge the Commission to consider measures that would incentivize broker-dealers to initiate research coverage for Tier 2 issuers. We believe that an investment bank would need some reassurance that research reports published about a Tier 2 issuer will not constitute offering-related communications.

Conclusion

In closing, the Committee would like to express its admiration for the work of the Commission and its Staff in bringing forward the Proposed Release. The Committee hopes that the comments set forth above will assist the Commission in improving upon a very constructive set of proposals.

The Committee appreciates the opportunity to submit these comments. Members of the Committee are available to meet and discuss these matters with the Commission and its Staff and to respond to any questions.

* * *

Very truly yours,

/s/ Catherine T. Dixon_
Catherine T. Dixon+

Chair, ABA Federal Regulation of Securities Committee

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