SECURITIES AND EXCHANGE COMMISSION

17 CFR PARTS 230, 232, 239, 240 AND 260

[Release Nos. 33-9497; 34-71120; 39-2493; File No. S7-11-13]

RIN 3235-AL39

Proposed Rule Amendments for Small and Additional Issues Exemptions Under Section 3(b) of the Securities Act

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rules.

SUMMARY: We are proposing rule amendments to Regulation A to implement Section 401 of the Jumpstart Our Business Startups Act. Section 401 of the JOBS Act added Section 3(b)(2) to the Securities Act, which directs the Commission to adopt rules exempting offerings of up to $50 million of securities annually from the registration requirements of the Securities Act. The proposed rules include issuer eligibility requirements, content and filing requirements for offering statements and ongoing reporting requirements for issuers.

DATES: Comments should be received by [insert date 60 days after publication in the Federal Register].

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment forms (http://www.sec.gov/rules/proposed.shtml);
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-11-13 on the subject line; or

- Use the Federal Rulemaking Portal (http://www.regulations.gov). Follow the instructions for submitting comments.

Paper Comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-11-13. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (http://www.sec.gov/rules/proposed.shtml). Comments also are available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Room 1580, Washington, DC 20549. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Zachary O. Fallon, Special Counsel; Shehzad K. Niazi, Attorney-Advisor; or Karen C. Wiedemann, Attorney Fellow; Office of Small Business Policy, Division of Corporation Finance, at (202) 551-3460, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-3628.

SUPPLEMENTARY INFORMATION: We propose to amend Rules 251-263[1] under Regulation A.[2]

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[1] 17 CFR 230.251 through 230.263.

[2] 17 CFR 230.251 through 230.263.

We also propose to revise Form 1-A,[3] rescind Form 2-A,[4] and create four new forms, Form 1-K (annual updates), Form 1-SA (semiannual updates), Form 1-U (current reporting), and Form 1-Z (exit report).

We further propose to revise Rule 4a-1[5] under the Trust Indenture Act[6] to increase the dollar ceiling of the exemption from the requirement to issue securities pursuant to an indenture, and to amend Rule 15c2-11[7] of the Securities Exchange Act of 1934 (the "Exchange Act")[8] to permit an issuer's ongoing reports filed under Regulation A to satisfy a broker-dealer's obligations to review and maintain certain information about an issuer's quoted securities. In addition, we propose a technical amendment to Exchange Act Rule 15c2-11 to amend subsection (d)(2)(i) of the rule to update the outdated reference to the "Schedule H of the By-Laws of the National Association of Securities Dealers, Inc." which is now known as the "Financial Industry Regulatory Authority, Inc." and to reflect the correct rule reference.

As a result of the proposed revisions to Regulation A, conforming and technical amendments would be made to Rule 157(a),[9] in order to reflect amendments to Section 3(b) of the Securities Act, and Rule 505(b)(2)(iii),[10] in order to reflect the

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[3] 17 CFR 239.90.

[4] 17 CFR 239.91.

[5] 17 CFR 260.4a-1.

[6] 15 U.S.C. 77aaa *et seq*.

[7] 17 CFR 240.15c2-11.

[8] 15 U.S.C. 78a *et seq*.

[9] 17 CFR 230.157(a).

[10] 17 CFR 230.505(b)(2)(iii).

proposed changes to Rule 262 of Regulation A. Additionally, Item 101(a)[11] of Regulation S-T[12] would be revised to reflect the mandatory electronic filing of all issuer initial filing and ongoing reporting requirements under proposed Regulation A. The portion of Item 101(c)(6)[13] of Regulation S-T dealing with paper filings related to a Regulation A offering, and Item 101(b)(8)[14] of Regulation S-T dealing with the optional electronic filing of Form F-X by Canadian issuers, would therefore be rescinded.

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[11] 17 CFR 232.101(a).

[12] 17 CFR 232.10 *et seq*.

[13] 17 CFR 232.101(c)(6).

[14] 17 CFR 232.101(b)(8).

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I. INTRODUCTION AND BACKGROUND

A. JOBS Act Section 401

This rulemaking would implement a statutory directive under the Jumpstart Our Business Startups Act (the "JOBS Act")[15] to create a new exemption from registration under the Securities Act of 1933 (the "Securities Act") for small offerings. Section 401 of the JOBS Act amended Section 3(b) of the Securities Act by designating existing Section 3(b), the Commission's exemptive authority for offerings of up to $5 million, as Section 3(b)(1), and creating a new Section 3(b)(2). New Section 3(b)(2) directs the Commission to adopt rules adding a class of securities exempt from the registration requirements of the Securities Act for offerings of up to $50 million of securities within a twelve-month period. Issuers conducting offerings in reliance on Section 3(b)(2) would be required to follow terms and conditions established by the Commission, and, where applicable, to make ongoing disclosure.

Congress enacted Section 3(b)(2) against a background of public commentary suggesting that Regulation A, an exemption for small issues originally adopted by the Commission in 1936 under the authority of Section 3(b) of the Securities Act,[16] should be expanded and updated to make it more useful to small companies.[17] Section 3(b)(2)

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15 Pub. L. No. 112-106, 126 Stat. 306.

16 SEC Release No. 33-632 (Jan. 21, 1936). Prior to codification as such, Regulation A was a collection of individual rules issued by the Federal Trade Commission and the Commission during the period of 1933-1936. Each such rule exempted particular classes of securities from registration under the Securities Act. Regulation A's initial annual offering limit was raised from $100,000 to $300,000 in 1945, $500,000 in 1970, $1.5 million in 1978, and to its current level of $5 million in 1992.

17 H.R. Rep. No. 112-206 (2011), at 3-4. *See also* Remarks and prepared statements of William Hambrecht, CEO of WR Hambrecht + Co., ("A confluence of . . . reasons . . . has made Regulation A a poor alternative for small growth-oriented companies seeking to raise development capital and also explains why the offering mechanism has virtually disappeared from the capital raising landscape."), and Michael Lempres, Asst. General Counsel, SVB Financial Group,

requires us to engage in rulemaking that is meant to increase the use of Regulation A, thereby helping to make capital available to small companies.[18]

To implement Section 401 of the JOBS Act, as mandated by Section 3(b)(2), we have endeavored to craft a workable revision of Regulation A that would both promote small company capital formation and provide for meaningful investor protection. We propose to amend Regulation A to create two tiers of offerings: Tier 1, for offerings of up to $5 million in a twelve-month period, and Tier 2, for offerings of up to $50 million in a twelve-month period. Both Tiers would be subject to basic requirements as to issuer eligibility, disclosure, and other matters, drawn from the current provisions of Regulation A and updated in some areas to align Regulation A with current practice for

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("Regulation A has not proved to be a useful capital raising vehicle for small issuers. . . . An average of eight filings a year, with a maximum amount of $5 million each, proves the irrelevance of Regulation A as it stands today. It simply is not a viable vehicle for raising funds and is providing benefit to neither companies nor investors.") before the H. Comm. on Fin. Serv. for the 111th Congress, Serial No. 111-168 (December 8, 2010), *available at*: http://archives.financialservices.house.gov/Hearings/hearingDetails.aspx?NewsID=1381; Remarks and prepared statement of David Weild, Sr. Advisor, Grant Thorton, ("[A]n increase to the Regulation A [offering] ceiling will provide a less costly and more effective alternative for smaller, entrepreneurial companies that want to access the public capital markets. It may also enable smaller, growth-oriented companies to access the public market at an earlier stage in their growth cycle.") before the H. Comm. on Fin. Serv., Subcommittee on Capital Markets and Gov't Sponsored Entities for the 112th Congress, Serial No. 112-19 (March 16, 2011), *available at*: http://financialservices.house.gov/calendar/eventsingle.aspx?EventID=231755; Remarks and prepared statements of Professor John C. Coffee, Columbia Law School ("[I]n 2010 only seven offerings went effective under Regulation A (which is based on Section 3(b)). Most issuers saw Section 3(b) as unattractive (in comparison to a private placement under Regulation D) both because of Section 3(b)'s low ceiling (*i.e.*, $5 million) and the need to file an offering document that is reviewed by the SEC."), before the U.S. Senate Comm. on Banking, Housing and Urban Affairs (December 1, 2011), *available at*: http://www.banking.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=a96c1bc1-b064-4b01-a8ad-11e86438c7e5; U.S. Government Accountability Office (GAO), *Factors that May Affect Trends in Regulation A Offerings* (July 2012) (*available at*: http://www.gao.gov/assets/600/592113.pdf).

[18] H.R. Rep. No. 112-206, at 3 (2011) ("The low number of Regulation A filings—each for the maximum amount of $5 million—demonstrates that a revision to Regulation A is necessary. To increase the use of Regulation A offerings and help make capital available to small companies, Representative Schweikert introduced H.R. 1070, which increases the offering threshold to $50 million.").

registered offerings. In addition to these basic requirements, Tier 2 offerings would be subject to additional requirements, including the provision of audited financial statements, ongoing reporting obligations, and certain limitations on sales.

B. Current Regulation A

Currently, Regulation A permits unregistered public offerings of up to $5 million of securities in any twelve-month period by non-reporting U.S. and Canadian companies, including no more than $1.5 million of securities offered by securityholders of the company.[19] The exemption requires that an offering statement on Form 1-A be filed with the Commission.[20] Filings are made on paper,[21] rather than electronically, and are subject to staff review. The offering statement must be "qualified,"[22] which, in the absence of a delaying notation, would occur without Commission action on the 20th calendar day after filing.[23] The core of the offering statement is the offering circular, a disclosure document much like an abbreviated version of the prospectus in a registered offering.[24] The offering circular, which must be delivered to prospective purchasers,[25]

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19 17 CFR 230.251(a), (b). Under Rule 251(b), affiliates resales are prohibited unless the issuer has had net income from continuing operations in at least one of its last two fiscal years.

20 17 CFR 230.251(d), 17 CFR 230.252.

21 17 CFR 232.101(c)(6).

22 17 CFR 230.251(g). *See also* 17 CFR 200.30-1(b)(2) (delegated authority to authorize the qualification of offering statements under Regulation A to the Director of the Division of Corporation Finance).

23 The qualification process under Regulation A is similar to the process of a registration statement being declared effective under the Securities Act. As with registration, the staff review process for an offering circular generally takes more than the 20 calendar days provided by rule, even taking into account that pre-qualification amendments to an offering statement restart the 20 calendar-day period. Issuers include a delaying notation on Form 1-A to ensure that both the issuer and staff reviewing the offering statement have completed the review process before an offering statement is qualified.

24 17 CFR 230.253.

25 17 CFR 230.251(d).

can be in a question-and-answer format or a more traditional narrative disclosure format.[26]

Regulation A permits issuers to communicate with potential investors, or "test the waters" for potential interest in the offering, before filing the offering statement.[27] Any solicitation material used to test the waters must be submitted to the Commission not later than the time of first use and must contain a required legend or disclaimer.[28]

Regulation A offering circulars are required to contain issuer financial statements,[29] but the financial statements are not required to be audited unless the issuer otherwise has audited financial statements available.[30] Qualification of a Regulation A offering statement does not trigger reporting obligations under the Exchange Act. A Regulation A offering is a public offering, with no prohibition on general solicitation and general advertising. Securities sold under Regulation A are not "restricted securities" under the Securities Act and, therefore, are not subject to the limitations on resale that apply to securities sold in private offerings.[31]

Because Regulation A offerings are exempt from the registration requirements of the Securities Act, issuers and other offering participants are not subject to the liability

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26 Form 1-A, Part II (Offering Circular), 17 CFR 239.90.

27 17 CFR 230.254.

28 17 CFR 230.254(b)(2). Testing the waters solicitation materials must state: i) that no money is being solicited or will be accepted, if sent in response; ii) that no sales will be made or commitment to purchase accepted until delivery of an offering circular that includes complete information about the issuer and the offering; iii) that an indication of interest by a prospective purchaser is non-binding; and iv) the identity of the chief executive officer of the issuer and a brief description of the issuer's business and products.

29 17 CFR 230.253(a).

30 Form 1-A, Part F/S, 17 CFR 239.90. Market participants have indicated that the laws of some states may require audited financial statements for offerings conducted under Regulation A.

31 *See, e.g.,* 17 CFR 230.502(d); *see also* Rule 144 (17 CFR 230.144).

provisions of Section 11 of the Securities Act. Instead, other anti-fraud and civil liability provisions of the securities laws, including Sections 12(a)(2) and 17 of the Securities Act, Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5, apply to the offer and sale of securities in reliance upon Regulation A.[32] Securities offerings conducted pursuant to Regulation A are subject to state securities law registration and qualification requirements, unless an exemption is available under state law.

C. Use of Regulation A

In recent years, Regulation A offerings have been rare in comparison to offerings conducted in reliance on other Securities Act exemptions or on a registered basis. From 2009 through 2012, there were 19 qualified Regulation A offerings for a total offering amount of approximately $73 million.[33] During the same period, there were approximately 27,500 offerings of up to $5 million (*i.e.*, at or below the cap on Regulation A offering size), for a total offering amount of approximately $25 billion, claiming a Regulation D exemption, and 373 offerings of up to $5 million, for a total offering amount of approximately $840 million, conducted on a registered basis. In 2012 alone, there were eight qualified Regulation A offerings for a total offering amount of approximately $34.5 million, compared to approximately 7,700 Regulation D offerings of up to $5 million for a total offering amount of approximately $7 billion, and 52 registered offerings of up to $5 million for a total offering amount of approximately $132 million.[34]

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[32] *See* SEC Rel. No. 33-6924 (March 20, 1992) [57 FR 9768], at fn. 57 (discussing the anti-fraud and civil liability provisions applicable to Regulation A).

[33] One qualified offering involved a dividend reinvestment plan by an issuer that did not include an offering amount.

[34] The figures cited above are derived from information contained in the Commission's EDGAR database and the S&P Capital IQ database. *See also* Section IV. below for a discussion on the usage of current methods of raising capital of up to $50 million.

Section 402 of the JOBS Act required the Comptroller General to conduct a study on the impact of state "Blue Sky" laws on offerings conducted under Regulation A, and to report its findings to Congress. The resulting U.S. Government Accountability Office ("GAO") report to Congress indicates that various factors may have influenced the use of Regulation A, including the type of investors businesses seek to attract, the process of filing the offering statement with the Commission, state securities law compliance, and the cost-effectiveness of Regulation A relative to other exemptions.[35]

D. The Section 3(b)(2) Exemption

Section 401 of the JOBS Act imposes a number of requirements for the rules the Commission must adopt under Section 3(b)(2), and also provides for the exercise of Commission discretion in setting additional terms and conditions for the exemption.

The mandatory provisions, in addition to the $50 million annual offering limit, include:

- Features based on the current provisions of Regulation A:
    - the securities may be offered and sold publicly;
    - the securities are not "restricted securities" within the meaning of federal securities laws and regulations;
    - the civil liability provisions of Section 12(a)(2) of the Securities Act would apply to offers and sales of the securities; and

[35] *Factors that May Affect Trends in Regulation A Offerings*, GAO-12-839 (July 2012) (*available at*: http://www.gao.gov/assets/600/592113.pdf). The GAO report concludes that it is unclear whether increasing the Regulation A offering ceiling from $5 million to $50 million will improve the utility of the exemption.

    - issuers may solicit interest in the offering before filing an offering statement;
- A new requirement for issuers to file audited financial statements with the Commission annually;[36] and
- A limitation on the types of securities eligible for exemption under Section 3(b)(2) to equity securities, debt securities, and debt securities convertible into or exchangeable for equity interests, including any guarantees of such securities.

The Commission, in its discretion, may determine to include other terms, conditions, or requirements, including:

- electronic filing of offering materials, the form and content of which would be prescribed by the Commission, including audited financial statements, issuer business description, issuer financial condition, issuer corporate governance principles, use of investor funds, and other appropriate matters;
- "bad actor" disqualification provisions (which, if included, must be substantially similar to the regulations adopted under Section 926 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"));[37] and
- periodic disclosures regarding the issuer, its business operations, financial condition, corporate governance principles, use of investor funds, and other appropriate matters.[38]

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36 JOBS Act Section 401(a)(2).

37 Pub. L. No. 111-203, § 926, 124 Stat. 1376, 1851 (July 21, 2010). Among other things, Section 926 required the issuance of disqualifying rules substantially similar to the "bad actor" disqualification provisions of Rule 262 of existing Regulation A.

38 JOBS Act Section 401(a)(2).

Section 401 of the JOBS Act also requires the Commission to review the $50 million offering limit not later than two years after enactment of the JOBS Act and every two years thereafter and, if the Commission decides not to increase the amount, requires that it report its reasoning to Congress.

II. PROPOSED AMENDMENTS TO REGULATION A

A. Overview

Title IV of the JOBS Act amended Section 3(b) of the Securities Act to add Section 3(b)(2), which, subject to various terms and conditions, directs the Commission to enact rules that add a class of securities exempt from the registration provisions of the Securities Act. Prior to the amendment, Section 3(b) contained the statutory authority relied upon to establish current Regulation A. Although the JOBS Act amended Section 3(b) to designate this existing authority as Section 3(b)(1) and add new Section 3(b)(2), it did not amend the existing statutory authority of Regulation A or direct the Commission to amend specific rules adopted thereunder.[39] We propose to implement this JOBS Act mandate by expanding Regulation A into two tiers: Tier 1, for offerings of up to $5 million; and Tier 2, for offerings of up to $50 million.[40] The proposals for offerings under Tier 1 and Tier 2 build on current Regulation A, and preserve, with some modifications, existing provisions regarding issuer eligibility, offering circular contents, testing the waters, and "bad actor" disqualification. We also propose to modernize the Regulation A filing process for all offerings and align practice in certain areas with

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[39] *Cf.* Title II of the JOBS Act, Pub. L. No. 112-106, § 201 (directing the Commission to amend Rule 506 of Regulation D, 17 CFR § 230.506).

[40] An issuer of $5 million or less of securities could elect to proceed under either Tier 1 or Tier 2.

prevailing practice for registered offerings, to create additional flexibility and streamline compliance for Regulation A issuers. Issuers in Tier 2 offerings would be required to include audited financial statements in their offering documents and to file annual, semiannual and current reports with the Commission, and purchasers in Tier 2 offerings would be subject to certain limitations on their investment. The differences between Tier 1 and Tier 2 offerings are described more fully below.

In developing the current proposals, we considered the statutory language of JOBS Act Section 401, the legislative history, the current Regulation A exemption, comment letters received to date on Title IV of the JOBS Act[41] and recent recommendations of the Commission's Government-Business Forum on Small Business Capital Formation,[42] the Advisory Committee on Small and Emerging Companies,[43] and the Equity Capital Formation Task Force.[44]

Following are the key provisions of the proposed amendments to Regulation A:

Scope of the exemption:

- Tier 1: annual offering limit of $5 million, including no more than $1.5 million on

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41 To facilitate public input on JOBS Act rulemaking before the issuance of rule proposals, the Commission has invited members of the public to make their views known on various JOBS Act initiatives in advance of any rulemaking by submitting comment letters to the Commission's website at http://www.sec.gov/spotlight/jobsactcomments.shtml. Comment letters received to date on Title IV of the JOBS Act are *available at*: http://www.sec.gov/comments/jobs-title-iv/jobs-title-iv.shtml.

42 Prior recommendations of the Commission's Government-Business Forum on Small Business Capital Formation ("Small Business Forum") are *available at*: http://www.sec.gov/info/smallbus/sbforum.shtml.

43 Prior recommendations of the Advisory Committee on Small and Emerging Companies ("Advisory Committee") are *available at*: http://www.sec.gov/info/smallbus/acsec.shtml.

44 Equity Capital Task Force, *From the On-Ramp to the Freeway: Refueling Job Creation and Growth by Reconnecting Investors with Small-Cap Companies*, presentation to the U.S. Dep't. of Treasury (November 11, 2013), *available at*: http://www.equitycapitalformationtaskforce.com/ ("ECTF Report").

behalf of selling securityholders.

- Tier 2: annual offering limit of $50 million, including no more than $15 million on behalf of selling securityholders.
- Update the restrictions on issuer eligibility to exclude from Regulation A issuers that are or have been subject to any order of the Commission pursuant to Section 12(j) of the Exchange Act entered within five years before the filing of the offering statement.
- Update the restrictions on issuer eligibility to exclude from Regulation A 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.
- Limit the amount of securities an investor can purchase in a Tier 2 offering to no more than 10% of the greater of annual income and net worth.
- Exclude asset-backed securities, as defined in Regulation AB, from the list of eligible securities.
- Update the safe harbor from integration and provide additional guidance on the potential integration of offerings conducted concurrently with, or close in time after, a Regulation A offering.

Solicitation materials:

- Permit issuers to "test the waters" or solicit interest in a potential offering with the general public either before or after the filing of the offering statement, so long as any solicitation materials used after publicly filing the offering statement are preceded or accompanied by a preliminary offering circular or contain a notice

informing potential investors where and how the most current preliminary offering circular can be obtained. This requirement could be satisfied by providing the uniform resource locator ("URL") where the preliminary offering circular or the offering statement may be obtained on EDGAR.

Qualification, communications, and offering process:

- Require issuers and intermediaries in the prequalification period to deliver a preliminary offering circular to prospective purchasers at least 48 hours in advance of sale.
- Modernize the qualification, communications, and offering process in Regulation A to reflect analogous provisions of the Securities Act registration process:[45]
    - Permit issuers and intermediaries to satisfy their delivery requirements as to the final offering circular under an "access equals delivery" model when the final offering circular is filed and available on EDGAR;
    - Require issuers that sell to prospective purchasers in reliance on the delivery of a preliminary offering circular to, not later than two business days after completion of the sale, provide the purchasers with a copy of the final offering circular or a notice that the sale occurred pursuant to a qualified offering statement that includes the URL where the final offering circular or to the offering statement of which such final offering circular is part may be obtained and contact information sufficient to notify a purchaser where a request for a final offering circular can be sent and received in response; and

    - Permit issuers to file offering circular supplements after qualification of the offering statement in certain circumstances in lieu of post-qualification amendments, including to provide the types of information that may be excluded from a prospectus under Rule 430A.
- Permit continuous or delayed offerings under the proposed rules, but require issuers in continuous or delayed Tier 2 offerings to be current in their annual and semiannual reporting obligations.
- Permit issuers to qualify additional securities in reliance on Regulation A by filing a post-qualification amendment to a qualified offering statement.

Offering statement:

- Require issuers to electronically file offering statements with the Commission.
- Permit the non-public submission of offering statements and amendments for review by Commission staff before filing such documents with the Commission, so long as all such documents are publicly filed not later than 21 calendar days before qualification.
- Eliminate the Model A (Question-and-Answer) disclosure format under Part II (Offering Circular) of Form 1-A.
- Update and clarify the Model B (Narrative) disclosure format under Part II of Form 1-A (renaming it as Offering Circular), while continuing to permit the use of Part I of Form S-1 narrative disclosure as an alternative.
- Allow an offering statement to be qualified only by order of the Commission rather than, in the absence of a delaying notation on the offering statement,

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[45] *See* Securities Offering Reform, SEC Rel. No. 33-8591 (July 19, 2005) [70 FR 44722].

without Commission action on the 20th calendar day after filing.

- Require issuers in a Tier 2 offering to include audited financial statements in their offering circulars.
- Require all 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).
- Permit issuers to provide financial statements in Form 1-A that are dated not more than nine months before the date of non-public submission or filing, and require issuers to include financial statements in Form 1-A that are dated not more than nine months before qualification, with the most recent annual or interim balance sheet not older than nine months. If interim financial statements are required, they must cover a period of at least six months.

Ongoing reporting:

- Require issuers that conduct a Tier 1 offering to electronically file a Form 1-Z exit report with the Commission not later than 30 calendar days after termination or completion of a qualified Regulation A offering to provide information about sales in such offering and to update certain issuer information.
- Require issuers that conduct a Tier 2 offering to electronically file with the Commission annual and semiannual reports, as well as current event updates.
- Require issuers that conduct a Tier 2 offering to, where applicable, provide special financial reports to provide information to investors in between the time the financial statements are included in Form 1-A and the issuer's first periodic report due after qualification of the offering statement.
- Permit the ongoing reports filed by an issuer conducting a Tier 2 offering to be

used to satisfy a broker-dealer's obligations under Exchange Act Rule 15c2-11.

- Provide that issuers conducting Tier 2 offerings would exit the Regulation A ongoing reporting regime when they become subject to the ongoing reporting requirements of Section 13 of the Exchange Act, and may exit the Regulation A reporting regime at any time by filing a Form 1-Z exit report after completing reporting for the fiscal year in which the offering statement was qualified, so long as the securities of each class to which the offering statement relates are held of record by fewer than 300 persons and offers or sales made in reliance on a qualified Regulation A offering statement are not ongoing.
- Require issuers that conduct a Tier 2 offering to include in their first annual report after termination or completion of a qualified Regulation A offering, or in their Form 1-Z exit report, information about sales in the terminated or completed offering and to update certain issuer information.
- Eliminate the requirement that issuers file a Form 2-A with the Commission to report sales and the termination of sales made under Regulation A every six months after qualification and within 30 calendar days after the termination, completion, or final sale of securities in the offering.

"Bad actor" disqualification provisions:

- Substantially conform the "bad actor" disqualification provisions of Rule 262 to new Rule 506(d) and add a new disclosure requirement similar to Rule 506(e).

Application of state securities laws:

- In light of the total package of investor protections proposed to be included in the implementing rules for Regulation A, provide for the preemption of state

securities law registration and qualification requirements for securities offered or sold to "qualified purchasers," defined to be all offerees of securities in a Regulation A offering and all purchasers in a Tier 2 offering.

B. Scope of Exemption

1. Eligible Issuers

Section 401 of the JOBS Act does not include any express issuer eligibility requirements.[46] Currently, Regulation A is limited to companies organized in and with their principal place of business inside the United States or Canada. It is unavailable to:

- companies subject to the ongoing reporting requirements of Section 13 or 15(d) of the Exchange Act ("reporting companies");
- companies registered or required to be registered under the Investment Company Act of 1940 ("investment companies");[47]
- development stage companies that have no specific business plan or purpose or have indicated their business plan is to engage in a merger or acquisition with an unidentified company or companies ("blank check companies");[48] and
- issuers of fractional undivided interests in oil or gas rights, or similar interests in other mineral rights.[49]

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46 Section 3(b)(2)(G)(ii) specifies that if the Commission chooses to enact so-called "bad actor" disqualification provisions, such provisions must be substantially similar to the regulations adopted in accordance with Section 926 of the Dodd-Frank Act. Proposed "bad actor" disqualification provisions are discussed below in Section II.F.

47 15 U.S.C. 80a-1 *et seq.* ("Investment Company Act"). The proposed rules would clarify the current exclusion of business development companies from Regulation A. *See* SEC Rel. No. 33-6924, at fn. 65 (noting that companies registered or required to be registered under the Investment Company Act of 1940, including business development companies, are prohibited from using Regulation A).

Several commenters have suggested that the expanded exemption should continue to be unavailable to blank check companies,[50] two of which also suggested that the exemption should be unavailable to special purpose acquisition companies ("SPACs").[51] Two commenters suggested that business development companies ("BDCs") should be permitted to rely on the exemption,[52] and also suggested that shell companies should no longer be permitted to rely on Regulation A.[53] One commenter expressed concern over allowing BDCs, as well as real estate investment trusts ("REITs"), to rely on the

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48 Rule 251(a)(3); *see also* SEC Rel. No. 33-6949 [57 FR 36442] (July 30, 1992), at fn. 50 (clarifying that blank check companies regardless of whether they are issuing penny stock are precluded from relying on Regulation A).

49 Regulation B formerly provided exemptive relief for such issuers. Regulation B was rendered obsolete in light of other exemptions, such as those afforded issuers under Section 4(a)(2) of the Securities Act and Regulation D, and was rescinded in May 1996. *See* SEC Release No. 33-7300 [61 FR 30398] (May 31, 1996).

50 Letter from Catherine T. Dixon, Chair, Federal Regulation of Securities Committee, American Bar Association, Sept. 7, 2013 ("ABA Letter"); Letter from William R. Hambrecht, Chairman and CEO, WR Hambrecht + Co., Jan. 4, 2013 ("WR Hambrecht + Co. Letter"); Letter from A. Heath Abshure, President, North American Securities Administrators Association ("NASAA"), April 10, 2013 ("NASAA Letter 2"); *see also* Letter from Robert R. Kaplan, Jr. and Mark A. Cleaves, Kaplan Voekler Cunningham & Frank PLC ("Kaplan Voekler"), May 14, 2013 (Kaplan Voekler Letter 2").

51 NASAA Letter 2; WR Hambrecht + Co. Letter; *see also* Kaplan Voekler Letter 2 (noting that there are important distinctions between SPACs, blank check companies, and shell companies). A SPAC is a type of blank check company created specifically to pool funds in order to finance a merger or acquisition opportunity within a set timeframe.

52 ABA Letter (suggesting that permitting BDCs to rely on Regulation A would be consistent with the policy goals behind enactment of Section 3(b)(2) of the Securities Act, and Commission staff guidance on the JOBS Act and the treatment of BDCs as emerging growth companies under Title I of the JOBS Act); WR Hambrecht + Co. Letter (suggesting that permitting BDCs to rely on Regulation A would be consistent with the policy goals behind enactment of Section 3(b)(2) of the Securities Act). A BDC is a closed-end company that, among other things, is operated for the purpose of making investments in certain types of securities, and makes available to issuers of such securities significant managerial assistance. *See* Section 2(a)(48) of the Investment Company Act.

53 ABA Letter; WR Hambrecht + Co. Letter. A shell company is a company that has, or at any time previously has had, no or nominal operations, and either no or nominal assets, assets consisting solely of cash or cash equivalents, or assets consisting of any amount of cash and cash equivalents and nominal other assets. 17 CFR 230.405; *see also* 17 CFR 144(i)(1)(i).

exemption without additional entity-specific disclosure requirements,[54] while another suggested that REITs should be allowed to rely on the exemption without additional disclosure obligations.[55] One commenter suggested that the Commission permit reporting companies, and foreign private issuers[56] that expressly consent to Exchange Act Section 10(b) liability, to rely on the exemption.[57] One commenter proposed limiting the availability of the exemption to non-reporting companies, and to operating companies, while continuing to make the exemption unavailable to pooled investment funds.[58]

We propose to add two new categories of ineligible issuers to, but to otherwise maintain, Regulation A's existing issuer eligibility requirements. As proposed, the exemption would continue to be available to companies organized in, and with their principal place of business inside, the United States or Canada. Under the proposal, the exemption would continue to be unavailable to Exchange Act reporting companies,

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54 NASAA Letter 2 (citing the unique "nature and timing of [such companies'] capital formation and investment strategies, fee structures, and liquidity, necessitate disclosure fitting for these specific entities."). We solicit comment on potential BDC- and REIT-specific disclosure in Section II.C.3.b. below.

55 Kaplan Voekler Letter 2. A REIT is a company that owns and generally operates income-producing real estate or real estate-related assets. *See* Sections 856 through 859 of Internal Revenue Code, 26 U.S.C. 856-859; *see also* general discussion of REIT characteristics in SEC Rel. No. IC-29778 (Aug. 31, 2011) [76 FR 55300], at 55302. Among other things, a REIT must have the bulk of its assets and income connected to real estate investment and must distribute at least 90 percent of its taxable income to shareholders annually in the form of dividends.

56 Under Rule 405 (17 CFR § 230.405), a foreign private issuer is any foreign issuer—other than a foreign government—except an issuer meeting the following conditions as of the last business day of its most recently completed second fiscal quarter:

(i) More than 50 percent of the outstanding voting securities of such issuer are directly or indirectly owned of record by residents of the United States; and

(ii) Any of the following:

(A) The majority of the executive officers or directors are United States citizens or residents;

(B) More than 50 percent of the assets of the issuer are located in the United States; or

(C) The business of the issuer is administered principally in the United States.

57 ABA Letter.

investment companies, blank check companies, certain issuers disqualified from participation in such offerings under the "bad actor" provisions of Rule 262, as proposed to be amended,[59] and to issuers of fractional undivided interests in oil or gas rights, or similar interests in other mineral rights.[60]

Additionally, we propose to make the exemption unavailable to 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 a new offering statement (or for such shorter period that the issuer was required to file such reports).[61] We recently proposed a similar eligibility requirement for issuers in our proposed rules for securities-based crowdfunding transactions pursuant to Section 4(a)(6) of the Securities Act.[62] We believe that our rules for ongoing reporting in Regulation A, as proposed to be amended, would benefit investors by enabling them to consider updated information about the issuer, make informed investment decisions, facilitate the development of an efficient secondary market in such securities, and would enhance our ability to analyze and monitor the Regulation A market. We therefore believe fulfilling an obligation to file ongoing reports pursuant to proposed Regulation A is an important investor protection that should be a factor in determining issuer eligibility.

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58 WR Hambrecht + Co. Letter.

59 *See* discussion in Section II.G. below.

60 *See* proposed Rules 251(b) and 262.

61 *See* Section II.E.1. below for a discussion on proposed ongoing reporting requirements applicable to Tier 1 and Tier 2 offerings.

62 *See* SEC Rel. No. 33-9470 (Oct. 23, 2013), at 36 [78 FR 66427] (proposed rules for Regulation Crowdfunding under Title III of the JOBS Act) *and* proposed Rule 100(b)(5) of Regulation Crowdfunding.

We further propose to exclude from the category of eligible issuers under Regulation A issuers that are or have been subject to an order by the Commission denying, suspending, or revoking the registration of a class of securities pursuant to Section 12(j) of the Exchange Act that was entered within five years before the filing of the offering statement. Under Section 12(j) of the Exchange Act, an issuer's securities registered under the Exchange Act may be subject to a denial, suspension, or revocation of registration pursuant to an order by the Commission if, after notice and opportunity for a hearing, the Commission finds that the issuer of such securities has failed to comply with any of the provisions of, or the rules and regulations enacted under, the Exchange Act. We do not believe that issuers that, after notice and opportunity for a hearing, are or have been subject to such orders by the Commission within a five-year period immediately preceding the filing of the offering statement should benefit from the provisions of Regulation A, as proposed to be amended. We would therefore exclude such issuers from the category of eligible issuers.

We solicit comment on the proposed issuer eligibility requirements, the suggestions made in the advance comments to date, and on the issues discussed below.

Request for Comment

1. As proposed, in addition to the two newly proposed issuer eligibility requirements, should we otherwise maintain the existing categories of Regulation A issuer eligibility requirements? Why or why not? If not, which categories of issuer eligibility requirements should we alter, and why? Please explain.

2. As proposed, should we add an additional issuer eligibility requirement to exclude 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 a new offering statement (or for such shorter period that the issuer was required to file such reports)? If so, should we only require issuers to be current in their Regulation A ongoing reporting at the time of the filing of a new offering statement in order to be eligible? Alternatively, should we consider a time period other than two years? Why or why not?

3. As proposed, should we add an additional issuer eligibility requirement to exclude issuers that are or have been subject to an order by the Commission denying, suspending, or revoking the registration of a class of securities pursuant to Section 12(j) of the Exchange Act that was entered within five years before the filing of the offering statement? Why or why not? If not, please explain. Alternatively, should we alter the proposed five-year period during which an issuer could not have been subject to an order by the Commission pursuant to Section 12(j) to cover a longer or shorter period of time? Why or why not? If so, please explain.

a. U.S. nexus other than organization and domicile

We are seeking comment on whether we should expand availability of the Regulation A exemption to issuers that may not satisfy domicile-based requirements, particularly those that have a substantial United States nexus, such as certain foreign

companies with domestic operations, or domestic subsidiaries of foreign multinational companies.[63]

As its name suggests, one goal of the JOBS Act was the creation of jobs within the United States.[64] Expansion of issuer eligibility to include foreign issuers with a substantial U.S. nexus may serve to better implement the JOBS Act goal of domestic job creation. According to statistics from the U.S. Department of Commerce's Bureau of Economic Analysis ("BEA"), many American jobs are created not only by U.S. companies, but by the U.S. affiliates of foreign multinational companies.[65] According to the report, total U.S. employment by majority-owned U.S. affiliates of foreign multinational companies rose in 2011 at nearly twice the rate of employment in the U.S.

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63 A domestic subsidiary of a foreign multinational company (*i.e.*, one organized in the United States or Canada) would be eligible to rely on Regulation A if its principal place of business were located in the United States or Canada.

64 *See, e.g.*, H.R. Rep. No. 112-206, at 4 (2012) ("Small companies are critical to economic growth in the United States. Amending Regulation A to make it viable for small companies to access capital will permit greater investment in these companies, resulting in economic growth and jobs. By reducing the regulatory burden and expense of raising capital from the investing public, [Title IV of the JOBS Act] will boost the flow of capital to small businesses and fuel America's most vigorous job-creation machine.").

65 *See* Anderson, Thomas, U.S. Dep't of Commerce, Bureau of Econ. Analysis, *Summary Estimates for Multinational Companies: Employment, Sales, and Capital Expenditures for 2011* (Apr. 18, 2013) ("BEA Release 13-16"), at Table 3, *available at:* http://www.bea.gov/newsreleases/international/mnc/2013/_pdf/mnc2011.pdf. The BEA's advance summary estimates for 2011 show total employment of approximately 22.9 million workers by U.S. parents of multinational companies (some of which are themselves foreign-owned), accounting for approximately one-fifth of total U.S. private sector employment, and total employment of approximately 5.6 million workers by majority-owned U.S. affiliates of foreign multinational companies, accounting for approximately five percent of total U.S. private sector employment. *Id.* at 1-2. As some U.S. parents of multinational companies are themselves foreign-owned, there is some overlap between the employment figures of U.S. parents of multinational companies and U.S. affiliates of foreign multinational companies. For more information on multinational companies, *see http://www.bea.gov/iTable/index_MNC.cfm*.

private-industry sector as a whole.[66] As the BEA data suggest, domestic job creation is not necessarily dependent on company domicile or principal place of business.[67]

Currently, Regulation A is limited to companies organized, and with their principal place of business, in the United States or Canada.[68] The Commission could make the Regulation A exemption available to all non-U.S. issuers, rather than only Canadian issuers. Additionally, we could subject issuers to conditions intended to ensure that the capital raised in the offering is put to work in the United States. For example, we could add a requirement that a minimum percentage of the offering proceeds be used in the United States, in connection with the issuer's domestic operations.[69] Such a requirement could, however, be difficult to administer because of challenges in delineating domestic versus foreign operations and in tracing use of proceeds.

Alternatively, issuer eligibility under Regulation A could be extended to "domestic issuers," defined as any issuer that is not a foreign government or a "foreign private issuer."[70] Domestic issuers would, in general, have a demonstrated presence in

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66 *BEA Release 13-16*, at 2.

67 *See id.; see also* Matthew J. Slaughter, *American Companies and Global Supply Networks: Driving U.S. Economic Growth and Jobs by Connecting with the World*, Business Roundtable et al. (January 2013), at 9, *available at:* http://businessroundtable.org/uploads/studies-reports/downloads/BRT-SlaughterPaper-singles-Dec21.pdf (noting that both U.S.-headquartered multinational companies and foreign-headquartered multinational companies that operate in the U.S. create tens of millions of well-paying jobs domestically).

68 The Commission originally proposed the elimination of Canadian issuers from the Regulation A exemptive scheme in 1992 on the grounds that such issuers rarely used the exemption. *See* SEC Rel. No. 33-6924, at 19. In response to public comment, however, this proposal was not adopted. SEC Rel. No. 33-6949, at 36443. No Canadian issuers have qualified an offering in reliance on Regulation A since 2002.

69 *Cf.* Rule 147. 17 CFR 230.147. Rule 147 is a safe harbor from registration under Section 3(a)(11) of the Securities Act. Section 3(a)(11) is more commonly known as the intrastate exemption, and requires, among other things, that issuers conducting an intrastate offering use at least 80% of the net proceeds of the offering in connection with their business operations in the relevant state.

70 In Regulation S (17 CFR 230.901 *et seq.*), a "domestic issuer" is defined as any issuer other than a "foreign government" or "foreign private issuer." 17 CFR 230.902(e). A "foreign government"

the United States, which could increase the likelihood that proceeds from the offering are used within the United States.[71] We could limit issuer eligibility further by adding a condition that most of the offering proceeds be used in connection with the issuer's U.S. domestic operations.

Request for Comment

4. Should issuer eligibility to rely on Regulation A continue to require an issuer to be organized under the laws of the United States or Canada with a principal place of business in the United States or Canada? Or should Regulation A be limited to issuers organized and with a principal place of business in the United States, thereby excluding Canadian issuers? Should Regulation A be made available to "domestic issuers" as described above, or to all issuers, including foreign private issuers? Is there a reason to treat Canadian issuers differently from other foreign issuers? What would the impact be on issuers, investors, and other market participants if the issuer eligibility criteria were broadened? Please explain.

5. If we modify or eliminate current requirements regarding domicile and principal place of business, should we limit availability of the exemption in some other way that reflects a U.S. nexus? If so, how should we define, or in what ways should we limit the availability of the exemption to issuers that

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means the government of any foreign country or of any political subdivision of a foreign country. *See* 17 CFR 230.405. *See* fn. 56. above for the definition of a "foreign private issuer."

71 The Commission previously used the term "domestic issuers" in the proposed amendments to Regulation A in 1992 to refer to entities organized and with a principal place of business in the United States. *See* SEC Rel. No. 33-6924, at 19, 156.

demonstrate, a U.S. nexus? Are there criteria we could use that would be easy to administer? If so, what criteria?

6. If we extend issuer eligibility to include foreign private issuers, should we require express consent from such issuers to Exchange Act Section 10(b) liability?[72] Should we consider requiring additional or alternative conditions for the eligibility of such issuers? Why or why not? Should we make other changes in Regulation A to accommodate such issuers? For example, as proposed with respect to Canadian issuers,[73] should we permit all non-U.S. issuers to prepare their financial statements using International Financial Reporting Standards (IFRS) as issued by the International Accounting Standards Board (IASB), rather than U.S. Generally Accepted Accounting Principles (U.S. GAAP)?

b. Additional and alternative types of issuers

As noted above, we propose not to amend Regulation A's existing prohibitions on use of the exemption by investment companies registered or required to be registered under the Investment Company Act, including BDCs; blank check companies and SPACs; and issuers of fractional undivided interests in oil or gas rights, or similar interests in other mineral rights. As proposed, shell companies that do not meet the definition of "blank check company" would continue to be able to rely on the

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72 In 2010, the U.S. Supreme Court held that Section 10(b) of the Exchange Act, 15 U.S.C. 78j(b), covers only transactions in securities listed on domestic exchanges, and securities purchased or sold domestically. *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010). *But see*, Section 929P(b) of the Dodd-Frank Act, Pub. L. No. 111-203, § 929P(b).

73 *See* discussion in Section II.C.3.b(2). below.

exemption.[74] We seek comment on whether to permit BDCs, blank check companies and SPACs, and oil, gas and mineral interest rights issuers to rely on Regulation A, as well as on the potential exclusion of shell companies.

BDCs. BDCs are a type of closed-end company operated for the purpose of making investments in small, developing, or financially troubled companies. Typically, BDCs are subject to the registration and reporting requirements of the Securities Act and Exchange Act. The Investment Company Act requires BDCs to have at least 70% of their investment portfolio in eligible portfolio companies and certain other assets at the time they make any new investment.[75] Rules 2a-46 and 55a-1 of the Investment Company Act define eligible portfolio companies to include all private companies and companies whose securities are listed on a national securities exchange but have an aggregate market value of less than $250 million, or that met such requirements at the time of the BDC's initial investment in such company.[76] Currently, BDCs are able to rely on Regulation E[77] for offerings of up to $5 million in any twelve-month period. Extension of Regulation A issuer eligibility to BDCs could assist small companies with capital formation by indirectly providing such companies—otherwise qualifying as eligible portfolio companies—with greater access to investment capital. As noted above, however, one commenter expressed concern about the potential extension of

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[74] A shell company that is a development stage company with no specific business plan or purpose would not be an eligible issuer under the exclusion for blank check companies.

[75] *See* Section 2(a)(48) of the Investment Company Act.

[76] 17 CFR 270.2a-46; 17 CFR 270.55a-1.

[77] 17 CFR 230.601 *et seq.*

Regulation A to BDCs absent disclosure requirements that are more appropriately tailored for these issuers.[78]

Blank Check Companies and SPACs. By its terms, the definition of blank check companies under the federal securities laws can include early stage and startup companies with no specific business plans.[79] Extension of Regulation A issuer eligibility to include companies with characteristics that are similar to blank check companies could therefore be consistent with Title IV's goal of increasing the capital formation options for smaller companies.[80] As noted above, however, some commenters have expressed concern about, and recommended against, permitting blank check companies and SPACs to use Regulation A.[81] As currently proposed, blank check companies and SPACs would not be permitted to rely on the exemption. We seek comment on whether the Commission should revisit this exclusion, and, if so, on what basis.

Shell Companies. A shell company is a company that has, or at any time previously has had, no or nominal operations, and either no or nominal assets, assets consisting solely of cash or cash equivalents, or assets consisting of any amount of cash and cash equivalents and nominal other assets.[82] Shell companies are not expressly excluded from Regulation A, although any shell company that met the definition of a

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78 NASAA Letter 2; *see also* fn. 54 above.

79 A blank check company is a development stage company that has no specific business plan or purpose or has indicated its business plan is to engage in a merger or acquisition with an unidentified company or companies or other entity. *See* 17 CFR 230.419.

80 *See* fn. 85 below. The Commission recently acknowledged, in proposing rules for securities-based crowdfunding transactions under Section 4(a)(6) of the Securities Act, the challenges associated with distinguishing between early stage companies that can provide information sufficient to support such transactions and those whose business plan is so indeterminate that they may not be able to provide adequate information. *See* SEC Rel. No. 33-9470, at 37.

81 *See* fn. 89 below; *see also* fn. 51 above for the definition of a SPAC.

82 17 CFR 230.405; *see also* 17 CFR 144(i)(1)(i).

blank check company would be excluded on that basis. As noted above, some commenters have suggested that the Commission consider an express exclusion for shell companies.[83] At their earliest stages of development, however, many small early stage and startup companies have limited operations and few, if any, assets. We anticipate that some Regulation A issuers would be startups where it may be uncertain as to whether they fall within the shell company definition.[84] We believe, however, that Regulation A, as proposed to be amended, is intended to provide smaller companies, including early stage companies, the opportunity to raise capital from the general public in a manner that is consistent with the proposed rules. In our view, excluding such companies from proposed Regulation A would be contrary not only to the provisions of current Regulation A, but also to Title IV of the JOBS Act.[85] We do not therefore propose to exclude shell companies from reliance on Regulation A. For the same reasons we are soliciting comment on potential blank check companies' access to, or exclusion from, the exemptive scheme; however, we also seek comment on whether shell companies should be prohibited from relying on Regulation A.

Operating Companies. We are also seeking comment on whether we should take a different approach with respect to issuer eligibility requirements and, instead of

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83 ABA Letter; WR Hambrecht + Co. Letter (suggesting that shell company access to Regulation A is inconsistent with the JOBS Act because such companies do not promote job creation).

84 *But see* SEC Rel. No. 33-8869 (December 6, 2007) at fn. 172 ("Rule 144(i)(1)(i) is not intended to capture a 'startup company,' or, in other words, a company with a limited operating history, in the definition of a reporting or non-reporting shell company, as we believe that such a company does not meet the condition of having 'no or nominal operations.'").

85 H.R. Rep. No. 112-206, at 4 (2012) ("Small companies are critical to economic growth in the United States. Amending Regulation A to make it viable for small companies to access capital will permit greater investment in these companies, resulting in economic growth and jobs. By reducing the regulatory burden and expense of raising capital from the investing public, [Title IV of the JOBS Act] will boost the flow of capital to small businesses and fuel America's most vigorous job-creation machine.").

prohibiting blank check company access to the exemption (as is currently proposed and consistent with current Regulation A), to limit availability of the exemption to companies satisfying a new definition of "operating company."[86] The Commission previously proposed to limit Regulation A to operating companies in 1992.[87] Though not adopted at that time, the Commission proposed to make the exemption available only "to raise funds to put into the operations of an actual business and not simply for investment." The proposal would have specifically excluded "those enterprises with the principal business of investing or reinvesting funds in securities, properties, commodities, business opportunities or similar media of speculative opportunity."[88] Along the same lines, we seek comment on whether we should exclude certain non-operating companies from Regulation A. We could, for example, limit availability of the exemption to operating companies, defined to include issuers that have generated total revenue in excess of a certain amount (*e.g.*, $1,000,000) over a certain period of time (*e.g.*, its prior two fiscal years) through the provision of goods or services, or based on similar or different criteria intended to facilitate access to the proposed rules by small companies. Adopting an operating company definition could more effectively eliminate the types of blank check companies, SPACs, and shell companies that are not otherwise the intended beneficiaries

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86 An operating company definition would not alter our current proposal to continue to prohibit reporting company and investment company reliance on Regulation A.

87 *See* SEC Rel. No. 33-6924, at 20-21.

88 *Id.* The adopting release noted that partnerships or certain other entities organized primarily for investment purposes had historically been eligible to use Regulation A, and that after consideration of public comment it was appropriate to continue to make the exemption available to such issuers. See SEC Rel. No. 33-6949, at 36443.

of Regulation A from eligibility, an issue we discuss above, request comment on below, and about which several commenters have expressed concern.[89]

Issuers of Interests in Mineral Rights. Issuers of fractional undivided interests in oil or gas rights, or similar interests in other mineral rights, have historically been prohibited from relying on Regulation A. Instead, such issuers were permitted to conduct offerings in reliance on Regulation B.[90] Regulation B was rescinded in 1996, however, as it was deemed no longer necessary in light of other exemptions available to these types of issuers, such as Section 4(a)(2) of the Securities Act and Regulation D.[91] In light of the elimination of Regulation B and the current ability of such issuers to conduct offerings under, *e.g.*, Rule 506 of Regulation D, we seek comment on whether such issuers should continue to be ineligible to rely on Regulation A, or should now be permitted to conduct offerings under Regulation A.

Request for Comment

7. Should we amend Regulation A to make BDCs eligible to rely on it? Why or why not? Would it raise particular concerns about investor protection? If so, please explain.

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89 ABA Letter ("The purpose and goal of Section 3(b)(2) should . . . be to expand the capital raising opportunities available to operating companies. We are concerned about the possibility of abuse should non-operating companies be able to rely on the exemption. The Commission's proposed rules should . . . provide that Section 3(b)(2) will not be available for use by issuers that are blank check companies or shell companies and should define "eligible issuer" for purposes of Section 3(b)(2) to exclude specifically these types of issuers."); WR Hambrecht + Co. Letter (suggesting limiting Regulation A issuers to operating companies, and prohibiting reliance on the exemption by blank check companies, SPACs, and shell companies); NASAA Letter 2 (indicating that offerings by blank check companies and SPACs are generally prohibited as fraudulent offerings under state securities laws).

90 Regulation B was an exemption from registration under the Securities Act relating to fractional undivided interests in oil or gas. *See* 17 CFR 230.300 – 230.346 (1995).

91 *See* SEC Release No. 33-7300 (May 31, 1996) [61 FR 30397].

8. Would extension of Regulation A issuer eligibility to BDCs be inconsistent with the exemption's current prohibition on use by reporting companies? If so, should we limit the extension of Regulation A issuer eligibility to only non-Exchange Act reporting BDCs? If not, should we permit BDC ongoing reporting under the Exchange Act to satisfy their reporting obligations under Regulation A?[92] If Regulation A eligibility were extended to BDCs, should other rules be amended to require additional disclosure about such issuers? If so, what specific additional disclosure should we require about BDCs?

9. Should we extend Regulation A issuer eligibility to include blank check companies? Or would such an extension be inconsistent with the intent of Title IV of the JOBS Act, or the Commission's investor protection mandate? Why or why not?

10. If all or some segment of blank check companies are permitted to rely on Regulation A, should we specifically exclude SPACs from being able to rely on the exemption? Why or why not?

11. Should we amend Regulation A to make shell companies ineligible to rely on it? Or would the exclusion of shell companies from Regulation A be too broad, such that many small companies or startups would become ineligible to rely on the exemption?

12. Should we limit access to Regulation A to issuers that qualify as "operating companies"? If so, should we use the operating company definition described

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[92] *See* Section II.E. below for a discussion of an issuer's ongoing reporting obligations under proposed Regulation A.

above, or some modified version? Please include a discussion of the effects on issuer access to the exemption that would result from using such a definition as a condition to issuer eligibility.

13. Should we reconsider the continued prohibition on use of the Regulation A exemptive scheme by issuers of fractional undivided interest in oil or gas rights, or similar interests in other mineral rights? If so, please explain. Are there risks associated with this type of issuer that merit maintaining Regulation A's current prohibition on use by such issuers?

14. Are there other limitations on issuer eligibility that we should consider? Alternatively, are there other types of issuers that could benefit from Regulation A, as proposed to be amended? Please provide data, if available, on the impact of imposing fewer, more, or different limitations on issuer eligibility than we have proposed.

c. Potential limits on issuer size

Regulation A currently limits the size of offerings that can be conducted under the exemption, but not the size of issuers eligible to rely on the exemption. We do not currently propose any issuer size-based limitations and to date we have not received any public comment on this issue. While we appreciate that limitations on offering size may, to some extent, create a practical limitation on the ability of larger issuers to rely on Regulation A, we are soliciting comment on potentially limiting access to Regulation A on the basis of issuer size.

We could, for example, look to the standards for "smaller reporting companies" and limit availability of the exemption to issuers with less than $75 million in public

float, or, if unable to calculate the public float, less than $50 million in annual revenue.[93] Alternatively, consistent with a recent recommendation by the Commission's Advisory Committee on Small and Emerging Companies ("Advisory Committee") as to the appropriate size limits for "smaller reporting companies,"[94] we could limit access to Regulation A to companies with a public float of up to $250 million, or, if unable to calculate the public float, less than $100 million in annual revenue.[95] Limiting access to the exemption on the basis of issuer size might more effectively target the segment of the market that Congress sought to assist by enacting Title IV of the JOBS Act. We solicit comment below on whether the reference to "public float" would be an appropriate metric for the non-reporting companies using Regulation A.

Request for Comment

15. Should we limit availability of the Regulation A exemption to smaller issuers? Or does the $50 million annual offering limit effectively limit availability of the exemption to smaller issuers such that the Commission need not consider issuer size-based limitations? Why or why not? Should we use issuer size-based limitations to determine the imposition of certain requirements of proposed Regulation A such as the on-going disclosure requirements?

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93 *See* 17 CFR 229.10(f).

94 *See* SEC Rel. No. 33-9258 (Sept. 12, 2011) [76 FR 57769] (the Advisory Committee was formed to provide the Commission with advice on its rules, regulations, and policies as they relate to, among other things, capital raising by emerging privately-held small businesses and publicly traded companies with less than $250 million in public float), *available at*: http://www.sec.gov/rules/other/2011/33-9258.pdf.

95 *Recommendations Regarding Disclosure and Other Requirements for Smaller Public Companies*, Securities and Exchange Commission, Advisory Committee on Small and Emerging Companies (February 1, 2013), at 2-3 (the Advisory Committee recommendation was made in the context of potentially revising the definition of a smaller reporting company), *available at:* http://www.sec.gov/info/smallbus/acsec/acsec-recommendation-032113-smaller-public-co-ltr.pdf.

16. If we include size-based issuer eligibility requirements, is a test based on the smaller reporting company public float and revenue thresholds appropriate for potential Regulation A issuers? Should we look to the higher thresholds recommended by the Advisory Committee, or other size thresholds? Alternatively, are there better metrics on which to determine issuer size-based eligibility (*e.g.*, an assets test)? Would the concept of public float have any applicability to non-reporting companies, or to repeat Regulation A issuers, which could develop a trading market for their securities?

d. Reporting companies

We do not propose to make Regulation A available to companies that are subject to the reporting requirements of Section 13 of the Exchange Act.[96] Before the amendments to Regulation A adopted in 1992, reporting companies were permitted to conduct offerings in reliance on Regulation A, provided they were current in their public reporting.[97] In 1992, however, the Commission determined that it was no longer necessary to permit reporting companies to rely on the exemption in light of the small business integrated registration and reporting system adopted at that time.[98] Simplified registration and reporting forms under Regulation S-B were presumed to meet the capital raising needs of reporting small business issuers.[99] As a result, reporting companies were

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96 As discussed in Section II.E.3. below, however, we solicit comment on whether we should permit Regulation A issuers to register under the Exchange Act by means of a simplified process under certain circumstances.

97 17 CFR 230.252(f) (1992).

98 SEC Rel. No. 33-6949, at 36443.

99 "Small business issuers" were defined as companies with annual revenues of less than $25 million whose voting stock does not have a public float of $25 million or more. *Id.*, at 36446.

excluded from the Regulation A exemptive scheme.[100] While the forms and form of the disclosure rules that apply to smaller issuers has changed since that time, their content is substantially the same as in 1992.[101]

The two public comments we have received to date on this issue take opposing positions on whether Regulation A should be available to reporting companies. One commenter suggested that reporting companies should be allowed to rely on the exemption because it would permit issuers to conduct a public offering of unrestricted securities that is less burdensome, quicker and less expensive than a public offering subject to full Securities Act registration (*e.g.*, by permitting issuers to incorporate by reference Exchange Act reports into an abbreviated offering statement).[102] This commenter suggested that reporting company access could be limited on the basis of the issuer's size.[103] The other commenter suggested that reporting companies should not be permitted to rely on Regulation A, but companies should be permitted to become a reporting company by means of a Regulation A offering.[104]

Given the availability of scaled disclosure requirements for Securities Act registration and Exchange Act reporting by smaller reporting companies, we continue to believe that reporting companies would not necessarily benefit from access to Regulation A, as proposed to be amended. We therefore do not propose to permit

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100 SEC Rel. No. 33-6924 (March 20, 1992) [57 FR 9768], at 9771.

101 In 2007, the Commission rescinded Regulation S-B (enacted in tandem with the 1992 amendments to Regulation A, *see* SEC Rel. No. 33-6949), eliminated the SB forms and the definition of "small business issuer," and adopted the current smaller reporting company regime. *See* SEC Rel. No. 33-8876 (Dec. 19, 2007) [73 FR 934].

102 ABA Letter.

103 *Id.* (suggesting reporting company access to the exemptive scheme should be limited to issuers with less than $1 billion in revenue).

reporting companies to rely on the proposed rules. We are soliciting comment, however, on whether reporting companies should be permitted to rely on Regulation A.

Request for Comment

17. Should we amend issuer eligibility requirements to permit reporting companies to rely on the Regulation A exemption? Why or why not? Would reporting companies find Regulation A a useful means of raising capital? How would such a change affect issuers, investors, financial intermediaries, and other market participants?

18. If reporting companies were permitted to rely on Regulation A, should we impose limitations on their use of the exemption? For example, should reporting companies be eligible to use Regulation A only for a limited period of time, *e.g.*, a three-year period after they begin Exchange Act reporting? Or should we limit reporting company access to the exemptive scheme on the basis of issuer size?

19. If reporting companies are permitted to rely on Regulation A, should the availability of the exemption be conditioned on being current with Exchange Act reporting requirements,[105] which would be consistent with ongoing use of Regulation A?[106] Additionally, if reporting companies are permitted to rely on the exemption, should such companies be permitted to satisfy their

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104 WR Hambrecht + Co. Letter.

105 As noted above, before the 1992 amendments to Regulation A, reporting companies were permitted to conduct offerings in reliance on Regulation A, provided they were current in their Exchange Act reporting obligations. *See* former Rule 252(f), 17 CFR 230.252(f) (1991).

106 *See* discussion on proposed issuer eligibility requirements in Section II.B.1. above; *see also* proposed Rule 251(b)(7).

disclosure requirements under Regulation A through incorporation by reference to their previous or ongoing reports filed under the Exchange Act? Or, as proposed with respect to issuers of Regulation A securities that register such securities under the Exchange Act, if reporting companies are permitted to rely on Regulation A, should the Regulation A reporting obligation for such issuers be suspended altogether for the duration of any obligation to file ongoing reports under the Exchange Act?[107]

2. Eligible Securities

Section 3(b)(3) of the Securities Act limits the availability of any exemption enacted under Section 3(b)(2) to "equity securities, debt securities, and debt securities convertible or exchangeable into equity interests, including any guarantees of such securities."[108] On the basis of the statutory language, it is unclear which types of securities were meant to be excluded, although there is some evidence that suggests the exemption is meant for ordinary—and not exotic—securities.[109] We solicit comment on the types of securities that should be excluded, if any, consistent with the statutory mandate.

We propose to limit the types of securities eligible for sale under both Tier 1 and Tier 2 of Regulation A to the specifically enumerated list of securities in Section 3(b)(3), with the exception of asset-backed securities. Asset-backed securities are subject to the provisions of Regulation AB, an appropriately-tailored regulatory regime enacted to

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[107] *See* discussion in Section II.E. below.

[108] 15 U.S.C. 77c(b)(3).

cover such securities that was not in effect when Regulation A was last updated in 1992.[110] We do not believe that Title IV of the JOBS Act was enacted to facilitate the issuance of asset-backed securities, nor do we believe that Regulation A's disclosure requirements are suitable for offerings of such securities. We therefore propose to exclude asset-backed securities from the list of eligible securities under Regulation A.

Request for Comment

20. As proposed, should we exclude asset-backed securities from the list of eligible securities under Regulation A? Why or why not? If asset-backed securities were eligible to be sold under Regulation A, what changes would be required to Form 1-A and the other proposed Regulation A forms to accommodate these issuers?

21. Should any additional types of securities be specifically excluded from offerings conducted in reliance on Regulation A? If so, what types of securities, and why? Should the rules provide more specificity as to the types of securities that are included or excluded from Regulation A offerings? What effects could excluding specified types of securities from Regulation A offerings have on issuers, investors, and other market participants?

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109 *Small Company Capital Formation Act of 2011: Markup of H.R. 1070 before the H. Comm. on Fin. Serv. for the 112th Congress*, 157 Cong. Rec. 89, (daily ed. June 21, 2011), *available at*: http://financialservices.house.gov/calendar/eventsingle.aspx?EventID=247453.

110 Regulation AB, 17 CFR 229.1100 *et seq.*, was enacted in 2005. *See* SEC Rel. No. 33-8518 (Dec. 22, 2004). Asset-backed securities are defined in Rule 1101(c)(1) to generally mean a security that is primarily serviced by the cash flows of a discrete pool of receivables or other financial asset, either fixed or revolving, that by their terms convert into cash within a finite time period.

3. Offering Limitations and Secondary Sales

Regulation A currently permits offerings of up to $5 million of securities in any twelve-month period, including up to $1.5 million of securities offered by selling securityholders.[111] Section 3(b)(2)(A) provides that the aggregate offering amount of all securities offered and sold within the prior twelve-months in reliance on Section 3(b)(2) shall not exceed $50 million. As noted above, we propose to amend Regulation A to create two tiers of requirements: Tier 1, for offerings of up to $5 million of securities in a twelve-month period; and Tier 2, for offerings of up to $50 million of securities in a twelve-month period.[112] Proposed Tier 1 would reflect the same offering size limitations that currently apply under Regulation A. Proposed Tier 2 would reflect the Section 3(b)(2) offering size limitation.[113] We believe issuers raising smaller amounts of capital may benefit from a tiered system that affords two options for capital formation based on differing disclosure and other requirements.

We believe sales by selling securityholders to be an important part of the exemptive scheme and therefore propose to preserve in Tier 1 Regulation A's current limitation of no more than $1.5 million of securities offered by selling securityholders, and permit Tier 2 offerings to include up to $15 million of securities offered by selling securityholders. Sales by selling securityholders have been permissible under

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111 Rule 251(b), 17 CFR 230.251(b).

112 If the offering included securities that were convertible, exercisable or exchangeable for other securities, the offer and sale of the underlying securities would also be required to be qualified and the aggregate offering price would include the aggregate conversion, exercise, or exchange price of such securities, regardless of when they become convertible, exercisable or exchangeable. This differs from the approach taken in registered offerings that involve similar securities, but we believe would simplify compliance.

113 Offerings of up to $5 million could be conducted under either Tier 1 or Tier 2.

Regulation A in one form or another since 1940.[114] Initially, sales by an issuer and sales by a "controlling stockholder" were treated as separate categories of exempt transactions; the offering amount of each respective category was not aggregated for purposes of determining the maximum offering amount available under the exemption.[115] Later, Regulation A contained a single offering ceiling for *all* sales of an issuer's securities during a twelve-month period, while each category of seller had a different permissible maximum selling amount.[116] In 1972, the Commission returned to the concept of separate categories of seller transactions, each of which contained an independent offering ceiling.[117] For example, at that time, Rule 254(a) required issuer and affiliate sales in any twelve-month period to be aggregated against the then-current $500,000 offering ceiling with any one affiliate being limited to $100,000 in offers in any twelve-month period.[118] Sales by non-affiliates were excluded from the $500,000 offering ceiling, and any one such seller was permitted to offer up to $100,000, but, in the aggregate with other such non-issuer/affiliate sellers in an amount of no more than $300,000 in any twelve-month period.[119] In 1992, the Commission returned to a single offering ceiling for all sales of an issuer's securities in a twelve-month period, and limited all secondary sales to its current $1.5 million limit (representing 30% of the

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114 SEC Rel. No. 33-2410 (December 3, 1940) [5 FR 4749].

115 *Id.*

116 *See, e.g.*, Rule 254(a), 17 CFR 230.254(a) (1956), cited in SEC Rel. No. 33-3663 (July 31, 1956) [21 FR 5739], at 5741. Additionally, at this time, secondary sales by certain newly organized or unproven entities were prohibited. *Id.*, at 5739.

117 *See* SEC Rel. No. 33-5225 (Jan 10, 1972) [37 FR 599].

118 *Id.*

119 *Id.*

maximum offering limit permitted in a primary offering), aggregated with issuer sales during the same period for a total of up to $5 million.[120]

Two commenters recommended permitting secondary sales by selling securityholders in the expanded exemptive scheme.[121] One such commenter suggested that removing the limitation on the amount of securities available for resale by selling securityholders would decrease the cost of capital for smaller issuers and encourage greater investment in companies by increasing a potential investors liquidity options.[122] The other suggested adopting a limitation similar to the current Regulation A provision in order to encourage investment in companies and improve the liquidity options of investors.[123] Both commenters suggested removing current restrictions on affiliate resales in Rule 251(b),[124] which prohibits such sales when the issuer has not had net income from continuing operations in at least one of its last two fiscal years.

Another commenter, however, urged the Commission to prohibit selling securityholders, such as venture capital and private equity firms, from relying on the expanded exemption.[125] In this commenter's view, superior negotiating power at the time of such parties' initial investment and greater access to information about the issuer should disqualify such parties from the exemption because, while maintaining such advantages, they may seek to offload their investment on the general public (and,

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120 *See* SEC Rel. No. 33-6949, at 36443; *see also* Rule 251(b).

121 ABA Letter; WR Hambrecht + Co. Letter.

122 ABA Letter.

123 WR Hambrecht + Co. Letter.

124 17 CFR 230.251(b).

125 NASAA Letter 2.

sometimes against the wishes of the issuer itself).[126] This commenter further argued that selling securityholder offerings do not provide capital to the issuer or contribute to job creation.[127] Alternatively, the commenter suggested that if selling securityholders are permitted to rely on the exemption, the Commission should require approval of a majority of the issuer's independent directors as a pre-condition to any sales.[128]

Selling securityholder access to Regulation A has been a historically important feature of the exemptive scheme. We believe it would continue to be an important part of Regulation A, as proposed to be amended. Allowing selling securityholders access to avenues for liquidity should encourage investment in companies seeking to raise capital.[129] Thus, we believe that allowing selling securityholders to sell securities under Regulation A would facilitate capital formation and be consistent with Title IV of the JOBS Act.

We do not propose to amend Regulation A to eliminate the ability of selling securityholders to conduct secondary offerings.[130] Consistent with the existing provisions of Regulation A, we propose to permit sales by selling securityholders up to 30% of the maximum amount permitted under the applicable offering limitation ($1.5 million in any twelve-month period for Tier 1 and $15 million in any twelve-month period for Tier 2). Sales by selling securityholders under either Tier would be aggregated with sales of Regulation A securities by the issuer and other selling securityholders for

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126 *Id*.

127 *Id*.

128 *Id*.

129 *See* discussion in Section IV.B.2.c. below.

130 *See* proposed Rule 251(a).

purposes of calculating the maximum permissible amount of securities that may be sold during any twelve-month period.

In addition, we propose to eliminate 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 provision was originally adopted in Regulation A in 1956 to prohibit secondary sales of securities of certain new companies and companies without net income in at least one of their last two fiscal years[131] in order "to correct . . . the threat of the 'bail-out' by the promoters and insiders of their securities holdings."[132] When the Commission amended Regulation A in 1992, it maintained these restrictions in modified form, by limiting them to affiliate resales where the issuer had no net income from continuing operations in at least one of its last two fiscal years.[133]

While one commenter has expressed concern that affiliates of an issuer could use an informational advantage to sell securities in unsuccessful ventures at the expense of the investing public,[134] we are not persuaded that the absence of net income is necessarily a meaningful indicator of enhanced risk that this could occur. Further, the Commission's current disclosure review and qualification processes and enforcement programs are significantly more sophisticated and robust than they were in the 1950s. In addition, today's proposed rules for Regulation A include revised "bad actor" disqualification

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131 *See* SEC Rel. No. 33-3663, at 5739.

132 SEC Ann. Rep. 29 (1956).

133 *See* SEC Rel. No. 33-6924, at fn. 59; *see also* Rule 251(b).

134 NASAA Letter 2.

provisions and additional issuer eligibility requirements aimed at limiting the market participants that have access to the exemption.[135]

We also do not believe that a focus on issuers that have not had net income from continuing operations in at least one of its last two fiscal years would be appropriately tailored for startup and early stage companies that may devote large portions of their resources to startup expenses and research and development.[136] In this market, net income from continuing operations may not be a material data point in the evaluation of an investment opportunity.[137] In addition, as mentioned above, some commenters have argued that limiting the liquidity options of selling securityholders, including sales by affiliates of the issuer, may discourage investment in the issuer in the first instance and increase the issuer's cost of capital.[138]

On balance, we believe that investor protections provided by Regulation A, as proposed to be amended, support the elimination of the current restriction on affiliate resales, particularly in light of the potential benefits of permitting secondary sales. We therefore do not propose to carry this provision forward in amended Regulation A.

Request for Comment

22. Should we consider different annual offering thresholds for selling securityholder sales than the proposed $1.5 million limitation for Tier 1 offerings and $15 million limitation for Tier 2 offerings? Why or why not? If so, should sales in reliance on Regulation A by selling securityholders be

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135 *See* discussions in Section II.G. (Bad Actor Disqualification) below, and Section II.B.1. (Eligible Issuers) above.

136 *See* ABA Letter; WR Hambrecht + Co. Letter.

137 *See* ECTF Report.

permitted up to the annual offering ceiling for each respective Tier, or limited at a different threshold? Should we limit sales by selling securityholders to a percentage of the total amount offered in conjunction with a primary offering of Regulation A securities over a given period of time, or to Regulation A offerings where primary securities are offered? Alternatively, should we prohibit all sales by selling securityholders in Regulation A? Why or why not?

23. Should the rules treat sales by non-affiliate selling securityholders as a separate category of exempt transaction, as was once the case under Regulation A, and not aggregate such sales with issuer sales for purposes of determining the maximum offering amount available under the exemption? If so, should non-affiliate resales be permitted up to the applicable annual offering ceiling, or limited at a different threshold?

24. If selling securityholders are permitted to rely on Regulation A, should we impose eligibility requirements or other limitations on those securityholders? For example, should we require selling securityholders to have owned the securities offered for resale under Regulation A for a specified period of time before resale? If so, why and what should the relevant holding period be (*e.g.* six months or twelve months before initial submission or filing of the offering statement)? If the rules impose a holding period before securities can be offered for resale under Regulation A, should the holding period only apply to affiliates? Or to all selling securityholders?

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[138] *See* ABA Letter; WR Hambrecht + Co. Letter.

25. Does the existing Rule 251(b) requirement that an issuer have net income from continuing operations in each of its last two fiscal years, in order for an affiliate to be able to conduct a secondary sale in reliance on Regulation A, have continuing validity, and should we therefore retain this provision? Why or why not? Please explain.

4. Investment Limitation

Regulation A does not currently limit the amount of securities an investor can purchase in a qualified Regulation A offering. We recognize, however, that with the increased annual offering limitation provided in Section 3(b)(2) comes a risk of commensurately increased investor losses. To address that risk, Title IV of the JOBS Act mandates certain investor protections[139] and suggests that the Commission consider others as part of its Section 3(b)(2) rulemaking.[140] Additionally, we believe that Congress recognized in Section 3(b)(2) that certain other investor protections—not directly contemplated by Title IV of the JOBS Act—may be necessary in the revised regulation. To that end, Section 3(b)(2)(G) indicates that the Commission may include in the expanded exemption "such other terms, conditions, or requirements . . . necessary in the public interest and for the protection of investors . . . ."

Consistent with Section 3(b)(2)(G) and the Commission's investor protection mandate, in addition to the disclosure, reporting and other requirements of Regulation A,

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139 *See* Section 3(b)(2)(D) (expressly providing for Section 12(a)(2) liability for any person offering or selling Section 3(b)(2) securities); Section 3(b)(2)(F) (requiring issuers to file audited financial statements with the Commission annually).

140 *See* Section 3(b)(2)(G) (inviting the Commission to consider, among other things, requiring audited financial statements in the offering statement and implementing bad actor disqualification provisions); Section 3(b)(4) (inviting the Commission to consider implementing ongoing reporting requirements).

we propose to limit the amount of securities investors can purchase in a Tier 2 offering to no more than 10% of the greater of their annual income and their net worth.[141] For this purpose, annual income and net worth would be calculated for individual purchasers as provided in the accredited investor definition under Rule 501 of Regulation D.[142]

We believe that this proposed new requirement could usefully augment the other requirements for Tier 2 offerings. Limiting the amount of securities that a potential investor could invest in a Tier 2 offering to 10% of the greater of the investor's annual income and net worth would help to mitigate any concern that an investor may not be able to absorb the potential loss of the investment.[143] The additional investor protection afforded by such a loss limitation is similar to the provisions for our recently proposed rules for securities-based crowdfunding transactions under Section 4(a)(6) of the Securities Act.[144] We believe that an investment limitation for Tier 2 offerings, coupled with the additional investor protection requirements discussed above and more fully

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141 If securities that are convertible, exercisable or exchangeable for other securities are being purchased by an investor, the proposed investment limitation would include the aggregate conversion, exercise, or exchange price of such securities, in addition to the purchase price. This treatment corresponds to the treatment of such securities for purposes of calculating the offering cap.

142 17 CFR 230.501.

143 An underwriter in a firm commitment underwritten Regulation A offering, or participating broker-dealer that is involved in stabilization activities with respect to an offering of Regulation A securities would not be considered an investor that is subject to the proposed investment limitations

144 *See* Section 4(a)(6)(ii) of the Securities Act, 15 U.S.C. 77d(a)(6)(ii), and SEC Rel. No. 33-9470. In Section 4(a)(6), Congress outlined a new exemption for securities-based crowdfunding transactions intended to take advantage of the internet and social media to facilitate capital-raising by the general public, or crowd. In that provision, Congress established limitations on the amount of securities an investor could acquire through this type of offering, as well as a variety of other investor protections, including disclosure requirements and the use of regulated intermediaries. *See, generally*, the requirements for issuers and intermediaries set forth in Title III of the JOBS Act, Pub. L. No. 112-106, 126 Stat. 306, §§ 301-305.

below, could protect investors in Tier 2 offerings in a similar way as the proposed rules for securities-based crowdfunding transactions.

Under the proposal, issuers would be required to make investors aware of the investment limitations,[145] but would otherwise be able to rely on an investor's representation of compliance with the proposed investment limitation unless the issuer knew, at the time of sale, that any such representation was untrue. We are mindful of the privacy issues and practical difficulties associated with verifying individual income and net worth, and do not therefore propose to require investors to disclose personal information to issuers in order to verify compliance with the investment limitation.[146] We are, however, soliciting comment below on whether verification of the income and net worth limit should be required.

Request for Comment

26. As proposed, should we impose investment limitations on investors in Tier 2 offerings? Or does Regulation A, as proposed to be amended, have sufficient investor protections for Tier 2 offerings, such that an investment limitation for investors is not necessary? Why or why not?

27. Are the proposed investment limitations appropriate in the context of a Tier 2 offering? Why or why not? What impact would the proposed investment limitation restriction have on issuers and investors? Should the proposed

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145 *See* cover page of the offering circular of proposed Form 1-A.

146 Investors may, for example, be reluctant to provide issuers with their Internal Revenue Service (IRS) Form W-2 (Wage and Tax Statement) in order to verify compliance with the proposed annual income investment limitation or to disclose documents, such as bank or investment account statements, that would verify net worth. Relatedly, issuers may have difficulty ascertaining the veracity or comprehensiveness of any documentation provided to them by investors. *Cf.* SEC Rel.

limitations on investment not apply to accredited investors? Are there other investment limitation criteria we should consider? For example, should we impose a limitation based on a percentage of total investment assets in addition to, or instead of, annual income or net worth?

28. Alternatively, should the investment limitation be higher or lower than the 10% proposed? If so, what percentage and why would that percentage be appropriate? Would the proposed investment limitation be appropriate for investors that are entities rather than natural persons? Should we establish a minimum annual investment amount, similar to $2,000 annual investment that would be permitted under our proposed crowdfunding rules, that all investors could make in Regulation A offerings irrespective of their income and net worth? Why or why not?

29. Should the proposed investment limitation apply on a per offering basis, as proposed? Or should the limitation apply on an aggregated basis, across all investments in Regulation A securities? Why or why not? If the limitation were to apply on an aggregated basis, how should the limitation apply? Should we limit the provision so that only Regulation A offerings close in time (for example, within a twelve-month period), or otherwise related, would be aggregated in the 10% calculation?

30. Should we permit issuers, as proposed, to rely on an investor's representation of compliance with the 10% investment limitation, unless the issuer has

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No. 33-9415 (July 10, 2013) [78 FR 4471], at II.B (discussing verification of accredited investor status for private offerings under Rule 506(c) of Regulation D).

knowledge that any such representation was untrue? Why or why not? If not, what level of inquiry or verification should issuers have to perform in order to ensure compliance with the requirement? Should the issuer and its intermediaries be required to have a reasonable belief that the investor certification can be relied upon (*e.g.*, should they be required to conduct further investigation if they have reason to believe that the certification is untrue)? Why or why not? If we permit issuers to rely on an investor's representation regarding compliance with the 10% investment limitation, as proposed, should we require the representation to be made in a particular form, such as an investor questionnaire? Should we require the issuer to provide disclosure or educational materials in connection with the representation?

5. Integration

Existing Rule 251(c) of Regulation A governs the integration of Regulation A offerings with other offerings.[147] This provision provides that offerings under Regulation A are not to be integrated with any of the following:

- prior offers or sales of securities; or
- subsequent offers and sales of securities that are:
  - registered under the Securities Act, except as provided in Rule 254(d);[148]

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147 17 CFR 230.251(c). The integration doctrine seeks to prevent an issuer from improperly avoiding registration by artificially dividing a single offering into multiple offerings such that Securities Act exemptions would apply to multiple offerings that would not be available for the combined offering.

148 Rule 254(d) provides a safe harbor for an issuer that has a bona fide change of intention and decides to register an offering under the Securities Act after soliciting interest in a Regulation A offering, but without having filed the related offering statement. To take advantage of the safe

- made in reliance on Rule 701 under the Securities Act;
- made pursuant to an employee benefit plan;
- made in reliance on Regulation S; or
- made more than six months after completion of the Regulation A offering.

We believe Regulation A's existing integration safe harbors provide issuers, particularly smaller issuers whose capital needs often change, with valuable certainty as to the contours of a given offering and its eligibility for an exemption from Securities Act registration. To date, the public comment we received on integration suggested we maintain Regulation A's existing integration provisions.[149] We propose, subject to certain exceptions discussed below, to generally preserve the existing Regulation A integration safe harbors.[150] We also propose to provide additional guidance on the potential integration of offerings conducted concurrently with, or close in time after, a Regulation A offering.

The safe harbor from integration provided by existing Rule 251(c) expressly provides that any offer or sale made in reliance on Regulation A will not be subject to integration with any other offer or sale made either before the commencement of, or more than six months after, the completion of the Regulation A offering.[151] In other words, for transactions that fall within the provisions of existing Rule 251(c), issuers do not have to

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harbor, such issuers must wait at least 30 calendar days from the date of the last solicitation of interest before filing a registration statement for the offering with the Commission. 17 CFR 230.254(d). Under existing Regulation A, issuers are not allowed to solicit interest in an offering after filing the offering statement with the Commission. *See* discussion in Section II.D. below.

149 ABA Letter.

150 Existing Rule 254(d) of Regulation A would become proposed Rule 255(e).

conduct an independent integration analysis under the provisions of, for example, another rule-based exemption in order to determine whether, under the terms of that rule, the two offerings would be treated as one for purposes of qualifying for an exemption. This bright-line rule assists issuers in analyzing certain transactions, but does not address the issue of potential offers or sales that occur concurrently with, or close in time after, a Regulation A offering.

Currently, the note to Rule 251(c) indicates that, if the provisions of the safe harbor are unavailable, offers and sales may still not be integrated with the Regulation A offering depending on the particular facts and circumstances, so there is no presumption that offerings outside the integration safe harbors should be integrated.[152] Additionally, we believe that an offering made in reliance on Regulation A should not be integrated with another exempt offering made by the issuer, provided that each offering complies with the requirements of the exemption that is being relied upon for the particular offering.[153] For example, an issuer conducting a concurrent exempt offering for which general solicitation is not permitted would need to be satisfied that purchasers in that offering were not solicited by means of the offering made in reliance on Regulation A, including without limitation any "testing the waters" communications.[154] Alternatively,

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151 *Contra* Rule 502(a) of Regulation D, 17 CFR 230.502(a), which states that offers and sales made more than six months before the start, or after the completion, of a Regulation D offering will not be considered part of that Regulation D offering.

152 The note cites to the guidance provided in SEC Rel. No. 33-4552 (Nov. 6, 1962) [27 FR 11316], which states the Commission's traditional five-factor test for integration.

153 We recently proposed a similar approach to integration in the context of offerings under the proposed provisions for securities-based crowdfunding transactions pursuant to Title III of the JOBS Act. *See* SEC Rel. No. 33-9470, text accompanying fn. 33-34.

154 For a concurrent offering under Rule 506(b), an issuer would have to conclude that purchasers in the Rule 506(b) offering were not solicited by means of a Regulation A general solicitation. For example, the issuer may have had a preexisting substantive relationship with such purchasers.

an issuer conducting a concurrent exempt offering for which general solicitation is permitted could not include in any such general solicitation an advertisement of the terms of an offering made in reliance on Regulation A that would not be permitted under Regulation A. An issuer conducting, for example, a concurrent Rule 506(c) offering could not include in its Rule 506(c) general solicitation materials an advertisement of a concurrent Regulation A offering, unless that advertisement also included the necessary legends for, and otherwise complied with, Regulation A.[155]

In addition to this approach to integration, we propose to add to the list of safe harbor provisions subsequent offers or sales of securities made pursuant to the proposed rules for securities-based crowdfunding transactions under Title III of the JOBS Act. Given the unique capital formation method available to issuers and investors in the proposed rules for securities-based crowdfunding transactions and the small dollar amounts involved, we do not propose to integrate offers or sales of such securities that occur subsequent to the commencement of any offers or sales of securities made in reliance on Regulation A.[156]

We further propose to amend Rule 254(d) to provide that where an issuer decides to register an offering after soliciting interest in a contemplated, but abandoned, Regulation A offering, any offers made pursuant to Regulation A would not be subject to

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Otherwise, the solicitation conducted in connection with the Regulation A offering may preclude reliance on Rule 506(b). *See also* SEC Rel. No. 33-8828 (Aug. 3, 2007) [72 FR 45116].

155 *See* discussion in Section II.D. below.

156 *See* SEC Rel. No. 33-9470. An issuer contemplating a securities-based crowdfunding transaction pursuant to Section 4(a)(6) subsequent to any offers or sales conducted in reliance on Regulation A, as proposed to be amended, should look to the proposed rules for securities-based crowdfunding transactions to ensure compliance with the advertising provisions of that proposed exemption.

integration with the registered offering, unless the issuer engaged in solicitations of interest in reliance on Regulation A to persons other than qualified institutional buyers ("QIBs") and institutional accredited investors permitted by Section 5(d)[157] of the Securities Act.[158] An issuer (and any underwriter, broker, dealer, or agent used by the issuer in connection with the proposed offering) soliciting interest in a Regulation A offering to persons other than QIBs and institutional accredited investors must wait at least 30 calendar days between the last such solicitation of interest in the Regulation A offering and the filing of the registration statement with the Commission.[159] We believe these updated provisions are necessary, given the broad permissible target audience of Regulation A solicitations, the proposed expanded use of solicitation materials in Regulation A discussed more fully in Section II.D. below, and the addition of similar provisions for registered offerings under Section 5(d).

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157 15 U.S.C. 77e(d).

158 *See* proposed Rule 255(e).

159 *Id*.

Request for Comment

31. As proposed, should we adopt an integration safe harbor in Regulation A that largely follows the existing provisions of Rule 251(c), while adding the exemption provided by the proposed JOBS Act crowdfunding rules into the list of safe harbors for subsequent offers or sales? Why or why not? Should we alter or add additional provisions to the list of safe harbors for subsequent offers or sales? If so, please provide supporting analysis for your suggestions. For example, should we reduce the six-month period in Rule 251(c)(2)(v)?

32. Should we amend the provisions of Rule 254(d), as proposed,[160] to take into account the expanded use of solicitation materials in Regulation A, the ability of emerging growth companies to solicit interest from certain types of investors under Title I of the JOBS Act, and the potential effect that an abandoned Regulation A offering, in which an issuer solicited interest from potential investors, may have on that issuer's ability to immediately thereafter register the offering under the Securities Act? Why or why not? Are there any alternative approaches for the interaction of these two provisions in the context of an abandoned Regulation A offering followed immediately thereafter by a registered offering? If so, please explain.

6. Treatment under Section 12(g)

Exchange Act Section 12(g) requires, among other things, that an issuer with total assets exceeding $10,000,000 and a class of equity securities held of record by either 2,000 persons, or 500 persons who are not accredited investors, register such class of

[160] *See* proposed Rule 255(e).

securities with the Commission.[161] Unlike Title III of the JOBS Act, which includes a provision regarding the treatment under Section 12(g) of securities issued in securities-based crowdfunding transactions pursuant to Section 4(a)(6) of the Securities Act, Title IV does not include a provision regarding how Regulation A issuers should be treated under Section 12(g).

Section 12(g) was originally enacted by Congress as a way to ensure that investors in over-the-counter securities about which there was little or no information, but which had a significant shareholder base, were provided with ongoing information about their investment.[162] As discussed more fully below, Regulation A, as proposed to be amended, would require issuers that conducted Tier 2 offerings to provide ongoing information to their investors, albeit somewhat less than is required of an Exchange Act reporting company. If securities issued under Regulation A were to be excluded for purposes of determining record holders under Section 12(g), a company may never become subject to mandatory Exchange Act reporting as a result of selling securities under Regulation A, regardless of how many shareholders it has or whether such shareholders were accredited investors. Alternatively, if Regulation A issuers that conducted Tier 2 offerings were current in their ongoing reporting were exempt from registration under Section 12(g), or their obligations to register were suspended, issuers would have the ability to remain in the Regulation A reporting regime on a long-term basis, irrespective of growth in their shareholder base.

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161 15 U.S.C. 78*l*(g).

162 *See, generally*, *Report of the Special Study of Securities Markets of the Securities and Exchange Commission*, House Document No. 95, House Committee on Interstate and Foreign Commerce, 88th Cong., 1st Sess. (1963), at 60-62.

One commenter suggested we provide a conditional exemption from mandatory Exchange Act reporting under Section 12(g) for emerging growth companies that have conducted a Regulation A offering and comply with its ongoing reporting requirements; otherwise, emerging growth companies that may cross the Section 12(g) asset and record holder thresholds following a Regulation A offering would be disincentivized from relying on the exemption.[163] In the commenter's view, the exemption from Section 12(g) could be temporary and lapse once the issuer obtains a non-affiliate market capitalization of $250 million.[164]

We believe, however, that the Section 12(g) record holder threshold continues to provide an important baseline, above which issuers should be subject to the more expansive disclosure and compliance obligations of the Exchange Act. We are not proposing to exempt Regulation A securities from the requirements of Section 12(g) or to provide that issuers that are current in their Regulation A ongoing reporting under Tier 2 would be exempt from Section 12(g) or have their obligations to register under Section 12(g) suspended. We do, however, solicit comment as to whether a Section 12(g) exemption or suspension should be provided.

Request for Comment

33. Should Regulation A securities be exempt from Section 12(g), either conditionally or otherwise? Would an exemption from Section 12(g) encourage Regulation A issuers to continue ongoing reporting under the

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163 Letter from Michael L. Zuppone, Paul Hastings LLP, Nov. 26, 2013 ("Paul Hastings Letter").

164 The commenter suggested $250 million of non-affiliate market capitalization to accord with the threshold the Commission set for defining the mandate of its Advisory Committee on Small and Emerging Companies. *See* fn. 94 above.

proposed rules for Tier 2 offerings, where such issuers might otherwise cease reporting?[165]

34. Does Section 12(g) continue to serve as a valuable proxy for market interest in the equity securities of an issuer issued pursuant to Regulation A, such that an issuer that crosses its asset and record holder thresholds should become subject to mandatory Exchange Act reporting? Why or why not?

7. Liability under Section 12(a)(2)

The liability provisions of Section 12(a)(2) of the Securities Act apply to any public offering of securities by use of an oral communication or prospectus that includes a material misleading statement or material misstatement of fact.[166] Section 3(b)(2)(D) of the Securities Act provides that "[t]he civil liability provision in section 12(a)(2) [of the Securities Act] shall apply to any person offering or selling [Regulation A] securities." Therefore, consistent with current Regulation A,[167] sellers of Regulation A securities would have liability under Section 12(a)(2) to investors for any offer or sale by means of an offering circular or an oral communication that includes a material misleading statement or material misstatement of fact.[168]

C. Offering Statement

Section 3(b)(2)(G)(i) gives the Commission discretion to require an offering statement in such form and with such content as it determines necessary in the public

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165 *See* discussion in Section IV.B.2.f. below.

166 15 U.S.C. 77*l*(a)(2).

167 *See* SEC Rel. No. 33-6924, at fn. 57.

168 Regulation A prohibits sales until the Form 1-A has been qualified. *See* Rule 251(d)(2), 17 CFR 230.251(d)(2); *cf.* Securities Offering Reform, SEC Rel. No. 33-8591, at 173 *et seq*. (discussing Section 12(a)(2) liability in the context of information conveyed at the time of sale).

interest and for the protection of investors. The provision permits electronic filing of offering statements, and provides a non-exhaustive list of potential content that may be required in the offering statement, including audited financial statements, a description of the issuer's business operations, financial condition, corporate governance principles, use of investor funds, and other appropriate matters.

1. Electronic Filing; Delivery Requirements

Currently, Regulation A offering statements are filed with the Commission in paper form.[169] The paper filing process does not align with the Commission's electronic filing requirements for issuers in registered offerings[170] or notices in connection with offerings under Regulation D.[171] The Commission has required electronic filing of registration statements since 1996,[172] and of Form D filings since 2009.[173] Requiring offering statements to be filed electronically rather than on paper may reduce potential logistical problems and delays that can occur with the receipt, processing and dissemination of paper filings by the Commission for issuers seeking to raise capital under Regulation A. Electronic filing would facilitate a more efficient review process for such filings by Commission staff by allowing the offering and related materials, once

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169 17 CFR 232.101(c)(6). There are no filing fees associated with filing a Form 1-A with the Commission. *See* Section 6(b) of the Securities Act, 15 U.S.C. 77f(b) (permitting the recovery of costs of services to the government only with respect to registered offerings).

170 Offerings registered under the Securities Act are required to be filed electronically on the Commission's Electronic Data Gathering, Analysis, and Retrieval System (EDGAR) system. *See* Rule 101(a)(1)(i) of Regulation S-T (17 CFR 232.101(a)(1)(i)).

171 Issuers relying on Regulation D are required to electronically file a notice of sales on Form D with the Commission. *See* Rule 101(a)(1)(xiii) of Regulation S-T (17 CFR 232.101(a)(1)(xiii)); *see also* Rule 503 of Regulation D (17 CFR 230.503). Form D is also required for offerings under Section 4(a)(5) of the Securities Act.

172 *See* SEC Rel. No. 33-6977 (Feb. 23, 1993) [58 FR 14628]. Foreign private issuers have been required to file their registration statements electronically since 2002. SEC Rel. No. 33-8099 (May 16, 2002).

submitted or filed, to be rapidly processed and disseminated internally. In addition, paper submissions—while publicly available in a technical sense—are not widely or immediately accessible. Electronic filing of offering statements could facilitate investor and market access to the information contained in offering statements in a more efficient way than paper filings do.

In Section 3(b)(2)(G)(i), Congress gave the Commission discretion to require issuers to file their offering statements electronically. Commenters are generally supportive of electronic filing.[174] Consistent with these comments and the language of Section 3(b)(2)(G)(i), we propose to require Regulation A offering statements to be filed with the Commission electronically on the EDGAR system.[175]

As proposed, amended Form 1-A would consist of three parts:

- an eXtensible Markup Language (XML) based fillable form, which would capture key information about the issuer and its offering using an easy to fill out online form, similar to Form D,[176] with drop-down menus, indicator boxes or buttons, and text boxes, while also assisting issuers in determining their ability to rely on the exemption. The XML-based fillable form would enable the convenient provision of information to the Commission, and support the

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173 *See* SEC Rel. No. 33-8891 (Feb. 6, 2008) [73 FR 10592].

174 ABA Letter; WR Hambrecht + Co.; Kaplan Voekler Letter 2; *see also* Letter from George W. Beard, Managing Member, Beacon Investment Partners LLC (DE), Oct. 5, 2012 ("Beacon Investment Letter"). *See also* Final Report of the 30th Annual SEC Government-Business Forum on Small Business Capital Formation, Recommendation 16, at 31 (Nov. 17, 2011) (*available at*: http://www.sec.gov/info/smallbus/gbfor30.pdf).

175 In conjunction with this proposed change, the portion of Item 101(c)(6) of Regulation S-T (17 CFR 232.101(c)(6)) dealing with filings related to Regulation A offerings would be rescinded.

176 17 CFR 239.500.

assembly and transmission of such information to EDGAR, without requiring the issuer to purchase or maintain additional software or technology;[177]

- a text file attachment containing the body of the disclosure document and financial statements, formatted in HyperText Markup Language (HTML) or American Standard Code for Information Interchange (ASCII) to be compatible with the EDGAR filing system;[178] and
- text file attachments, containing the exhibits index and the exhibits to the offering statement, formatted in HTML or ASCII to be compatible with the EDGAR filing system.[179]

We further propose to require all other documents required to be submitted or filed with the Commission in conjunction with a Regulation A offering, such as ongoing reports, to be submitted or filed electronically on EDGAR.[180]

We believe this proposed approach to electronic filing would be both practical and useful for issuers of Regulation A securities, investors in such securities, other market participants, and the Commission staff who work with issuers throughout the qualification process. Issuers would maintain better control over their filing process, reduce the printing costs associated with filing seven copies of the offering statement and any amendments with the Commission, obtain immediate confirmation of acceptance of

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177 Part I (Notification) of Form 1-A. As discussed more fully in Section II.C.3.a. below, the cover page and Part I of current Form 1-A would be converted into, and form the basis of, the XML-based fillable form.

178 Part II (Offering Circular) of Form 1-A. *See* discussion in Section II.C.3.b. below.

179 Part III (Exhibits) of Form 1-A. *See* discussion in Section II.C.3.c. below.

180 *See* discussion regarding proposed ongoing reporting requirements at Section II.E. below. Consistent with current Regulation A, there would be no filing fees associated with Regulation A, as proposed to be amended.

an offering statement, and ultimately save time in the qualification process. Investors would gain real-time access to the information contained in Regulation A filings.[181] The efficiency of the Regulation A market should improve with the increased accessibility of information about Regulation A issuers and offerings. Additionally, as with registered offerings, EDGAR would allow the Commission to store, process, and disseminate filings in a more efficient manner, which may, in turn, improve the efficiency of the staff review and qualification processes.

As proposed, electronic filing would also facilitate the capture of important financial and other information about Regulation A issuers and offerings that would enable the Commission and market participants to monitor and analyze any market that develops in Regulation A securities, including, for example, issuer size, issuer location, key financial metrics, summary information about securities offered and offering amounts, the jurisdictions in which offerings take place, and expenses associated with the offering.[182]

We appreciate, however, that requiring EDGAR filing would impose costs on issuers that currently are not required to enter the EDGAR filing system or format their disclosure documents in ways that the EDGAR system can accept. For that reason, we are soliciting comment on whether electronic filing should be mandated for Regulation A offerings.

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181 Investors would not, however, have immediate access to non-public submissions of draft offering statements. *See* discussion in Section II.C.2. below.

182 The specific disclosure requirements included in the XML-based fillable form are discussed more fully in Section II.C.3.a. below.

If electronic filing on EDGAR is required, one commenter suggested that the Commission propose for Regulation A offering circulars an analog to the "access equals delivery" model for prospectuses under Securities Act Rule 172.[183] Currently, Regulation A prohibits sales pursuant to a qualified offering statement unless a preliminary offering circular or final offering circular is furnished to an investor at least 48 hours before the mailing of the confirmation of sale, and the final offering circular is delivered to the investor with the confirmation of sales (unless delivered at any earlier time).[184] By comparison, under Rule 172, a final prospectus in a registered offering is deemed to precede or accompany a security for sale for purposes of Section 5(b)(2) of the Securities Act as long as the final prospectus meeting the requirements of Section 10(a) of the Securities Act is filed with the Commission on EDGAR.[185] Additionally, Rule 172(a), which provides an exemption from Section 5(b)(1) of the Securities Act, permits issuers to send written confirmations and notices of allocations after effectiveness of a registration statement without being accompanied or preceded by a final prospectus, so long as the registration statement is effective and the final prospectus is filed with the Commission.[186]

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[183] Kaplan Voekler Letter 2.

[184] Rule 251(d)(2).

[185] 17 CFR 230.172(b); *see also* Securities Offering Reform, SEC Rel. No. 33-8591, at 245 (discussing Rule 172). This provision also applies where the issuer will make a good faith and reasonable effort to file the final prospectus with the Commission as part of the registration statement within the required Rule 424 time period. 17 CFR 230.172(c)(3). Currently, there is no analog in Regulation A to filings permitted in the registered context under Rule 424, although one commenter has suggested we consider one. *See* Kaplan Voekler Letter 2; *see also* discussion in Section II.C.3. below and text accompanying fn. 235.

[186] 17 CFR 230.172(a); *see also* Securities Offering Reform, SEC Rel. No. 33-8591, at 251 (discussing Rule 172(a)).

We are proposing an access equals delivery model for Regulation A final offering circulars. The expanded use of the Internet and continuing technological developments suggest that we should consider alternative methods of final offering circular delivery for Regulation A, particularly given that the regulation has not been substantively updated since 1992. Where, upon qualification of an offering statement, sales of Regulation A securities occur on the basis of offers made using a preliminary offering circular, issuers and intermediaries could presume that investors have access to the Internet, and would be permitted to satisfy their delivery requirements for the final offering circular if it is filed and available on EDGAR.[187] We further propose to require issuers to include a notice in any preliminary offering circular they use that would inform potential investors that the issuer may satisfy its delivery obligations for the final offering circular electronically. As with registered offerings, we propose to permit dealers, during the aftermarket delivery period, to be deemed to satisfy their final offering circular delivery requirements if it is filed and available on EDGAR.[188]

Further, consistent with prior Commission releases on the use of electronic media for delivery purposes, "electronic-only" offerings of Regulation A securities would not be prohibited under the proposed rules for Regulation A.[189] In such offerings, however, an issuer and its participating intermediaries would have to obtain the consent of investors to the electronic delivery of:

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187 *Cf.* Securities Offering Reform, SEC Rel. No. 33-8591, at 244.

188 *See* proposed Rule 251(d)(2)(ii) for the dealer aftermarket delivery requirements.

189 An electronic-only offering is an offering in which investors are permitted to participate only if they agree to accept the electronic delivery of all documents and other information in connection with the offering. *See* SEC Rel. No. 34-37182 (May 9, 1996) [61 FR 24644] (Use of Electronic Media by Broker-Dealers, Transfer Agents and Investment Advisers for Delivery of Information) and SEC Rel. No. 34-42728 (Apr. 28, 2000) [65 FR 25843] (Use of Electronic Media).

- the preliminary offering circular and other information, but not the final offering circular, in instances where, upon qualification, the issuer plans to sell Regulation A securities based on offers made using a preliminary offering circular; and
- all documents and information, including the final offering circular, when the issuer sells Regulation A securities based on offers conducted during the post-qualification period using a final offering circular.

We further propose to maintain the existing requirements of Rule 251(d)(2)(ii), which requires dealers to deliver a copy of the current offering circular to purchasers for sales that take place within 90 calendar days after qualification,[190] but to otherwise update and amend Rule 251(d)(2)(i), which currently requires that a preliminary or final offering circular be furnished to prospective purchasers at least 48 hours before the mailing of the confirmation of sale. When originally adopted in 1973, Regulation A's offering circular delivery requirements aligned with the prospectus delivery requirements for registered offerings.[191] In the intervening time, prospectus delivery requirements have changed,[192] with no corresponding updates to Regulation A. Notably, the

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190 *See* proposed Rule 251(d)(2)(ii). As proposed, this provision clarifies the date on which dealer delivery obligations commence in the context of continuous or delayed offerings pursuant to proposed Rule 251(d)(3).

191 *See* SEC Rel. No. 33-5277 (July 26, 1972) (noting that there should be no distinction in the delivery requirements of Regulation A offerings and registered offerings, and therefore proposing (and eventually adopting) rules requiring delivery of the offering circular 48 hours in advance of mailing of a confirmation of sale.); SEC Rel. No. 33-6075 (June 1, 1979) [44 FR 33362], at 33363-64 (permitting for the first time the use of a preliminary offering circular in Regulation A offerings, and imposing the same delivery requirements for such preliminary offering circulars as were then in effect for registered offerings).

192 *See* SEC Rel. No. 33-6383 (March 3, 1982) [47 FR 11380] (Integrated Disclosure Release, which, among other things, added Exchange Act Rule 15c2-8, 17 CFR 240.15c2-8, which requires broker-dealers participating in a registered offering of securities of a non-reporting issuer to

Commission formalized its 48-hour preliminary prospectus delivery requirement in 1982 by amending Exchange Act Rule 15c2-8 to require only broker-dealers participating in a registered offering of securities by a non-reporting issuer to deliver a preliminary (and not final) prospectus at least 48 hours in advance of the mailing of the confirmation of sale.[193]

We believe the delivery of the preliminary offering circular to potential investors before they make an investment decision remains an important investor protection that should be preserved in Regulation A, particularly in light of the proposed expanded use of "testing the waters" solicitation materials to include the period of time after non-public submission or filing of the offering statement discussed further in Section II.D. below.[194] We also recognize the need to update and amend Regulation A's offering circular delivery requirements to accord with the requirements of broker-dealers in the context of registered offerings. We therefore propose to amend Rule 251(d)(2)(i) to require issuers and participating broker-dealers to deliver only a preliminary offering circular to

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deliver a copy of the preliminary prospectus to any prospective purchaser at least 48 hours before the mailing of the confirmation of sale.); *see also* Securities Offering Reform, SEC Rel. No. 33-8591, at 173 *et seq.* and 241 *et seq.* (discussing information conveyed at time of sale for purposes of Section 12(a)(2) liability and prospectus delivery requirement reforms).

193 SEC Rel. No. 33-6383, at 11400. The advance delivery requirements do not, however, apply in the context of registered offerings by issuers subject to a reporting obligation under Section 13 or 15(d) of the Exchange Act. Before the addition of Rule 15c2-8(b), the Commission required assurances that the managing underwriter had taken reasonable steps to send investors a preliminary prospectus at least 48 hours in advance of mailing confirmations of sale before accelerating effectiveness of a registration statement. *See* SEC Rel. No. 33-4968 (May 1, 1969) [34 FR 7235]. *Cf.* 17 CFR 230.460 (Distribution of Preliminary Prospectus in Registered Offerings).

194 *Cf.* Securities Offering Reform, SEC Rel. No. 33-8591, at 245 (noting that access equals delivery is not appropriate for preliminary prospectus delivery obligations in IPOs because it is important for potential investors to be sent the preliminary prospectus).

prospective purchasers[195] at least 48 hours in advance of sale when a preliminary offering circular is used during the prequalification period to offer such securities to potential investors.[196] Unlike Exchange Act Rule 15c2-8, this delivery requirement would apply to both issuers and participating broker-dealers.[197] We believe this is an important investor protection that should apply to issuers in advance of sale, and is consistent with current Regulation A.[198] Consistent with current Rule 251(d)(1)(iii), we propose to continue to require a final offering circular to accompany or precede any written communications that constitute an offer in the post-qualification period.[199]

In addition to the revised delivery requirements discussed above, we propose to add a provision analogous to Rule 173.[200] Currently, Regulation A requires the delivery of a final offering circular to the purchaser with the confirmation of sale, unless it has

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195 Prospective purchasers would include any person that has indicated an interest in purchasing the Regulation A securities before qualification, including, but not limited to, those investors that respond to an issuer's solicitation materials. *See* proposed Rule 251(d)(2)(i).

196 In accordance with time of sale provisions discussed in Securities Offering Reform, *see* SEC Rel. No. 33-8591, at p. 173 *et seq.*, we propose to base the 48-hour period in advance of "sale" rather than the "mailing of the confirmation of sale." *See also* Section II.D. below for a discussion of the delivery requirements for solicitation materials used after publicly filing the offering statement.

197 *Cf.* Exchange Act Rule 3a4-1, 17 CFR 240.3a4-1 (Associated persons of an issuer deemed not to be brokers). Issuers would be able to rely on reasonable assurances of delivery from participating broker-dealers to satisfy their delivery obligations.

198 *Cf.* 17 CFR 230.460 (Distribution of Preliminary Prospectus in Registered Offerings). Additionally, with continued improvements in information and communication technologies, we believe direct public offerings (*i.e.*, offerings conducted by an issuer without the involvement of an underwriter) may become a more attractive option for certain issuers. For that reason, it is important that the advance preliminary offering circular delivery requirements for participating broker-dealers apply equally to issuers.

199 *See* proposed Rule 251(d)(1)(iii). Consistent with Rule 172(a) in the context of registered offerings, issuers and intermediaries sending written confirmations and notices of allocation in the post-qualification period would be allowed to rely on the EDGAR filing of the final offering circular to satisfy any delivery requirements under Rule 251(d)(1)(iii). For a discussion of Rule 172(a), *see* Securities Offering Reform, SEC Rel. No. 33-8591, at 251.

200 17 CFR 230.173.

been delivered already.[201] The proposed provision would allow issuers and participating broker-dealers that satisfy the 48-hour requirement by furnishing a preliminary offering circular to, not later than two business days after completion of the sale, provide the purchaser with a copy of the final offering circular or a notice stating that the sale occurred pursuant to a qualified offering statement. As proposed, the notice must include the URL[202] where the final offering circular, or the offering statement of which such final offering circular is part, may be obtained on EDGAR and contact information sufficient to notify a purchaser where a request for a final offering circular can be sent and received in response.

We propose to allow an issuer to withdraw an offering statement, with the Commission's consent, if none of the securities that are the subject of such offering statement have been sold and such offering statement is not the subject of a Commission order temporarily suspending a Regulation A exemption.[203] Under the proposed rules, the Commission also would be able to declare an offering statement abandoned if the offering statement has been on file with the Commission for nine months without amendment and has not become qualified.[204] These withdrawal and abandonment procedures are similar to the ones that apply to reporting companies.

Request for Comment

35. Should the rules require the electronic filing of Regulation A offering and related documents on EDGAR, as proposed? Why or why not? Please

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201 17 CFR 230.251(d)(2)(i)(C).

202 In the case of an electronic-only offering, the notice must include an active hyperlink to the final offering circular or to the offering statement of which such final offering circular is part.

203 *See* proposed Rule 259(a).

address expected costs of electronic filings and benefits to both issuers and investors of having these documents available in electronic format. Alternatively, for Tier 1 offerings, what would be the benefits, if any, of maintaining Regulation A's current paper filing system for offering statements and related documents? Should we maintain paper filing for issuers conducting Tier 1 Regulation A offerings? Why or why not?

36. As proposed, should we require issuers to file the body of the disclosure document, financial statements, and text file attachments, containing the exhibits index and the exhibits to the offering statement, electronically in a HTML or ASCII format that is compatible with the EDGAR filing system? Or should we permit the filing of offering and related materials in Portable Document Format (PDF) or in some other format that is readily accessible to smaller issuers to constitute an official filing with the Commission under Regulation S-T?[205]

37. Should we adopt, as proposed, an access equals delivery model for final offering circular delivery requirements, in which case investors would be presumed to have access to the Internet, and issuers and intermediaries could satisfy their delivery requirements if the final offering circular were filed with the Commission on EDGAR?[206] Or should we maintain our existing requirement that issuers deliver to purchasers a final offering circular with the

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[204] *See* proposed Rule 259(b).

[205] *See* 17 CFR 232.104 (Unofficial PDF copies included in an electronic submission).

[206] Kaplan Voekler Letter 2.

mailing of the confirmation of sale to such purchasers (if not delivered previously)? Why or why not?

38. Should we update, as proposed, the delivery requirements in Rule 251(d)(2)(i) to maintain advance delivery requirements of preliminary offering circulars, while eliminating the requirement that issuers and broker-dealers participating in the distribution of Regulation A securities pursuant to an offering statement deliver a final offering circular to investors at least 48 hours before sale? Why or why not? Would updating this provision, as proposed, be inconsistent with the rationale behind similar updates to prospectus delivery requirements for registered offerings? Why or why not?

39. While not currently proposed, should we adopt a provision similar to Exchange Act Rule 15c2-8(b), which would only require the advance delivery of a preliminary offering circular in the context of offerings by issuers not already subject to an ongoing reporting obligation under Regulation A? Similarly, should we adopt an analog to Rule 174(b),[207] which applies to registered offerings, so that a dealer would not have an aftermarket delivery obligation to purchasers of Regulation A securities to the extent the issuer of such securities is subject to an ongoing reporting obligation under Regulation A immediately before the time of filing the offering statement? Or, in such circumstances, should we only require dealer aftermarket delivery for a 25 calendar-day period? Why or why not?

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[207] 17 CFR 230.174(b)

40. In conjunction with the proposed access equals delivery model for final offering circular delivery requirements, should we adopt, as proposed, a provision analogous to Rule 173? If so, should compliance with that requirement be made a condition of Regulation A? Why or why not? Does the rationale behind Rule 173 apply to Regulation A offerings?[208]

2. Non-Public Submission of Draft Offering Statements

Unlike Title I of the JOBS Act,[209] Title IV does not provide for confidential submissions of offering statements under Regulation A. Commenters, however, supported providing issuers with the option of confidential submission of offering statements under Regulation A.[210] We propose to allow the non-public submission of draft offering statements by issuers of Regulation A securities. We note, however, that such submissions would not be subject to the statutorily-mandated confidentiality of draft IPO registration statements confidentially submitted by "emerging growth companies"[211] under Title I of the JOBS Act.[212]

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208 *See* Securities Offering Reform, SEC Rel. No. 33-8591, at p. 173 *et seq.*

209 Title I of the JOBS Act permits emerging growth companies to confidentially submit draft registration statements to the Commission for nonpublic review, provided the initial confidential submission and all amendments thereto are publicly filed not later than 21 calendar days before the issuer conducts its roadshow. *See* Section 106(a) of Title I, which added subsections 5(d) and 6(e) to the Securities Act.

210 Letter from Jonathan C. Guest, McCarter & English, LLP, July 10, 2012 ("McCarter & English Letter"); ABA Letter; WR Hambrecht + Co. Letter.

211 Under Section 2(a)(19) of the Securities Act, an "emerging growth company" is defined as, among other things, an issuer that had total annual gross revenues of less than $1 billion during its most recently completed fiscal year. 15 U.S.C. 77b(a)(19).

212 Under Section 6(e)(2) of the Securities Act, confidential submissions of draft registration statements by emerging growth companies are protected from compelled disclosure under the Freedom of Information Act (FOIA) (5 U.S.C. 552). There is no similar provision under Section 3(b) of the Securities Act. Issuers requesting confidential treatment of draft offering statement submissions under Regulation A could submit such documents under cover of the Commission's Rule 83. *See* 17 CFR 200.83.

Under Regulation A's proposed non-public submission of draft offering statement provisions, issuers whose securities have not been previously sold pursuant to a qualified offering statement under Regulation A or an effective registration statement under the Securities Act would be permitted to submit to the Commission a draft offering statement for non-public review. As with the confidential submission of draft registration statements, all non-public submissions of draft offering statements would be submitted via EDGAR. The initial non-public submission, all non-public amendments thereto, and correspondence with Commission staff regarding such submissions would be required to be publicly filed as exhibits to the offering statement not less than 21 calendar days before qualification of the offering statement.[213] Unlike emerging growth companies, which must publicly file any confidential submissions not later than 21 calendar days before a road show, the timing requirements for filing by issuers seeking qualification under Regulation A would not depend on whether or not the issuer conducts a road show.[214]

Request for Comment

41. As proposed, should the rules permit the non-public submission of draft offering statements under Regulation A? Would there be any adverse impact

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213 The timing is consistent with the guidance provided to emerging growth companies under Title I of the JOBS Act, where such issuers do not "test the waters" under Section 5(d) or otherwise conduct a traditional road show. *See* JOBS Act Frequently Asked Questions on Confidential Submission Process for Emerging Growth Companies, Question 9 (April 10, 2012), *available at*: http://www.sec.gov/divisions/corpfin/guidance/cfjumpstartfaq.htm.

214 Regulation A's proposed testing the waters provisions would encompass a variety of activities, including activities that could constitute a traditional road show. *See* Section II.D. below for a discussion on the timing and requirements for the use of testing the waters solicitation materials under Rule 254 as proposed to be amended.

on public investors of permitting the non-public submission of offering statements?

42. Is the proposed requirement of public filing at least 21 calendar days before qualification appropriate? Should public filing be required sooner or later than proposed?

43. Should the availability of non-public submission of Regulation A offering statements be limited, as proposed, to issuers whose securities have not been previously sold pursuant to a qualified offering statement under Regulation A or an effective registration statement under the Securities Act, in a manner similar to the limitation under Title I of the JOBS Act on the use of confidential submissions to issuers that have not previously sold common equity securities pursuant to an effective registration statement? Or should issuers be permitted to use the non-public submission provisions more than once?

44. As proposed, should issuers that non-publicly submit an offering statement under Regulation A be required to request confidential treatment under the cover of the Commission's Rule 83? Or should we adopt a new rule relating to confidential treatment of draft offering statements in Regulation A?

3. Form and Content

Section 3(b)(2)(G)(i) of the Securities Act[215] identifies certain requirements that the Commission may include, among others, in the requirements for offerings relying on the exemption. The requirements largely follow the existing offering statement

[215] *See* JOBS Act Section 401(a)(2).

requirements of Form 1-A.[216] For example, financial statements,[217] a description of the issuer's business operations,[218] financial condition,[219] and use of investor funds[220] are all currently required disclosures in Form 1-A. Additionally, Form 1-A requires issuers to disclose, among other things, their contact information, the price or method for calculating the price of the securities being offered, information about the issuer's property, results of operations, directors, officers, significant employees and certain beneficial owners, material agreements and contracts, past securities sales, material factors that make an investment in the issuer speculative or risky, dilution, the plan of distribution for the offering, executive and director compensation, and conflicts of interest and related party transactions. As with Regulation A generally, however, Form 1-A has not been substantively revised by the Commission since 1992.

Currently, Form 1-A consists of three parts: Part I (Notification), Part II (Offering Circular), and Part III (Exhibits). Part I of Form 1-A calls for certain basic information about the issuer and proposed offering that is necessary to determine the availability of the exemption.[221] For example, the existence of any "bad actor" disqualifications under Rule 262 and the presence of proposed affiliate sales in the absence of issuer net income from operations in at least one of the last two fiscal years,[222]

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216 The primary exception is the suggestion that issuers be required to submit audited financial statements. Currently, the financial statements required under Regulation A are required to be audited only if the issuer has them available.

217 *See* Form 1-A, Part II, Part F/S.

218 *Id.*, Part II, *e.g.*, Model B, Item 6. (Description of Business).

219 *Id.*, *e.g.*, Part F/S.

220 *Id.*, *e.g.*, Item 5. (Use of Proceeds to Issuer).

221 *See* SEC Rel. No. 33-6275 (Jan. 9, 1981) [46 FR 2637], at 2638.

222 *See* Rule 251(b).

both of which may affect availability of the exemption, are required to be disclosed in Part I. Part I is filed with the Commission and publicly available, but is not required to be provided to investors.[223]

Part II of the offering statement consists of an offering circular—similar to the prospectus in a registration statement—which serves as the primary disclosure document to investors of the material facts about the issuer, its securities, and the offering. Issuers organized as corporations are given the option of following any one of three disclosure formats in Part II:

- Model A (Question-and-Answer Format);[224]
- Model B, a somewhat scaled version of Form S-1 that largely follows the Commission's disclosure standards in effect for registration statements when Model B was adopted in 1981;[225] and
- Part I of Form S-1.[226]

Issuers organized in non-corporate form, such as limited partnerships and limited liability companies, have the option of using either Model B or Part I of Form S-1. Part F/S of the offering circular—containing financial statements and notes—is required disclosure for all issuers. Part III requires an exhibits index and a description of exhibits required to be filed as part of the offering statement.

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223 *See* Rule 251(d)(2); *see also* SEC Rel. No. 33-6275, at 2639.

224 Model A is based on the North American Securities Administrators Association's (NASAA) Form U-7, also known as the Small Company Offering Registration (SCOR) form, adopted April 28, 1989. *See* http://www.nasaa.org/industry-resources/corporation-finance/scor-overview/scor-forms/.

225 *See* SEC Rel. No. 33-6275 [46 FR 2637], at 2639-40; SEC Rel. No. 33-6924 [57 FR 9768], at 9771.

Commenters generally supported maintaining Regulation A's existing Form 1-A, with modifications and updates to implement the provisions of the JOBS Act.[227] While some commenters supported simplifying the form or paring it down to focus on matters of greatest significance,[228] one commenter supported a more expansive disclosure regime.[229] This commenter suggested that the Commission coordinate with the States to create a single disclosure document that would address disclosure from both a federal and state securities law perspective. In the opinion of this commenter, a single form with heightened disclosure is better than a less-comprehensive federal form that would thereafter require additional disclosure items (and review) by state securities regulators.[230] According to this commenter, the need for robust disclosure is magnified by the increase in the annual offering amount and by an issuer's ability to solicit indications of interest before filing the offering statement, engage in general solicitation, and sell to investors regardless of investor qualifications.[231]

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226 17 CFR 239.11. Issuers choosing Part I of Form S-1 must, however, follow the financial statement requirements of Form 1-A, Part F/S.

227 ABA Letter; WR Hambrecht + Co.; NASAA Letter 2.

228 Letter from Thomas D. O'Rourke, President, Alpine Ventures, Sept. 26, 2012 ("Alpine Ventures Letter"); Letter from Rutheford B. Campbell, Jr., William L. Matthews Professor of Law, University of Kentucky, Nov. 13, 2012 ("Campbell Letter"); *see also* Letter from Richard Lacey, Small Business Owner, April 23, 2012 ("Lacey Letter") (suggesting the form should be simple); Letter from William Klehm, Fallbrook Technologies, September 23, 2013 ("Fallbrook Letter") (suggesting, among other things, that Regulation A should be simple and user-friendly); Letter from Og Oggilby, Bank Clerk, Jan. 22, 2013 ("Oggilby Letter") (suggesting relaxed regulations on the sale of securities of small companies). *But see* Letter from David R. Burton, General Counsel, National Small Business Association ("NSBA"), June 12, 2012 ("NSBA Letter") (suggesting the Commission not modify or update Regulation A other than by raising the annual offering limitation to $50 million).

229 Letter from Jack Herstein, President, NASAA, July 3, 2012 ("NASAA Letter 1") (suggesting that heightened disclosure is better than a less-comprehensive federal form that would thereafter require additional disclosure items (and review) by state securities regulators); NASAA Letter 2.

230 NASAA Letter 1.

231 NASAA Letter 2.

Separately, one commenter suggested that the Commission implement an offering statement scaled on the basis of offering size.[232] Another commenter suggested that the Commission consider requiring the scaled disclosure requirements available to smaller reporting companies in Form 1-A, while also: i) focusing disclosure on matters of the greatest significance, ii) limiting risk factors to those deemed important, iii) requiring disclosure of valuation assessments (for all offerings made at a fixed price) and internal projections used to set budgets as well as a discussion of management's expectations of future performance, iv) encouraging the use and filing of research reports, and v) if Section 3(b)(2) securities are permitted to list on a national securities exchange simultaneously with qualification of the offering statement, incorporating some Form 10[233] disclosure requirements into Form 1-A.[234]

One commenter suggested that the Commission update its rules regarding revisions to the offering statement during the post-qualification period in light of anticipated continuous, best efforts offerings.[235] The commenter suggested that the current rule, which requires any updated or revised offering circular to be filed as an amendment to the offering statement and requalified in accordance with Rule 252,[236] places an unnecessary burden on issuers. This commenter suggested that the Commission adopt rules analogous to those for registered offerings where most

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232 Campbell Letter (suggesting scaled disclosure in three tiers for offerings of: $0 – up to $1 million; over $1 million – up to $5 million; over $5 million – up to $50 million).

233 17 CFR 249.210.

234 WR Hambrecht + Co. Letter; s*ee also* Letter from Karl M. Sjogern, April 25, 2013 ("Sjogern Letter") (suggesting any issuer of equity securities should be required to disclose the valuation it has given itself given the terms of the offering, and to discuss the factors it considered when setting its valuation).

235 Kaplan Voekler Letter 2. *See* related requests for comment in Section II.C.4. below.

information meeting the undertaking requirements of Item 512 of Regulation S-K[237] requires a post-effective registration statement, and other updates to the prospectus in such registration statement may be filed pursuant to Rule 424.[238]

We propose to maintain Form 1-A's existing three-part structure—Part I (Notification), Part II (Offering Circular), and Part III (Exhibits)—while making various revisions and updates to the Form.

a. Part I (Notification)

Part I of Form 1-A serves as a notice of certain basic information about the issuer and its proposed offering, which also helps to confirm the availability of the exemption.[239] We propose to continue to require the disclosure of this information in modified and updated form. The current paper version of Part I of Form 1-A would be converted into an online XML-based fillable form with indicator boxes or buttons and text boxes and filed online with the Commission.[240] The information would be publicly available on EDGAR, as an online data cover sheet, but not otherwise required to be distributed to investors.[241] The fillable form would enable issuers to provide information in a convenient medium—without the requirement for specialty software—that would capture relevant data about the issuer and its offering in a structured format to facilitate

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236 *See* Rule 253(e)(3).

237 17 CFR 229.512.

238 17 CFR 230.424.

239 SEC Rel. No. 33-6275 [46 FR 2637], at 2638.

240 As proposed, the cover page to current Form 1-A would be eliminated as a standalone requirement, while portions of the information required on the cover page would be combined with Item 1 of Part I of Form 1-A in the XML fillable form.

241 The Commission would disseminate the information in a format that provides normal text for reading and XML-tagged data for analysis. With the exception of the items that focus issuers on

analysis of the Regulation A market and Regulation A issuers by the Commission, other regulators, third-party data providers, and market participants. As noted above, the XML-based fillable form would enable the convenient provision of information to the Commission, and support the assembly and transmission of such information to EDGAR. Facilitating the capture of important financial and other information about Regulation A issuers and offerings in the proposed XML-based fillable form would enable the Commission and market participants to monitor any developing market in Regulation A securities and the types of issuers relying on the exemption.

The information collected in Part I would continue to focus issuers on eligibility to use Regulation A, and would allow Commission staff reviewing the filings to more easily make a determination about the conditions to the availability of the exemption. If adopted, this could conserve issuer time and resources and enhance the efficiency of review by Commission staff. If, after compiling the information elicited by Part I, an issuer determined that it was ineligible to rely on Regulation A, it could choose to register its offering or, if available, conduct an exempt offering in reliance on a different exemption from registration.

The proposed notification in Part I of Form 1-A would require disclosure in response to the following items:

- Item 1. Issuer Information
- Item 2. Issuer Eligibility
- Item 3. Application of Rule 262 ("bad actor" disqualification and disclosure)

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eligibility to use Regulation A, much of the information called for in the XML-based fillable form is also required to be disclosed to investors in Part II of Form 1-A.

- Item 4. Summary Information Regarding the Offering and other Current or Proposed Offerings
- Item 5. Jurisdictions in Which Securities are to be Offered
- Item 6. Unregistered Securities Issued or Sold Within One Year

As proposed, Item 1 (Issuer Information), Item 2 (Issuer Eligibility), Item 3 (Application of Rule 262 ("bad actor" disqualification and disclosure)), Item 4 (Summary Information Regarding the Offering and other Current or Proposed Offerings), and Item 6 (Unregistered Securities Issued or Sold Within One Year) would represent substantive changes to Part I.

- Item 1 (Issuer Information) would require information about the issuer's identity, industry, number of employees, financial statements and capital structure, as well as contact information.[242]
- Item 2 (Issuer Eligibility) would require the issuer to certify that it meets various proposed issuer eligibility criteria.
- Item 3 (Application of Rule 262 ("bad actor" disqualification and disclosure)) would require the issuer to certify that no disqualifying events have occurred and to indicate whether related disclosure is included in the offering circular (*i.e.*, events that would have been disqualifying but occurred before the effective date of the amendments to Regulation A).[243]

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242 As proposed, some of the information in Item 1, such as the name of the issuer, jurisdiction of incorporation, contact information, primary Standard Industrial Classification Code Number, and I.R.S. Employer Identification Number is currently required to be included on the cover page of Form 1-A. We propose to eliminate the cover page of Form 1-A and to move the relevant information from the cover page into Item 1 of Part I.

243 *See* discussion of proposed Rule 262(a)(3) and (a)(5) in Section II.G. below.

- Item 4 (Summary Information Regarding the Offering and other Current or Proposed Offerings) would include indicator boxes or buttons and text boxes eliciting information about the offering (including whether the issuer was conducting a Tier 1 or Tier 2 offering, amount and type of securities offered, proposed sales by selling securityholders and affiliates, type of offering, estimated aggregate offering price of any concurrent offerings pursuant to Regulation A, anticipated fees in connection with the offering, and the names of auditors, legal counsel, underwriters, and certain others providing services in connection with the offering).
- Item 5 (Jurisdictions in Which Securities are to be Offered) would include data collection about the jurisdiction in which the securities are to be offered.
- Item 6 (Unregistered Securities Issued or Sold Within One Year), which largely restates existing Item 5 to Part I, would eliminate the requirement to provide the names and identities of the persons to whom unregistered securities were issued.

We propose to eliminate Item 1 (Significant Parties) of current Part I, which requires disclosure of the names, business address, and residential address of all the persons covered by current Rule 262. Instead, we propose to only require narrative disclosure in Part II of Form 1-A, as proposed, when the issuer has determined that a relevant party has a disclosable "bad actor" event.[244] We propose to eliminate Item 3 of current Part I because we propose to eliminate the current restrictions on affiliate resales

[244] *See* discussion in Section II.G. below.

under Rule 251(b).[245] Information regarding the amount of proposed secondary sales and the existence of affiliate sales in the offering, however, would continue to be disclosed in Item 4, as proposed. Item 6 (Other Present or Proposed Offerings) and Item 9 (Use of a Solicitation of Interest Document) of current Part I would be incorporated into proposed Item 4 (Summary Information Regarding the Offering and Other Current or Proposed Offerings). We also propose to eliminate Item 7 (Marketing Arrangements) and Item 8 (Relationship with Issuer of Experts Named in Offering Statement) of current Part I, as disclosure of this information is required in Part II (Offering Circular).

b. Part II (Offering Circular)

(1) Narrative Disclosure

As noted above, Part II (Offering Circular) in existing Form 1-A provides issuers with three options for their narrative disclosure: Model A, Model B, and Part I of Form S-1.[246] The use of these three options has not been revisited, nor have the Model A and Model B formats been substantively revised by the Commission, since their introduction in 1992.[247] In the context of a broader effort to update Regulation A and make it more useful for market participants, we believe that the form and content of the Regulation A Offering Circular is in need of reconsideration. In this regard, we propose to eliminate Model A as a disclosure option, to update and retain Model B as a disclosure

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245 The primary purpose of current Item 3 (Affiliate Sales) in Part I of Form 1-A is to ensure compliance with certain restrictions on affiliate resales under Rule 251(b). *See* discussion in Section II.B.3. above.

246 Non-corporate issuers are not permitted to use Model A.

247 Before the 1992 amendments to Regulation A, Model B was the only format permissible in Regulation A. *See* SEC Rel. No. 33-6275 [46 FR 2637]. Model A and Part I of Form S-1 were added as additional issuer options at that time. Model B has not been substantively revised or revisited since it was introduced by the Commission in 1981. *See* SEC Rel. No. 33-6924 [57 FR 9768], at 9771.

option (renaming it "Offering Circular"), and to continue to permit issuers to rely on Part I of Form S-1 to satisfy the disclosure obligations of Part II of Form 1-A.

Model A. Model A was first introduced as an option for corporate issuers' Regulation A offering statements in 1992. The basis for the form was the Small Company Offering Registration, or SCOR, form developed by NASAA, in coordination with state securities administrators and the securities bar, working through the ABA's State Regulation of Securities Committee.[248] Model A was intended to provide corporate issuers with a "balanced approach to the capital raising process, providing a registration form that small businesses can easily use at a reduced cost while still maintaining investor protection."[249] In practice, however, Model A has been used much less frequently than Model B, and offerings using Model A have generally taken significantly longer to qualify than those using Model B or Part I of Form S-1.[250] Commission staff who review Regulation A filings indicate that Model A's question-and-answer disclosure format often results in disclosure that lacks uniformity and is hard to follow. While the question-and-answer approach taken in Model A may help focus corporate issuers on crucial disclosure issues, we are not convinced that the disclosure format results in clear

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248 NASAA's Form U-7 (Small Company Offering Registration) was first approved for use in connection with certain securities offerings by NASAA in 1989. *See* NASAA's website on SCOR Forms, *available at*: http://www.nasaa.org/industry-resources/corporation-finance/scor-overview/scor-forms/. It was later revised by NASAA in 1999. The revised version has not been approved for use in connection with Regulation A by the Commission. In its comment letter, NASAA suggested that the Commission consider allowing revised Form U-7 to be used in connection with the Section 3(b)(2) exemption. *See* NASAA Letter 2.

249 SEC Rel. No. 33-6924, at 23-24.

250 From 2002 through 2012, approximately 21% of qualified Regulation A offerings have used Model A, 66% have used Model B and 13% have used Form S-1. During the same period, the average time required for an offering to qualify was 301 days for offerings using Model A, 220 days for offerings using Model B and 167 days for offerings using Form S-1. One reason that Model A is used less frequently may be that it was not updated to correspond to the version of the

and understandable disclosure being provided to investors. We therefore propose to eliminate Model A from the narrative disclosure options in Part II of Form 1-A.

Model B. Model B disclosure was first introduced by the Commission in 1981, and was the only available disclosure format at that time.[251] It was preserved as a disclosure option in the 1992 amendments to Regulation A.[252] It has not been substantively updated or revised since 1981.

Model B was originally the product of a Commission review of the disclosure practices of Regulation A issuers under Model B's predecessor, Schedule I.[253] The Commission found that Regulation A's then-existing disclosure guidance and rules did not provide sufficiently detailed directions for the types of offerings that were being conducted under Regulation A.[254] As a result, issuers and their counsel often looked to the existing disclosure guides for the preparation of registration statements[255] for guidance on disclosure under Regulation A.[256] Such disclosure, however, lacked uniformity, and caused delays in the Commission staff review and comment process.[257] Model B was a codification by the Commission of the disclosure standards that, in practice, were being applied to Regulation A offerings at that time.[258] As enacted,

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SCOR form adopted by NASAA in 1999, so an issuer may not be able to use the same disclosure document in connection with Regulation A that it can use for state securities regulation disclosure.

251 *See* SEC Rel. No. 33-6275.

252 *See* SEC Rel. No. 33-6949, at 36444.

253 SEC Rel. No. 33-6275, at 2638.

254 *Id.*

255 *See, e.g.,* SEC Rel. No. 33-4936 (Dec. 9, 1968) [33 FR 18617] (Guides for Preparation and Filing of Registration Statements).

256 SEC Rel. No. 33-6275, at 2638.

257 *Id.*

258 *Id.*

Model B was not intended to increase the disclosure obligations of issuers. Rather, in addition to removing uncertainty as to the content of required disclosures, Model B's more comprehensive and uniform set of disclosure standards was intended to reduce an issuer's total time spent preparing and amending the offering circular, and the Commission staff's time spent reviewing and commenting on it. The result was offering statement disclosure that closely followed the disclosure requirements then in effect for registration statements, but scaled for smaller issuers.[259]

Form S-1. The 1992 amendments to Regulation A also permitted issuers to draft offering circular disclosure based on the narrative disclosure requirements for registered offerings found in the then-newly created Form SB-1.[260] When Form SB-1 was rescinded as part of the simplification and modernization of requirements for small businesses, including the adoption of the smaller reporting company concept, Form 1-A was revised to permit issuers to follow the narrative disclosure provisions of Part I of Form S-1.[261] Thus, issuers are currently able to provide narrative disclosure under Part I of Form S-1 based on the disclosure requirements for smaller reporting companies (if applicable) or for larger companies that do not fall within the definition of a smaller reporting company.[262]

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259 As an example of the variances between Form 1-A and registered offering disclosure, Item 10 of Part II of Form 1-A called for disclosure of record ownership of voting securities by management and certain securityholders, whereas Form S-18, a simplified registration form available to certain corporate issuers going public for the first time before 1992, called for broader disclosure of beneficial ownership of such securities. *See* SEC Rel. No. 33-6275, at 2640. This distinction between Form 1-A and registered offering disclosure (on Form S-1) remains today.

260 Form SB-1 replaced Form S-18. *See* SEC Rel. No. 33-6949, at 36442.

261 *See* SEC Rel. No. 33-8876, at 166.

262 An issuer that qualifies as a smaller reporting company on the basis of public float or revenue (*see, e.g.*, Exchange Act Rule 12b-2, 17 CFR 240.12b-2) may follow the narrative disclosure requirements in Part I of Form S-1 that apply to such companies.

Form S-1 and the narrative disclosure requirements of Regulation S-K have been revised numerous times since the introduction of Model B disclosure in 1981 to reflect evolving disclosure requirements and standards. Model B disclosure, however, has remained essentially unchanged, as a version of Part I of Form S-1 circa 1981, scaled for smaller issuers. Thus, while eliciting disclosure of largely the same information, Model B and Part I of Form S-1 contain different item numbers and language.

Proposed Offering Circular. We propose to retain Model B (which, in light of the proposed elimination of Model A, will be renamed "Offering Circular") as a disclosure option under Part II of Form 1-A, updated as detailed below in accordance with Title IV of the JOBS Act and to reflect developments in disclosure requirements for registered offerings since 1981. Updates to the Offering Circular would also incorporate the disclosure guidelines in the Securities Act Industry Guides and guidance on the disclosure requirements applicable to limited partnerships and limited liability companies.[263] Additionally, we propose to continue to permit issuers to comply with Part II of Form 1-A by providing the narrative disclosure required in Part I of Form S-1.

We solicit comment as to whether it would be more appropriate to eliminate Model B disclosure altogether, and, in its place, to require issuers to follow the disclosure and form requirements of Part I of Form S-1, while maintaining Model B-specific disclosures where noted. As with the proposed updates to Model B, to the extent the Commission chose to require disclosure that tracks Part I of Form S-1, it would not increase the disclosure obligations of issuers except where noted below.

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263 *See* Item 7(c)-(d) to Part II of proposed Form 1-A; *see also* SEC Rel. No. 33-6900 (June 17, 1991) [56 FR 28979] (setting forth the Commission's view on the disclosure requirements for limited partnerships).

We are aware that eliminating Model A and updating Model B may raise concerns about an increase in the disclosure required for a Regulation A offering. Our proposal would create new requirements for audited financial statements (consistent with the JOBS Act requirement of the annual filing of audited financial statements) and for a section containing management's discussion and analysis (MD&A) of the issuer's liquidity, capital resources, and results of operations.[264] Consistent with the requirements of current Form 1-A, issuers that have not generated revenue from operations during each of the three fiscal years immediately before the filing of the offering statement would be required to describe their plan of operations for the twelve months following qualification of the offering statement.[265] Otherwise, it is not intended to substantially alter current Model B disclosure requirements.

As proposed, Offering Circular disclosure in Part II of Form 1-A would cover:

- Basic information about the issuer and the offering, including identification of any underwriters and disclosure of any underwriting discounts and commissions (Item 1: Cover Page of Offering Circular);
- Material risks in connection with the offering (Item 3: Summary and Risk Factors);
- Material disparities between the public offering price and the effective cash costs for shares acquired by insiders during the past year (Item 4: Dilution);

[264] While not currently an express disclosure requirement in Model B, some disclosure requirements similar to MD&A are included in Form 1-A. Disclosure similar to the MD&A required in registered offerings would provide potential investors with meaningful information upon which to make an investment decision. The proposed MD&A disclosure requirements would provide issuers with comprehensive guidance as to the specific requirements of such disclosure. The primary differences between the MD&A we propose to require in Form 1-A and the MD&A required under Item 303 of Regulation S-K, 17 CFR 229.303, are discussed below.

- Plan of distribution for the offering, including the disclosure required by Item 7 (Marketing Arrangements) of Part I of current Form 1-A and disclosure regarding selling securityholders (Item 5: Plan of Distribution and Selling Securityholders);
- Use of proceeds (Item 6: Use of Proceeds to Issuer);
- Business operations of the issuer for the prior three fiscal years (or, if in existence for less than three years, since inception) (Item 7: Description of Business);
- Material physical properties (Item 8: Description of Property);
- Discussion and analysis of the issuer's liquidity and capital resources and results of operations through the eyes of management covering the two most recently completed fiscal years; and, for issuers that have not received revenue from operations during each of the three fiscal years immediately before the filing of the offering statement, the plan of operations for the twelve months following qualification of the offering statement, including a statement about whether the issuer anticipates that it will be necessary to raise additional funds within the next six months (Item 9: Management's Discussion and Analysis of Financial Condition and Results of Operations);
- Identification of directors, executive officers and significant employees with a discussion of any family relationships within that group, business experience during the past five years, and involvement in certain legal proceedings during

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[265] *See* Item 6(3)(i) of Model B of Part II of Form 1-A.

the past five years (Item 10: Directors, Executive Officers and Significant Employees);

- Executive compensation data for the most recent fiscal year for the three highest paid officers or directors (Item 11: Compensation of Directors and Officers);
- Beneficial ownership of voting securities by executive officers, directors, and 10% owners (Item 12: Security Ownership of Management and Certain Securityholders);
- Transactions with related persons, promoters and certain control persons (Item 13: Interest of Management and Others in Certain Transactions);
- The material terms of the securities being offered (Item 14: Securities Being Offered);
- Two years of financial statements, which for Tier 2 offerings would be required to be audited. Tier 1 offerings would be required to provide audited financial statements to the extent the issuer had prepared them for other purposes;[266] and
- Any events that would have triggered disqualification of the offering under Rule 262 if the issuer could not rely on the provisions in proposed Rule 262(b)(1).[267]

The proposed content of the Offering Circular would update the disclosure requirements in some respects to more closely align Regulation A disclosure with the

[266] Financial statement requirements are discussed more fully in Section II.C.3.b(2). below.

smaller reporting company disclosure requirements for registered offerings, while certain scaled elements exclusive to Model B would be retained.[268] The changes would result in more detailed instructions on issuer disclosure in the MD&A section of the Offering Circular, as well as a description of the issuer's business for a period of three years (as opposed to current Model B's five-year requirement), with the added disclosure of any legal proceedings material to the issuer's business or financial condition. These changes would make Offering Circular disclosure more akin to what is required of smaller reporting companies in a prospectus, but more limited in certain respects. Additionally, as with registered offerings by smaller reporting companies, issuers would be required to disclose beneficial ownership of their voting securities, as opposed to record ownership of voting and non-voting securities. Lastly, as to transactions with related persons, promoters and certain control persons, issuers would no longer be required to disclose such transactions in excess of $50,000 in the prior two years (or similar transactions currently contemplated), but rather to follow the requirements for smaller reporting company disclosure of transactions during the prior two fiscal years that exceed the lesser

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[267] *See* discussion of disqualification provisions in Section II.G. below. We propose to require this "bad actor" disclosure even if the issuer elects to follow the Part I of Form S-1 disclosure format.

[268] We are not proposing, however, to include in the Offering Circular all disclosures required of smaller reporting companies under Regulation S-K. For example, we do not propose to include in the Offering Circular disclosure required of certain issuers by the Dodd-Frank Act regarding conflict minerals, payments made by resource extraction issuers, *see* SEC Rel. No. 34-67717 (Aug. 22, 2012) [77 FR 56365], pay ratio, pay for performance, hedging, or clawbacks. We also do not propose to require Regulation A issuers to provide disclosure regarding the market price of and dividends on common equity and related stockholder matters under Item 201 of Regulation S-K, 17 CFR 229.201, changes in and disagreements with accountants under Item 304 of Regulation S-K, 17 CFR 229.304, corporate governance matters under Item 407 of Regulation S-K, 17 CFR 229.407, and the determination of offering price under Item 505 of Regulation S-K, 17 CFR 229.505.

of $120,000 or 1% of the average total assets at year end for the last two completed fiscal years.[269]

With the exception of the requirements for disclosure of beneficial ownership, material legal proceedings, and related party transactions for certain issuers,[270] these proposed updates should not result in an overall increase in an issuer's disclosure obligations. For example, as mentioned above, issuers would be required to provide fewer years of business description and certain issuers would have a higher threshold for reporting transactions with related persons than current Model B.[271] Further, issuers would be permitted to provide more streamlined disclosure of dilutive transactions with insiders by no longer being required to present a dilution table based on the net tangible book value per share of the issuer's securities.[272] Additionally, while issuers would be provided with more detailed instructions on MD&A disclosure, similar disclosure is already called for under current requirements.[273] The proposed MD&A disclosure would clarify existing requirements and save issuers time by providing more express guidance regarding the type of information and analysis that should be included. We believe the clearer requirements should also lead to improved MD&A disclosure, which would

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269 *See* 17 CFR 229.404(d)(1).

270 As proposed, issuers that have $5 million (or less) in average total assets at year end for the last two completed fiscal years would be required to disclose related party transactions at a lower threshold (*i.e.*, 1% or more) than under the requirements of current Model B, which requires the disclosure of transactions in excess of $50,000 in the prior two years.

271 *See id*.

272 *See* Item 4 (Dilution) to the Offering Circular in Part II of Form 1-A.

273 MD&A disclosure is specifically required by Model A. Model B calls for similar information in Item 6, which requires disclosure of the characteristics of the issuer's operations or industry that may have a material impact upon the issuer's future financial performance. Item 6 also requires disclosure of the issuer's plan of operations and short-term liquidity if the issuer has not received revenue from operations during each of the three fiscal years immediately prior to filing the offering statement.

provide investors with better visibility into management's perspective on the issuer's financial condition and operations. Investors would also receive the benefit of disclosure that is more consistent across issuers in both registered offerings and Regulation A offerings.

Issuers providing disclosure in the Offering Circular would retain most of the scaled disclosure provisions currently found in Model B. We propose to continue to permit Regulation A issuers to:

- provide simplified executive compensation data for the three highest paid officers and directors in tabular form for the most recent fiscal year;[274]
- disclose 10% beneficial owners of voting securities;[275] and
- follow fewer specific disclosure requirements for the description of business section.[276]

Additionally, the Offering Circular would, in comparison to Model B of Form 1-A, contain more express MD&A disclosure requirements and guidance.[277] These requirements would not, however, be as extensive as those contained in Item 303 of Regulation S-K.[278] For example, the Offering Circular would include detailed guidance and requirements similar to Item 303 with respect to liquidity, capital resources, and

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274 *Cf.* Item 402(l)-(r) of Regulation S-K, 17 CFR 229.402(l)-(r), which requires more extensive disclosure and tabular information for the two most recent fiscal years.

275 *Cf.* Item 403 of Regulation S-K, 17 CFR 229.403, which requires disclosure of beneficial owners of more than 5% of voting securities.

276 Compare the requirements of Item 6 of Model B, Part II of Form 1-A with the more prescriptive requirements of Item 11 of Form S-1 and Item 101 of Regulation S-K, 17 CFR 229.101.

277 The requirements for financial statements in Part F/S of Part II of Form 1-A are discussed in Section II.C.3.b(2). below.

results of operations, including the most significant trend information,[279] but would not require disclosure (in the normal course) of off-balance sheet arrangements or contractual obligations.[280] As with the treatment of smaller reporting companies under Item 303(d), Regulation A issuers would only be required to disclose information about the issuer's results of operations for the two most recently completed fiscal years. Further, consistent with existing Form 1-A, issuers that have not generated revenue from operations during each of the three fiscal years immediately before the filing of the offering statement would have to describe their plan of operations for the twelve months following qualification of the offering statement, including a statement about whether, in the issuer's opinion, it will be necessary to raise additional funds within the next six months to implement the plan of operations.[281]

Consistent with the treatment of issuers in registered offerings, we further propose to permit issuers to incorporate by reference into Part II of the Form 1-A certain items previously submitted or filed on EDGAR. Incorporation by reference would be limited to documents publicly submitted or filed under Regulation A, such as Form 1-A and Form 1-K, and their exhibits. In order to be permitted to incorporate by reference, issuers would have to be subject to the ongoing reporting obligations for Tier 2 offerings.[282]

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278 17 CFR 229.303 (Management's discussion and analysis of financial condition and results of operations in the context of registered offerings).

279 17 CFR 303(a)(1)-(3). *Cf.* Form 20-F, at Item 5.

280 During the course of the qualification process, Commission staff reviewing the offering statement may request the disclosure of such information, where the disclosure of such information would be material to an understanding of the issuer's financial condition.

281 *See* Form 1-A, Model B, at Item 6 (Description of Business).

282 Issuers following the Offering Circular disclosure model would be permitted to incorporate by reference Items 2 through 14, whereas issuers following the narrative disclosure in Part I of Form S-1 would be permitted to incorporate by reference Items 3 through 11 of Part I of Form S-1. *See* General Instruction III to proposed Form 1-A. As with Model B, the item numbers

Issuers would be required to describe the information incorporated by reference, which would be required to be accompanied by a separate hyperlink to the relevant document on EDGAR, which need not remain active after the filing of the related offering statement.

(2) Financial Statements

Part F/S of Form 1-A currently requires issuers in Regulation A offerings to provide the following financial statements prepared in accordance with U.S. GAAP:

- a balance sheet as of a date within 90 days before filing the offering statement (or as of an earlier date, not more than six months before filing, if the Commission approves upon a showing of good cause) but, for filings made more than 90 days after the end of the issuer's most recent fiscal year, the balance sheet must be dated as of the end of the fiscal year;
- statements of income, cash flows, and stockholders' equity for each of the two fiscal years preceding the date of the most recent balance sheet, and for any interim period between the end of the most recent fiscal year and the date of the most recent balance sheet;
- financial statements of significant acquired businesses; and
- pro forma information relating to significant business combinations.

As noted above, the financial statements are not required to be audited unless the issuer has already obtained an audit of its financial statements for another purpose. If the issuer has audited financial statements, the qualifications and reports of the auditor must

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in the Offering Circular model of proposed Part II of Form 1-A and Part I of Form S-1 do not align.

meet the requirements of Article 2 of Regulation S-X[283] and the audit must be conducted in accordance with U.S. Generally Accepted Auditing Standards (GAAS) or the standards of the Public Company Oversight Board (PCAOB), but auditors are not required to be registered with the PCAOB.[284]

We have not received extensive comment on the potential financial statement requirements for issuers under Title IV of the JOBS Act. One commenter suggested audited financial statements should be required for all offerings.[285] Another commenter urged the Commission to prohibit the use of financial projections unless they are reviewed, and filed along with the issuance of an unqualified opinion, by a licensed certified public accountant.[286] Another commenter suggested—while discussing offering statements generally—that the Commission should consider scaling financial statement requirements on the basis of offering size.[287]

We propose to generally maintain the existing financial statement requirements of current Part F/S for Tier 1 offerings, while requiring issuers in Tier 2 offerings to file audited financial statements in Part F/S.[288] Specifically, we propose to require all issuers to file balance sheets as of the two most recently completed fiscal year ends (or for such shorter time that they have been in existence), instead of the current requirement to file a

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283 17 CFR 210.1 *et seq*.

284 *See* Form 1-A, Part F/S.

285 WR Hambrecht + Co. Letter.

286 NASAA Letter 2.

287 Campbell Letter.

288 *See* paragraph (c) of Part F/S of Form 1-A. An issuer offering up to $5 million that elects to conduct a Tier 2 offering would be required, in addition to filing audited financial statements in the offering statement, to provide ongoing reports to the Commission on the proposed annual and semiannual basis, with interim current event updates, *see* Section II.E.1. below, and only be

balance sheet as of only the most recently completed fiscal year end. In light of the requirement in Part F/S for 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, we believe issuers would already have the additional balance sheet or be in a position to easily generate the additional balance sheet at minimal additional cost, and that comparison between the two balance sheets would provide valuable additional information. Financial statements for U.S.-domiciled issuers would be required to be prepared in accordance with U.S. GAAP, as is currently the case. We propose, however, to permit Canadian issuers to prepare financial statements in accordance with either U.S. GAAP or International Financial Reporting Standards (IFRS) as issued by the International Accounting Standards Board (IASB).[289]

In general, issuers conducting Tier 1 offerings must follow the requirements for the form and content of their financial statements set out in Part F/S, rather than following the requirements in Regulation S-X. However, in certain less common circumstances, such as for an acquired business or subsidiary guarantors, Part F/S directs issuers conducting Tier 1 offerings to comply with certain portions of Regulation S-X, which provides guidance on the financial statements required in such transactions.[290]

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permitted to terminate their ongoing reporting obligation by satisfying the requirements for filing a Form 1-Z described in Section II.E.4. below.

[289] If the financial statements comply with IFRS as issued by the IASB, such compliance must be unreservedly and explicitly stated in the notes to the financial statements and the auditor's report must include an opinion on whether the financial statements comply with IFRS as issued by the IASB. *See* General Rule (a)(2) to Part F/S of proposed Form 1-A. *Cf.* Item 17(c) of Form 20-F.

[290] We propose to update the requirements for financial statements of businesses acquired or to be acquired in Part F/S to refer to the requirements of Rule 8-04 of Regulation S-X. We also propose to provide specific references to the relevant provisions of Regulation S-X regarding the requirements for financial statements of guarantors and the issuers of guaranteed securities (Rule 3-10 of Regulation S-X), financial statements of affiliates whose securities collateralize an issuance of securities (Rule 3-16 of Regulation S-X), and financial statements provided in

For all Tier 2 offerings, however, issuers would be required to follow the financial statement requirements of Article 8 of Regulation S-X, as if the issuer conducting a Tier 2 offering were a smaller reporting company, unless otherwise noted in Part F/S. This requirement would include any financial information with respect to acquired businesses required by Rule 8-04 and 8-05 of Regulation S-X.[291]

As with current Regulation A, financial statements in a Tier 1 offering would not be required to be audited. However, we also propose to maintain Regulation A's existing requirement that, if an issuer conducting a Tier 1 offering has already obtained an audit of its financial statements for other purposes, and that audit was performed in accordance with U.S. generally accepted auditing standards or the auditing standards of the PCAOB, and the auditor was independent pursuant to Rule 2-01 of Regulation S-X, then those audited financial statements must be filed. The auditor may, but need not be, registered with the PCAOB.

Issuers conducting Tier 2 offerings would, by contrast, be required to have their financial statements audited. As with Tier 1 offerings, the auditor of financial statements being filed as part of a Tier 2 offering must be independent under Rule 2-01 of Regulation S-X and must comply with the other requirements of Article 2 of Regulation S-X, but need not be PCAOB-registered.[292] Issuers conducting Tier 2 offerings would, however, be required to provide financial statements that are audited in

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connection with oil and gas producing activities (Rule 4-10 of Regulation S-X). The financial statements provided in these circumstances would only be required to be audited to the extent the issuer had already obtained an audit of its financial statements for other purposes.

291 Issuers would, however, follow paragraph (a)(3) of Part F/S of Form 1-A with respect to the age of the financial statements and the periods to be presented.

292 *See* Part F/S of Form 1-A (referencing Article 2 of Regulation S-X, 17 CFR 210.2-01 *et seq.*).

accordance with the standards of the PCAOB. In addition to auditing standards, PCAOB standards include requirements on auditor ethics, independence and quality control that, in comparison to the auditing standards of U.S. GAAS, could improve the quality of the audit and the financial statements provided to investors in potentially larger Tier 2 offerings.

Additionally, we propose to update the Form 1-A financial statement requirements to be consistent with the proposed timetable for ongoing reporting.[293] Under Regulation A, as currently in effect, issuers are required to prepare a balance sheet as of a date not more than 90 days before filing the offering statement, or not more than six months before filing if the Commission approves upon a showing of good cause.[294] If the financial statements are filed more than 90 days after the end of the issuer's most recently completed fiscal year, the financial statements must include that fiscal year.[295] In practice, however, Commission staff reviewing Form 1-A filings routinely affords issuers the six-month accommodation, subject to the requirement that financial statements must otherwise be dated as of the end of the most recently completed fiscal year if filed more than 90 days after the end of such fiscal year.

We propose to extend the permissible age of financial statements in Form 1-A to nine months, in order to permit the provision of financial statements that are updated on a timetable consistent with our proposed requirement for semiannual interim reporting.[296]

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293 Our proposals for ongoing reporting are discussed in Section II.E. below.

294 *See* Form 1-A, Part F/S.

295 *Id*.

296 This age of financial statements requirement is also consistent with the treatment of foreign private issuers in the context of registered offerings. *See* Division of Corporation Finance's Financial

We also propose to add a new limitation on the age of financial statements at qualification, under which an offering statement could not be qualified if the date of the balance sheet included under Part F/S were more than nine months before the date of qualification.[297] For filings made more than three months after the end of the issuer's most recent fiscal year, the balance sheet would be required to be dated as of the end of the most recent fiscal year.[298] For filings made more than nine months after the end of the issuer's most recent fiscal year, the balance sheet would be required to be dated no earlier than as of six months after the end of the most recent fiscal year.[299] If interim financial statements are required, they would be required to cover a period of at least six months.[300] Requiring issuers to file interim financial statements no older than nine months and covering a minimum of six months would have the beneficial effect of eliminating what could otherwise be a requirement for certain issuers to provide quarterly interim financial statements during the qualification process and would be consistent with the timing of our proposed ongoing reporting requirements.[301] We propose to generally maintain the timing requirement of existing Form 1-A concerning the date after which an issuer must provide financial statements dated as of the most recently completed fiscal

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Reporting Manual, at 6620, *available at*: http://www.sec.gov/divisions/corpfin/cffinancialreportingmanual.pdf#topic6.

297 Currently, Form 1-A does not expressly limit the age of financial statements at qualification. In practice, however, Commission staff requires issuers to update financial statements before qualification to the extent such financial statements no longer satisfy Form 1-A's requirements for the age of financial statements at the time of filing.

298 *See* paragraph (a)(3)(i) to Part F/S of proposed Form 1-A.

299 *Id*.

300 *See* paragraph (a)(3)(iv) to Part F/S of proposed Form 1-A.

301 *See* discussion in Section II.E.1.b. below (Semiannual Reports on Form 1-SA).

year, but to change the interval from 90 calendar days to three months, which we believe would simplify compliance.

We solicit comment below on whether issuers conducting Tier 2 offerings should be required to provide their financial statements to the Commission and on their corporate websites in interactive data format using the eXtensible Business Reporting Language (XBRL).[302] We have not received any public comment on this issue to date and do not propose any such requirement. If the Commission were to adopt any such requirement, as with registered offerings, the interactive data would have to be provided as an exhibit to the offering statement filed with the Commission. On the same basis and subject to the same qualifications, interactive data would be required for all periodic and current reporting, as well as for the annual audited financial statements. Filers would be required to prepare their interactive data using the list of tags the Commission specifies and submit them with any supporting files the EDGAR Filer Manual prescribes.[303] Interactive data would be required for the complete set of their financial statements, which includes the face financial statements and all footnotes.[304] Filers would be required to tag every financial statement line item and "detail tag" the footnotes by tagging each amount.

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302 Data becomes interactive when it is labeled or "tagged" using a computer markup language such as XBRL that software can process for analysis. For a discussion of current financial statement interactive data requirements, *see* SEC Rel. No. 33-9002 (Jan. 30, 2009) [74 FR 6776]. Financial statements for issuers seeking to qualify Tier 1 offerings may be treated differently because audited financial statements may not be required in the offering statements of such issuers.

303 The EDGAR Filer Manual is *available at*: http://www.sec.gov/info/edgar/edmanuals.htm.

304 17 CFR 210.12-01 *et seq*.

c. Part III (Exhibits)

We have not received any comments about the exhibits that should be filed with the offering statement.[305] We propose to continue to permit issuers to incorporate by reference certain information in documents filed under Regulation A that is already available on EDGAR, but, in addition to the requirement to describe the information incorporated by reference, issuers would be required to include a hyperlink to such exhibit on EDGAR.[306] As proposed, such issuers would also have to be subject to the ongoing reporting obligations for Tier 2 offerings. To the extent post-qualification amendments to offering statements must include audited financial statements, the consent of the certifying accountant to the use of such accountant's certificate in connection with the amended financial statements must be included.[307] Additionally, and consistent with the requirements of existing Regulation A, any solicitation materials used by the issuer would have to be included as an exhibit to the offering statement at the time of non-public submission or filing.

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305 Part III (Exhibits) of Form 1-A currently requires issuers to file the following exhibits with the offering statement: Underwriting agreement; Charter and by-laws; Instrument defining the rights of securityholders; Subscription agreement; Voting trust agreement; Material contracts; Material foreign patents; Plan of acquisition, reorganization, arrangement, liquidation, or succession; Escrow agreements; Consents; Opinion re legality; Sales material; "Test the water" material; Appointment for agent for service of process; and any additional exhibits the issuer may wish to file.

306 *See* General Instruction III to proposed Form 1-A and discussion in Section II.C.3.b(1). above regarding incorporation by reference in Part II of Form 1-A. The hyperlink must be active at the time of filing, but need not remain active after filing.

307 This is consistent with current practice under Regulation A, but would be made an express requirement under the proposed rules. *See* proposed Rule 252(h)(1)(ii).

d. Signature Requirements

Under current Regulation A, an issuer must file seven copies of the offering statement with the Commission, at least one of which must be manually signed.[308] In light of the proposed electronic filing requirements for Regulation A offering materials discussed above,[309] however, issuers would no longer be required to file a manually signed copy of the Form 1-A with the Commission.[310] Similar to the requirement for issuers in the context of registered offerings, issuers would instead be required to manually sign a copy of the offering statement before or at the time of filing that would have to be retained by the issuer for a period of five years.[311] Issuers would be required to produce the manually signed copy to the Commission, upon request.[312]

Additionally, if the issuer filing a Form 1-A under current Regulation A is a Canadian issuer, its authorized representative in the United States is required to sign the offering statement.[313] This requirement corresponds to a similar requirement under Section 6 of the Securities Act for filings of registration statements by foreign issuers.[314] We propose to eliminate this requirement under Regulation A. Offerings qualified under Regulation A are not subject to the liability provisions of Section 11 of the Securities Act, and having a signatory in the United States does not provide purchasers with significant additional protections. In addition, we propose to maintain the requirement that Canadian

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308 *See* Rule 252(e).

309 *See* discussion in Section II.C.1. above.

310 This proposed requirement would also apply to any Form 1-A non-publicly submitted to the Commission.

311 *See* Instruction 2 to Signatures in Form 1-A; *cf.* Rule 402(e), 17 CFR 230.402(e).

312 *Id.*

313 *See* Rule 252(f) and Instruction 1 to Signatures of Form 1-A.

issuers file a Form F-X[315] to provide an express consent to service of process in connection with offerings qualified under Form 1-A. This treatment is similar to requirements for Canadian companies making filings under the multijurisdictional disclosure system.[316]

Request for Comment

45. Should we continue to require a Part I (Notification) to be filed as part of the offering statement on Form 1-A? If so, should we require additional (or less) information in Part I than is currently required or proposed? If so, provide justifications for such disclosure.

46. As proposed, what would be the costs and benefits associated with requiring an issuer, as part of the electronic filing process, to enter key information about itself and its securities on a formatted cover sheet to accompany the EDGAR-formatted text file attachment?

47. Some market participants have urged us to simplify the disclosure requirements associated with Regulation A in order to facilitate more cost-effective capital formation by small companies.[317] Most commenters, however, have not made specific suggestions. Are there particular disclosure requirements associated with Regulation A that are most in need of simplification? Are there currently required disclosures that could be modified? Alternatively, are there any disclosure standards, not currently

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314 15 U.S.C. 77f(a).

315 17 CFR 239.42.

316 *See* SEC Rel. No. 33-6902 (June 21, 1991) [56 FR 30036] (adopting the multijurisdictional disclosure system).

required or proposed in Regulation A, that should be included as disclosure requirements in the new Form 1-A? If so, which disclosure could be reduced or eliminated, or should be included?

48. As proposed, should we continue to maintain certain disclosure requirements in the proposed Offering Circular, while updating others to be more in line with the disclosure required of smaller reporting companies? If not, why not? Please provide suggestions as to what disclosure should be preserved in the Offering Circular or updated to accord with the smaller reporting company requirements in the context of registered offerings.

49. Should we provide for scaled narrative disclosure in Form 1-A based on the size of the issuer or size of the offering? Why or why not? If so, on what size-based attributes of an issuer or the offering should we base any such scaled disclosure requirements and what types of scaled disclosure would be applicable to each resulting category?

50. Should we update and provide more specific guidance as to the MD&A section required to be included in the Offering Circular, as proposed? Is there any additional guidance we should provide?

51. As proposed, and consistent with the requirements of smaller reporting companies under Item 303 of Regulation S-K, should we permit Regulation A issuers to provide only two years of information about their results of operations? Why or why not? Are there any other specific provisions from Item 303 of Regulation S-K that would (or would not) be appropriate for the

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[317] Alpine Ventures Letter; Campbell Letter; Lacey Letter; Oggilby Letter.

types of issuers likely to rely on Regulation A? If so, please explain why any such provision should (or should not) apply.

52. Should we continue to require, as proposed, the disclosure of an issuer's plan of operations for the twelve months following qualification of the offering statement? Why or why not? Alternatively, is this disclosure requirement appropriate for the types of issuers likely to rely on Regulation A? If not, why not?

53. Should we consider adding a disclosure requirement in Part II of Form 1-A that would require issuers to disclose the value of the issuer prior to the contemplated Regulation A offering (*i.e.*, pre-money value)? If so, are there any practical limitations on the ability of issuers with complicated capital structures to provide investors with an accurate figure or basis for such a calculation? Should we also consider requiring disclosure of how the price to the public of the securities being offered was determined?

54. Would it be an efficiency to issuers if we were to eliminate the proposed Offering Circular disclosure format, and instead have Form 1-A refer issuers item-by-item to Form S-1 requirements, while preserving—where noted in Form 1-A itself—Model B-specific scaling? Alternatively, should we continue to allow issuers to use Part I of Form S-1 as a separate disclosure option in Part II of Form 1-A? Why or why not?

55. Should we make changes to the exhibit requirements of Part III of Form 1-A in addition to those proposed? For example, should we change the standard

for filing material contracts by specifically excluding certain types of contracts?

56. As proposed, should we permit issuers that are current in their Tier 2 reporting obligations to incorporate by reference certain information in documents filed under Regulation A into Part II of the offering statement, while also requiring issuers to include a hyperlink to such information on EDGAR? Why or why not? If so, should we also permit successor entities to incorporate by reference to the extent their predecessors were eligible? Why or why not? If we permit the incorporation by reference of information already available on EDGAR, should we exclude shell companies or any other types of entities from being able to rely on any such accommodation?[318] Why or why not? Should issuers be permitted to incorporate by reference to Exchange Act reports and documents filed in connection with registered offerings?

57. Should we alter the proposed period of time in which an issuer must have been current in their ongoing reporting in order to be able to incorporate by reference certain information into Part II of Form 1-A that is already available on EDGAR? If so, what period of time should apply to any requirement that an issuer be current in filing its ongoing reports?

58. Instead of the proposed general requirement that issuers must file audited financial statements for Tier 2 offerings, should the rules require audited financial statements at a different threshold (*e.g.*, for all offerings—whether

[318] Shell companies (other than business combination shell companies) are currently unable to incorporate by reference prior Exchange Act reports in Form S-1. *See* General Instruction VII.D. to Form S-1.

under Tier 1 or Tier 2—in excess of the $500,000 requirement for audited financial statements set forth under the Commission's proposed crowdfunding exemption pursuant to Section 4(a)(6) of the Securities Act, or for all Regulation A offerings)? Are there other characteristics of an offering, other than the aggregate offering amount, that should trigger the audited financial statement requirement, such as public float or asset size of the issuer? If so, which other characteristics?

59. For Tier 2 offerings, should the financial statement updating requirement be changed from the proposed requirements in Part F/S of Form 1-A that would permit issuers to file financial statements based on a balance sheet dated within nine months of non-public submission or filing, but must otherwise be dated as of the end of the most recently completed fiscal year, if non-publicly submitted or filed three months after the end of such fiscal year? Or should Part F/S of Form 1-A require updating for Tier 2 offerings on a schedule similar to what would be required in a registered offering by a smaller reporting company? Why or why not?

60. As proposed, should we require issuers to file balance sheets for the two most recently completed fiscal years, instead of the current requirement to file a balance sheet for only the most recently completed fiscal year? Why or why not?

61. As proposed, should we permit Canadian issuers to prepare their financial statements using IFRS as issued by the IASB, rather than U.S. GAAP? If so, as noted above in Section II.B.1.a., to the extent we extend issuer eligibility to

include foreign private issuers, should we permit all foreign private issuers to prepare their financial statements using IFRS as issued by the IASB, rather than U.S. GAAP?

62. As proposed, in Tier 1 offerings should we only refer to Regulation S-X when describing the auditor independence and compliance requirements of Article 2 and the financial statement requirements relating to guarantors and issuers of guaranteed securities, affiliates whose securities collateralize an issuance, or issuers engaged in oil and gas producing activities? Should we clarify the financial statement requirements in other specific situations? Instead of referring to Regulation S-X, should we develop new standards appropriate for Tier 1 offerings?

63. As proposed, should we permit issuers that do not qualify as a smaller reporting company to only provide two years of audited financial statements for Tier 2 offerings? Or should we require such issuers to file three years of financial statements? Why or why not?

64. As proposed, should we require that, when audited financial statements are required to be filed in Part F/S for Tier 2 offerings, those audits be conducted in accordance with PCAOB standards? Alternatively, as with existing Regulation A, should we require the financial statements audit to be performed in accordance with U.S. GAAS or the PCAOB standards? Should we require auditors to be PCAOB-registered? Why or why not?

65. Would there be a cost difference to issuers of requiring audits in Tier 2 offerings to be conducted in accordance PCAOB standards, as proposed, compared to U.S. GAAS? Would there be a benefit to investors?

66. Would there be a cost difference to issuers if, in addition to requiring auditors to conduct the audits in Tier 2 offerings in accordance with PCAOB standards, as proposed, we also required auditors to be PCAOB-registered? Would there be a benefit to investors?

67. Should we require interactive data tagging of financial statements included in Regulation A offering statements? If so, should we require interactive data for all Regulation A offerings, or only Tier 2 offerings? What effect would the cost of compliance with any interactive data tagging requirements have on the issuers likely to rely on Regulation A? If we require interactive data tagging, should we implement a phase-in period for such tagging and detailed footnote and schedule tagging?

68. As noted above in Section II.B.1.b. discussing issuer eligibility, in order to address concerns regarding the use of Regulation A by REITs (and on the potential use by BDCs) absent additional REIT- (or BDC-) specific disclosures, should we require additional disclosure by REITs (and BDCs, if ultimately permitted to rely on the exemption)? Why or why not? If so, please make specific recommendations as to the form and content of any such additional disclosure.

69. As proposed, should we continue to permit issuers to incorporate by reference certain information into Part III (Exhibits) of the offering statement that was

previously filed on EDGAR, while also requiring issuers to be subject to a Tier 2 reporting obligation? Or, as with current Regulation A, should we permit issuers to incorporate by reference in Part III of Form 1-A certain information irrespective of their obligation to file ongoing reports under Tier 2 of Regulation A? Why or why not?

70. As proposed, should we require issuers to retain manually signed copies of the offering statement for a period of five years? Or should we consider an alternative retention period? Alternatively, should we eliminate the requirement altogether in favor of alternative signature methods (*e.g.*, electronic signatures)? Why or why not?

71. As proposed, should we eliminate the requirement that Form 1-A be signed by an authorized representative in the United States when the filer is a Canadian issuer? Should we, as proposed, require Canadian issuers to file a Form F-X to provide an express consent to service of process in connection with offerings qualified under Form 1-A? Why or why not? If so, should Form F-X be required to be filed by Canadian issuers in connection with other filings under Regulation A, including proposed new Form 1-K, Form 1-SA, Form 1-U, or Form 1-Z?[319] Why or why not?

4. Continuous or Delayed Offerings and Offering Circular Supplements

Rule 251(d)(3) currently allows for continuous or delayed offerings under Regulation A if permitted by Rule 415.[320] By reference to the undertakings of

[319] The proposed rules for ongoing reporting, and related forms, are discussed in Section II.E.1. below.

[320] 17 CFR 230.415.

Item 512(a) of Regulation S-K,[321] Rule 415 does not necessarily require every change in the information contained in a prospectus to a registration statement in a continuous offering to be reflected in a post-effective amendment.[322] On the other hand, Regulation A requires every revised or updated offering circular in a continuous offering to be filed as an amendment to the offering statement to which it relates and requalified in a process analogous to the Commission staff review, comment and qualification process for initial offering statements.[323] The requalification process can be costly and time consuming for smaller issuers conducting continuous offerings of securities pursuant to Regulation A.[324] As discussed more fully below, we propose to clarify in the proposed rules for Regulation A the scope of permissible continuous or delayed offerings and the related concept of offering circular supplements.

Rule 415 attempts to promote efficiency and cost savings in the securities markets by allowing for the registration of certain traditional and other shelf offerings.[325] When Rule 415 was adopted, the Commission recognized that certain traditional shelf offerings have been allowed by administrative practice for many years despite the absence of such

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321 17 CFR 230.415(a)(3).

322 *See* 17 CFR 229.512(a)(1) (requiring issuers to file a post-effective amendment for purposes of an update under Section 10(a)(3) of the Securities Act, to reflect any facts or events arising after effectiveness that, individually or in the aggregate, represent a fundamental change in the information set forth in the registration statement, or to include, subject to certain exceptions, any material information with respect to the plan of distribution not previously disclosed (or material changes to information previously disclosed) in the registration statement).

323 *See* Rule 253(e); Rule 252(h)(1).

324 *See* Kaplan Voekler Letter 2.

325 *See* SEC Rel. No. 33-6499 [48 FR 52889] (Nov. 23, 1983) (noting the efficiency and cost savings issuers experienced during the eighteen month trial period for a previous temporary version of the rule).

a rule.[326] Since Rule 415 only addresses registered offerings, however, the precise scope of continuous or delayed offerings under Regulation A has been unclear. We believe that proposed Regulation A should continue to allow for certain traditional shelf offerings to promote flexibility, efficiency, and to reduce unnecessary offerings costs.[327] However, we propose to condition the ability to sell securities in a continuous or delayed offering on being current with ongoing reporting requirements at the time of sale. We believe this additional condition will not impose incremental costs on issuers, which are in any case required to update their offering statement and to file such ongoing reports, and will insure parity of information in secondary markets.

To provide clarity regarding the application of Rule 415 concepts to Regulation A offerings, we propose to add a provision to Regulation A similar to Rule 415, but with limitations we believe would be appropriate in the context of Regulation A. The provision would establish time limits similar to those in Rule 415 and make conforming changes as necessary.[328]

The proposed rule would provide for continuous or delayed offerings for the following types of offerings:

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326 Certain "traditional shelf offerings" have been allowed since at least 1968 by the Commission's guides for the preparation and filing of registration statements, such as Guide 4, and related administrative practice. *See id.*; *see also* SEC Rel. No. 33-4936 [33 FR 18617] (Dec. 9, 1968) (adopting Guide 4 and other Commission guides).

327 *See* SEC Rel. No. 33-6499, at IV.A. ("[T]he procedural flexibility afforded by the Rule enables a registrant to time its offering to avail itself of the most advantageous market conditions . . . registrants are able to obtain lower interest rates on debt and lower dividend rates on preferred stock, thereby benefiting their existing shareholders. The flexibility provided by [Rule 415] also permits variation in the structure and terms of securities on short notice, enabling registrants to match securities with the current demands of the marketplace.").

328 Proposed Rule 251(d)(3).

- securities offered or sold by or on behalf of a person other than the issuer or its subsidiary;
- securities offered and sold pursuant to a dividend or interest reinvestment plan or an employee benefit plan of the issuer;
- securities issued upon the exercise of outstanding options, warrants, or rights;
- securities issued upon conversion of other outstanding securities;
- securities pledged as collateral; or
- securities the offering of which commences within two calendar days after the qualification date, will be made on a continuous basis, may continue for a period in excess of 30 days from the date of initial qualification, and will be offered in an amount that, at the time the offering statement is qualified, is reasonably expected to be offered and sold within two years from the initial qualification date.[329]

The Rule 415 offerings we have not proposed to incorporate into Regulation A are those that would not have been available under existing Regulation A, such as those requiring securities to be registered on Form S-3 or Form F-3 or those conducted by issuers ineligible to use Regulation A,[330] as well as certain offerings that we do not currently believe would be appropriate to include in the Regulation A framework. For example, transactions typically done on Form S-4, such as acquisition shelf business combination transactions, would be excluded under the proposed rules. Further, we

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329 *Id.*

330 Rule 415(a)(1)(xi) discusses investment companies and BDCs.

propose to prohibit all "at the market" offerings under Regulation A.[331] While it is possible that a market in Regulation A securities may develop that is capable of supporting primary and secondary at the market offerings, rather than permit such offerings at the outset, we believe that any Regulation A market that develops on the basis of the proposed rules should be monitored in the short term to determine whether the exemption would be an appropriate method for such offerings going forward. Further, an offering sold at fluctuating market prices may not be appropriate within the context of an exemption that is contingent upon not exceeding a maximum offering size. We do, however, seek comment as to whether the provision should permit primary and/or secondary offerings conducted in reliance on Regulation A to be sold at market prices.

Under the proposed rules, changes in the information contained in the offering statement would no longer necessarily trigger an obligation to amend.[332] Offering circulars for continuous Regulation A offerings would continue to be required to be updated, and the offering statements to which they relate requalified, annually to include updated financial statements, and otherwise as necessary to reflect facts or events arising after qualification which, in the aggregate, represent a fundamental change in the information set forth in the offering statement.[333] In addition to post-qualification amendments to the offering statement that must be qualified, however, we also propose to allow issuers to use offering circular supplements in certain situations.[334] Further, we

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331 *See* proposed Rule 251(d)(3)(ii).

332 *See* proposed Rule 252(h)(1).

333 Proposed Rule 252(h)(2). *See also* discussion in Section II.E.1. below.

334 One commenter suggested that such supplements be permitted. *See* Kaplan Voekler Letter 2.

propose to permit issuers in continuous offerings to qualify additional securities in reliance on Regulation A by a post-qualification amendment.[335]

The proposed rules would build on Regulation A to create a regime similar to what is permissible for registered offerings, and would draw from and adapt the language in Rule 424, Item 512 of Regulation S-K, and Rule 430A[336] to do so. Although filing a post-qualification amendment and a review by the Commission staff remains appropriate in some circumstances, we recognize that additional flexibility could be provided in other circumstances. Under the proposed rules, we borrow from the experience in registered offerings under Rule 415 to permit offering circular supplements for continuous or delayed offerings where the offering statement is not required to be amended by Regulation A and there is no fundamental change in the offering statement's disclosure. We also propose to allow the use of offering circular supplements for final pricing information, where the offering statement is qualified on the basis of a bona fide price range estimate.[337] Additionally, offering circulars would be permitted to omit information with respect to the underwriting syndicate analogous to the provisions for registered offerings under Rule 430A.[338] The volume of securities (the number of equity securities or aggregate principal amount of debt securities) to be offered would not,

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335 *See* note to proposed Rule 253(b).

336 17 CFR 230.430A.

337 *See* proposed Rule 252(h). Relatedly, the Commission noted in the 1992 amendments to Regulation A that pricing information under Rule 430A did not necessarily need to be included in the final offering circular. *See* SEC Rel. No. 33-6949, at fn. 58. As proposed, the bona fide price range estimate could not exceed $2 for offerings where the upper end of the range is $10 or less and 20% if the upper end of the price range is over $10. *See* proposed Rule 253(b)(2).

338 *See* proposed Rule 253(b) (also permitting the omission of underwriting discounts or commissions, discounts or commissions to dealers, amount of proceeds, conversion rates, call prices and other items dependent upon the offering price, delivery dates, and terms of the

however, be allowed to be omitted.[339] As proposed, an offering circular supplement could also be used to indicate a decrease in the volume of, or to change the price range of, the securities offered in reliance on a qualified offering statement under Regulation A, provided that, in the aggregate, such changes represent no more than a 20% change from the maximum aggregate offering price calculable using the information in the qualified offering statement.[340] In such circumstances, offering circular supplements would not be available where the maximum aggregate offering price resulting from any changes in the price of the securities would exceed the offering amount limitation set forth in proposed Rule 251(a) or if the increase in aggregate offering price would result in a Tier 1 offering becoming a Tier 2 offering. Allowing for the use of offering circular supplements in the situations outlined above would not alter the legal determination as to whether such information must be provided to investors, but would align Regulation A with prevailing market and Commission staff practices.[341]

We further propose provisions similar to Rule 424 that would require issuers omitting certain information from an offering statement at the time of qualification, in reliance on proposed Rule 253(b), to file such information as an offering circular supplement no later than two business days following the earlier of the date of determination of such pricing information or the date of first use of the offering circular

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securities dependent upon the offering date, so long as certain conditions are met); *Cf.* Rule 430A, 17 CFR 430A.

339 *See* proposed Rule 253(b)(4).

340 *See* note to proposed Rule 253(b); *Cf.* Instruction to paragraph (a) in Rule 430A(a), 17 CFR 230.430A(a).

341 *Cf.* SEC Rel. No. 33-6714 [52 FR 21252] (June 5, 1987) (noting that the adoption of Rule 430A and the related changes to the procedures set forth in Rule 424 were "intended to simplify and reduce filing obligations without reducing investor protection.").

after qualification.[342] Further, these proposed provisions would require offering circulars that contain substantive changes (other than information omitted in reliance on proposed Rule 253(b)) in information previously provided in the last offering circular to be filed within five business days after the date such offering circular is first used after qualification.[343] Offering circular supplements that are not filed within the required time frames provided by the proposed rules would be required to be filed as soon as practicable after the discovery of the failure to file.[344] We are soliciting comment on the scope of changes that should require a post-qualification amendment instead of an offering circular supplement.

Request for Comment

72. Should Regulation A continue to permit traditional shelf offerings, as proposed? Are there types of transactions not currently covered by Rule 415 that should be included in the rules relating to continuous offerings under Regulation A? If so, provide justification for including those transactions in Regulation A.

73. Should we use the time limits for continuous offerings found in Rule 415 for similar Regulation A offerings or should we lengthen or shorten such requirements? If so, please suggest new time limits and explain why they are preferable to the proposed time limits.

74. As proposed, should we permit continuous offerings that would be offered in an amount that, at the time the offering statement is qualified, the issuer

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342 *See* proposed Rule 253(g).

343 *See* proposed Rule 253(g)(2).

reasonably expects to offer and sell within two years from the initial qualification date? Or should we limit this time period to one year from the initial qualification date?

75. We propose to no longer require issuers to amend an offering statement every time any information contained in the offering statement is changed, as is currently required in Rule 252(h), and instead require amendments to the offering statement to be filed and requalified annually to include updated financial statements, and otherwise as necessary to reflect facts or events arising after qualification which, in the aggregate, represent a fundamental change in the information set forth in the offering statement. Are there other types of changes in information or disclosure that should require a post-qualification amendment that must be qualified, rather than an offering circular supplement? Should we use a standard different from the "fundamental change" standard proposed, which is based on Item 512(a) of Regulation S-K? Please provide justifications for your suggested approach.

76. As proposed, should we permit issuers to qualify additional securities in reliance on Regulation A by filing a post-qualification amendment to a qualified offering statement? Why or why not?

77. As proposed, should we adopt provisions similar to Rule 430A that would permit issuers to omit certain information with respect to, among other things, the underwriting syndicate and related information analogous to the provisions for registered offerings under Rule 430A? Why or why not?

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[344] *See* proposed Rule 253(g)(4).

Additionally, as proposed, should we permit decreases to the volume of, or deviations from the price range of, the securities offered in reliance on Regulation A within the described limits?

78. As proposed, should we include in Regulation A provisions similar to Rule 424, which would require issuers relying on proposed Rule 253(b) to omit certain information from an offering statement at the time of qualification to file such information as an offering circular supplement no later than two business days following the earlier of the date of determination of such pricing information or the date of first use of the offering circular after qualification? Why or why not? Additionally, as proposed, should we require offering circulars that contain substantive changes (other than information omitted in reliance on proposed Rule 253(b)) in information previously provided in the last offering circular to be filed within five business days after the date such offering circular is first used after qualification? Why or why not?

79. Should we consider additional or alternative amendments to the proposed provisions for continuous offerings and offering circular supplements? Why or why not? If so, please explain.

80. As proposed, Regulation A is not specifically designed for business combination transactions. While such transactions, outside the context of acquisition shelf business combination transactions, are not prohibited, would Part II of proposed Form 1-A provide for appropriate disclosure of business combination transactions? Why or why not? If so, what additional narrative

or financial disclosure provisions, if any, should apply to issuers with respect to such transactions?

81. As proposed, should the rules preclude primary and secondary at the market offerings? Or should the rules only preclude primary at the market offerings? Why or why not? If the rules should not prohibit at the market offerings how should the offering size be calculated for purpose of determining whether the offering exceeds the proposed applicable annual offering amount limitations? Please explain.

5. Qualification

Under Regulation A, an offering statement is generally only qualified by order of the Commission in a manner similar to a registration statement being declared effective.[345] In such instances, the issuer includes a delaying notation on the cover of the Form 1-A that states the offering statements shall only be qualified by order of the Commission.[346] In order to remove a delaying notation, an issuer must file an amendment to the offering statement indicating that the offering statement will become qualified on the 20th calendar day after filing.[347] An offering statement that does not include a delaying notation will be qualified without Commission action on the 20th calendar day after filing.[348]

We propose to alter the qualification process of existing Regulation A. As proposed, an offering statement could only be qualified by order of the Commission, and

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345 *See* Rule 252(g)(2).

346 *Id*.

347 *See* Rule 252(g)(3).

348 *See* Rule 252(g)(1).

the process associated with the delaying notation would be eliminated. This not only conforms to the general practice of issuers under both Regulation A and registered offerings, but eliminates the risk that an issuer may exclude a delaying notation either in error or in an effort to become qualified automatically without review and comment by the Commission staff. Given our proposed electronic filing processes,[349] scaled disclosure requirements for Tier 1 and Tier 2 offerings,[350] and the preemption of state securities law registration and qualification requirements for Tier 2 offerings,[351] we believe it is appropriate to ensure that the Commission staff has a chance to review and comment on the offering statement before it becomes effective. We do, however, solicit comment on whether we should retain provisions for the automatic effectiveness of an offering statement in a manner similar to the current rules, in order to provide issuers with some flexibility and control over the timing of the qualification process.

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349 *See* discussion in Section II.C.1. above.

350 *See* discussion in Section II.C.3. above.

351 *See* discussion in Section II.H. below.

Request for Comment

82. Should we amend the qualification process, as proposed, so that an offering statement can only become qualified by order of the Commission? Or should we preserve the existing qualification provisions of Regulation A, which permit offering statements to become qualified without an order of the Commission on the 20th calendar day after filing? Why or why not? What effect, if any, would this have on issuers and their ability to control the timing of the qualification process?

D. Solicitation of Interest ("Testing the Waters")

Under Securities Act Section 3(b)(2)(E), issuers are to be permitted to test the waters for interest in an offering before filing an offering statement on such terms and conditions as the Commission prescribes. Testing the waters is currently permitted under Rule 254 of Regulation A, which requires, among other things, that issuers submit all solicitation material to the Commission no later than the time of first use. Issuers are further required to file all solicitation materials used in reliance on Rule 254 as an exhibit under Part III of Form 1-A, and are prohibited from making sales under Regulation A until 20 calendar days after the last publication or delivery of such materials. Under Rule 254(b)(3), issuers must cease using test the waters solicitation materials after the initial filing of the offering statement.

Testing the waters under Rule 254 of Regulation A is different from testing the waters for a registered offering by an emerging growth company under Section 5(d) of the Securities Act. Under Section 5(d), testing the waters is limited to communications with QIBs and institutional accredited investors. Under current Rule 254, however, there

is no limitation on the type of investors that may be solicited, as the provision is meant to assist smaller issuers in evaluating potential interest in a public offering before incurring costs associated with preparing mandated disclosure documents.[352] New Securities Act Section 3(b)(2)(E) also does not limit the type of investors that may be solicited, but instead specifies that we can prescribe terms and conditions. We do not believe it is appropriate to adopt provisions in proposed Regulation A that are more restrictive than currently exist in Rule 254 and therefore do not propose to alter the permissible target audience of testing the waters materials.

While one commenter suggested that the Commission permit the use of solicitation materials before the filing of an offering statement,[353] another commenter simply suggested that all such solicitation materials be made readily available.[354] Another commenter suggested that, in addition to the existing requirements of Rule 254(b)(2), the Commission limit the use of testing the waters materials before the filing of an offering statement to solicitations conducted by registered broker-dealers or solicitations in firm commitment underwritings.[355]

Testing the waters was first proposed and approved for use in Regulation A in 1992, to address the risk that small companies faced when expending funds to prepare for an offering of securities without knowing whether there would be any interest in the

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352 SEC Rel. No. 33-6924, at 10-11 (discussing the capital needs of smaller companies, and, in comparison to "limited [private] offerings to more sophisticated professional investors," the need to facilitate greater "access to the public market[s] for startup and developing companies, and . . . lower[] the costs for small businesses that undertake to have their securities traded in the public market.").

353 McCarter & English Letter.

354 Beacon Investment Letter.

355 NASAA Letter 2.

offering.[356] We do not believe, however, that the existing provisions of Rule 254 have proven as useful as originally intended. We are concerned that the amount of time that typically elapses between initial filing of the Form 1-A and qualification (which, on average, from 2002 through 2012 was approximately 241 days) may limit the possible benefits of testing the waters in advance of initial filing. In addition, we understand that testing the waters activities may not be permissible under many state securities laws.

To address the potential impact of the review period, we propose to permit issuers to use testing the waters solicitation materials both before and after the offering statement is filed, subject to issuer compliance with the rules on filing and disclaimers.[357] In our view, to do otherwise would unnecessarily limit the intended benefits to issuers of testing the waters. As with existing Regulation A, investor protections with respect to such solicitation materials would remain in place, as these materials remain subject to the antifraud and other civil liability provisions of the federal securities laws.[358] In addition, under the proposal, testing the waters materials used by an issuer or its intermediaries after publicly filing an offering statement would be required to include a current preliminary offering circular or contain a notice informing potential investors where and how the most current preliminary offering circular can be obtained. This requirement

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356 SEC Rel. No. 33-6924, at 12.

357 This timing is similar to the "testing the waters" permitted for emerging growth companies under new Section 5(d) of the Securities Act, added by the JOBS Act, which can also be conducted both before and after filing of a registration statement. Under Section 5(d), no legending or disclaimers are required, but testing the waters is limited to potential investors that are "qualified institutional buyers" or institutional "accredited investors."

358 The Commission's antifraud liability provisions in Section 17 of the Securities Act, 15 U.S.C. 77q, apply to any person who commits fraud in connection with the offer or sale of securities. Section 3(b)(2)(D) of the Securities Act, 15 U.S.C. 77c(b)(2)(D), states that the civil liability provisions of Section 12(a)(2) apply to any person offering or selling securities under Regulation A. *See also* SEC Rel. No. 33-6924, at fn. 48.

could be satisfied by providing the URL where the preliminary offering circular or the offering statement may be obtained on EDGAR.

Since we propose to require issuers to publicly file their offering statements not later than 21 calendar days before qualification, this timing requirement would ensure that, at a minimum, any solicitation made in the 21 calendar days before the earliest date of potential sales of securities would be conducted using the most recent version of preliminary offering circular.[359] While the proposed expansion on use of solicitation materials after filing would potentially result in investors receiving more sales literature in marketed offerings, in such circumstances, potential investors would also be afforded more time with the preliminary offering circular before making an investment decision.[360] Issuers and intermediaries that use testing the waters materials after publicly filing the offering statement would be required to update and redistribute—through any electronic or print media or television or radio broadcast distribution channels previously relied upon by the issuer or its intermediaries to market the offering during this period—such material to the extent that either the material itself or the preliminary offering circular attached thereafter becomes inadequate or inaccurate in any material respect.[361] Additionally, whether or not an issuer or its intermediaries tests the waters, as provided

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359 *See* discussion of non-public submissions of offering statements in Section II.C.2. above, which proposes to require an issuer to file its offering statement with the Commission not later than 21 calendar days before qualification.

360 *Cf.* The Regulation of Securities Offerings, SEC Rel. No. 33-7606A, at 78 (Nov. 17, 1998) [63 FR 67174] (discussing the importance of providing a preliminary prospectus in conjunction with the distribution of sales materials).

361 Issuers would not, however, be required to update and redistribute solicitation materials to the extent that: i) any such changes occur only with respect to the preliminary offering circular, ii) no similar changes are required in the solicitation materials previously relied upon, and iii) such materials included (when originally distributed) a URL where the preliminary offering circular or the offering statement filed on the issuer's EDGAR filing page and that URL continues to link to the most recent version of the preliminary offering circular.

for by proposed Regulation A, such parties would remain obligated in the pre-qualification period to deliver a copy of the preliminary offering circular to prospective purchasers at least 48 hours in advance of sale under proposed Rule 251(d)(2)(i).[362]

We further propose to amend the Rule 254 requirements for submission or filing of solicitation material, so that such material would be submitted or filed as an exhibit when the offering statement is either submitted for non-public review or filed (and updated for substantive changes in such material after the initial non-public submission or filing) but would no longer be required to be submitted at or before the time of first use. This approach is generally consistent with the Commission staff's treatment of solicitation materials used by emerging growth companies under Title I of the JOBS Act, with two exceptions:

- solicitation materials used in Regulation A offerings would be required to be filed;[363] and
- solicitation materials used by Regulation A issuers that file an offering statement with the Commission would be publicly available as a matter of course.[364]

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362 Proposed Rule 251(d)(2)(i) is discussed in Section II.C.1. above.

363 In practice, however, Commission staff reviewing filings by emerging growth companies regularly requests and receives such material as part of the review process to ensure consistency between the information contained in the solicitation materials and the registration statement. *See* 17 CFR 230.418 (Supplemental Information).

364 Where an issuer non-publicly submits an offering statement under Regulation A that is later abandoned before filing, and where that issuer properly submitted the offering statement pursuant to a confidential treatment request pursuant to Commission Rule 83 (17 CFR 200.83), the offering statement and solicitation materials may, under certain circumstances, qualify for an exemption from production pursuant to the FOIA. *See* http://www.sec.gov/foia/conftreat.htm for more information. Such materials, however, will be publicly available on EDGAR if, and when, an offering statement is eventually filed with the Commission.

We believe this approach would be consistent with the 1992 amendments to Regulation A that first allowed issuers to test the waters, and would make the use of solicitation materials more beneficial for issuers and investors, reduce the filing requirements for issuers, and entirely eliminate the filing requirement for issuers that, after testing the waters, decide not to proceed with an offering. Additionally, from an investor protection standpoint, it is important to note that sales under Regulation A may occur only under a qualified offering statement that reflects staff review and comment, including, where appropriate, disclosure addressing potentially incomplete or misleading statements made in test the waters solicitation material. For this reason, in addition to the statutory language of Section 3(b)(2)(E), which indicates that "issuer[s] may solicit interest in the offering," we do not believe it is necessary, as one commenter suggested, to limit the availability of this provision to solicitations carried out by registered broker-dealers or by underwriters in firm commitment underwritings.[365]

Currently, Rule 254(b)(2) requires all soliciting materials to bear a legend or disclaimer indicating: i) that no money or other consideration is being solicited, and if sent, will not be accepted; ii) that no sales will be made or commitments to purchase accepted until a complete offering circular is delivered; iii) that a prospective purchaser's indication of interest is non-binding; and iv) the identity of the issuer's chief executive officer and a brief description of the issuer's business and products.[366] We propose to amend Rule 254(b)(2)(ii) to more closely follow similar provisions in the context of

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365 *See* NASAA Letter 2 (suggests limiting the use of solicitation materials to solicitations made by broker-dealers, or in the context of firm commitment underwritten offerings).

366 17 CFR 230.254(b)(2).

registered offerings.[367] The amended language would recognize that, similar to the framework for registered offerings, sales made pursuant to Regulation A would be contingent upon the qualification of the offering statement, not the delivery of a final offering circular. Additionally, to provide greater flexibility when using solicitation materials, we propose to eliminate the requirement in Rule 254(b)(2)(iv) to identify the issuer's chief executive officer, business, and products.

Further, as noted above, we do not propose to limit testing the waters to QIBs and institutional accredited investors (as is currently the case with testing the waters under Title I of the JOBS Act), as we do not believe it is appropriate to adopt provisions in proposed Regulation A that are more restrictive than currently exist in the regulation.

Request for Comment

83. As proposed, should we differentiate between the requirements for the use of testing the waters materials before the issuer publicly files an offering statement and after filing (when it is proposed that a preliminary offering circular would have to be provided)? Why or why not? Is the proposed time period during which a preliminary offering circular would be required to be provided together with testing the waters materials appropriate, or should it be longer or shorter? Is the 48-hour period for the delivery of a preliminary offering circular under proposed Rule 251(d)(2)(i) sufficient to address any concerns about the use of solicitation materials at or near the time of qualification?[368] Should we distinguish between the use of testing the waters

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367 *See* Rule 134(d), 17 CFR 230.134(d), (required disclaimer for solicitations of interest in registered offerings).

368 *See* discussion of delivery requirements in Section II.C.1. above.

materials after an offering statement is non-publicly submitted versus publicly filed?

84. Should we amend Rule 254, as proposed, so that solicitation material would no longer be required to be submitted to the Commission at or before the time of first use? If not, in the absence of a confidential treatment request under Commission Rule 83 (17 CFR 200.83), should solicitation material be made publicly available immediately after submission on EDGAR? Or, as proposed, should we only require solicitation materials to be publicly available when included as an exhibit to an offering statement that is filed with the Commission not later than 21 calendar days before the offering statement is qualified?

85. Is the legend or disclaimer required to be included in the solicitation materials under proposed Rule 254 appropriately tailored for the likely recipients of such materials in Regulation A offerings? Why or why not? Should solicitation materials used by the issuer and its intermediaries before the initial public filing of the offering statement be required to include specific information about the issuer or the offering similar to current rules? If so, what information should be required?

86. While not currently proposed, should we limit the use of testing the waters materials to communications with QIBs and institutional accredited investors in order to be consistent with the treatment of emerging growth companies under Title I of the JOBS Act? Would QIBs or institutional accredited investors be the likely target audience for issuers testing the waters in reliance

on Regulation A? Why or why not? As proposed, should issuers and intermediaries that use testing the waters materials after publicly filing an offering statement be required to update and redistribute—through any electronic or print media or television or radio broadcast distribution channels previously relied upon by the issuer or its intermediaries to market the offering during this period—such material if either the material itself or the preliminary offering circular attached thereafter becomes inadequate or inaccurate in any material respect?[369] Why or why not? Would this requirement unduly limit the utility, and potentially raise the costs, of testing the waters after publicly filing an offering statement, or would it help to ensure that issuers and intermediaries that solicit interest in a potential offering during this period of time do so in a measured and judicious manner? Please explain.

87. Should we make the submission or filing of solicitation materials a condition to the Regulation A exemption, such that an issuer that fails to submit such materials as part of an offering statement submitted for non-public review, or to file such materials as part of a filed offering statement, loses its ability to rely on the exemption? If so, should we provide for a cure period for inadvertent failures to submit or file solicitation materials as an exhibit to an offering statement?

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[369] *But see* fn. 361 above for an exception to the general requirements for updates and redistribution.

E. Ongoing Reporting

Currently, Regulation A requires issuers to file a Form 2-A with the Commission every six months after qualification to report sales under Regulation A, with a final filing due within 30 calendar days after the termination, completion, or final sale of securities in the offering.[370] Section 3(b)(2) requires issuers to provide annual audited financial information on an ongoing basis, and expressly provides that the Commission may consider whether additional ongoing reporting should be required. Specifically, Section 3(b)(4) grants the Commission authority to require issuers "to make available to investors and file with the Commission periodic disclosures regarding the issuer, its business operations, its financial condition, its corporate governance principles, its use of investor funds, and other appropriate matters, and also provide for the suspension and termination of such requirement."

Most commenters agree that the Commission should require some form of ongoing reporting in revised Regulation A, but differ on the degree and frequency of such reporting.[371] In general, the comments received acknowledge that the Commission's task in determining the appropriate level of ongoing reporting requires balancing the risks of

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370 *See* 17 CFR 230.257; *see also* 17 CFR 239.91 (Form 2-A).

371 *See, e.g.*, Letter from Mike Liles, Jr., Attorney, Karr Tuttle Campbell, April 12, 2012 ("Karr Tuttle Letter"); Letter from Kurt N. Schacht, CFA, Managing Director, Standards and Financial Market Integrity, and Linda L. Rittenhouse, Director, Capital Markets Policy, CFA Institute, Aug. 16, 2012 ("CFA Institute Letter"); Fallbrook Letter. *But see* Letter from Robert R. Kaplan, Jr., Esq., Kaplan Voekler, May 10, 2012 ("Kaplan Voekler Letter 1") (suggesting that, in light of the relative costs to issuers in smaller dollar amount offerings, the Commission not require ongoing reports for Regulation A offerings of up to $5 million in securities annually); NSBA Letter (suggesting the only change the Commission should make in Regulation A is raising the dollar limitations from $5 million to $50 million); *see also* ECTF Report (suggesting ongoing periodic reporting that is reasonable in scope and balances investor protection concerns with regulatory and compliance costs).

imposing issuer disclosure requirements that are too prescriptive[372] or onerous[373] with the risks of providing too little information to either support,[374] or adequately protect investors in,[375] the secondary market. Some commenters suggested that the Commission require ongoing reporting only to the extent necessary to support an active secondary market, such as by requiring quarterly and material event reporting,[376] or semiannual performance updates.[377] Alternatively, one commenter suggested that the Commission only require annual filings under a two-year pilot program to determine whether such reports, without more, provide sufficient information to the market.[378] One commenter suggested that ongoing reporting requirements under Regulation A should be similar to, but less onerous than, Exchange Act reporting.[379] This commenter suggested that the rules require periodic reports that follow the disclosure requirements applicable to smaller reporting companies, or those of Exchange Act Rule 15c2-11. In its view, though, current reporting in a fashion similar to Form 8-K under the Exchange Act might be too burdensome for smaller issuers, while the OTC Markets' proprietary Alternative Reporting System might be more appropriate. The commenter also suggested that, if required, current reporting should be limited to material agreements, financial obligations, unregistered sales of securities, changes in accountants, changes in and the

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372 ABA Letter.

373 McCarter & English Letter.

374 Kaplan Voekler Letter 1.

375 NASAA Letter 1; NASAA Letter 2.

376 Kaplan Voekler Letter 1.

377 CFA Institute Letter.

378 Fallbrook Letter.

379 McCarter & English Letter.

compensation of directors and officers, and charter amendments. Another commenter suggested periodic reporting that is less prescriptive than Exchange Act reporting, and using Form 1-A disclosure requirements as a base.[380] Several commenters suggested that—to the extent the Commission permits Regulation A offerings to be simultaneously listed, or approved for listing, on a national securities exchange—it should permit Exchange Act reporting to satisfy Title IV's ongoing reporting requirements.[381] Another commenter suggested that any ongoing reporting requirements eventually adopted should be meaningful enough to provide investors with current information about issuers and to permit better informed investment decisions.[382]

The sole advance comment received on how and when to permit terminating ongoing reports suggested that the Commission permit automatic termination (or suspension) of ongoing reporting obligations in a fashion similar to that permitted under Section 15(d) of the Exchange Act.[383] That is, the Commission should allow ongoing reporting to be suspended as to any fiscal year, other than the fiscal year in which the offering was qualified, if at the beginning of such fiscal year the securities of the class sold in the offering are held of record by fewer than 300 persons.

We are mindful that an ongoing reporting regime that is suitable for one type of entity and its investor base may prove too onerous for another entity or provide its investors with more or more frequent information than they necessarily need or seek, resulting in undue costs to the issuer. In the discussion and proposals that follow, we

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380 ABA Letter.

381 ABA Letter; WR Hambrecht + Co. Letter.

382 NASAA Letter 1; NASAA Letter 2.

383 ABA Letter.

have endeavored to address the potential added costs and benefits associated with the provision of ongoing information about issuers of Regulation A securities to investors in such securities and any market that develops as a result.

1. Continuing Disclosure Obligations

As noted above, Regulation A currently requires issuers to file a Form 2-A with the Commission to report sales and the termination of sales made under Regulation A every six months after qualification and within 30 calendar days after the termination, completion, or final sale of securities in the offering.[384] The summary information about the issuer and its offering required to be disclosed in the Form 2-A is intended to provide the Commission with valuable data about Regulation A offerings and the effectiveness of Regulation A as a capital formation tool for smaller issuers. Currently, however, issuers of securities under Regulation A often neglect to file the form, thereby limiting the amount and utility of the data received.[385] We propose to rescind Form 2-A, but to continue to require Regulation A issuers to file the information generally disclosed in Form 2-A with the Commission electronically on EDGAR.[386] We believe that summary information and data about an issuer and its Regulation A offering, however, is most

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384 *See* 17 CFR 230.257; *see also* 17 CFR 239.91 (Form 2-A).

385 Currently, the filing of the Form 2-A is not a condition to an issuer's ability to rely on Regulation A. *See* Rule 257, 17 CFR 230.257. As proposed, the filing of the information required under current Form 2-A would not be a condition to an issuer's ability to rely on Regulation A for the current offering, but would affect the issuer's ability to conduct a follow-on Regulation A offering in the future. *See* the discussion in Section II.B.1. above regarding proposed issuer eligibility requirements.

386 We do not propose to continue to require issuers to disclose the use of proceeds currently disclosed in Form 2-A, as issuers must disclose this information in Part II of Form 1-A and any changes in the use of proceeds after qualification not previously disclosed would require issuers to determine whether a post-qualification amendment or offering circular supplement is necessary. *See* discussion of continuous or delayed offerings and offering circular supplements in Section II.C.4. above.

valuable when obtained after the offering is completed or terminated. We therefore propose to require issuers to disclose such information only after the termination or completion of the offering. Issuers conducting Tier 1 offerings would be required to provide this information on Part I of proposed new Form 1-Z not later 30 calendar days after termination or completion of the offering,[387] while issuers conducting Tier 2 offerings would be required to provide this information on either Part I of Form 1-Z at the time of filing an exit report or proposed new Form 1-K as part of their annual report.

As proposed, issuers in Tier 2 offerings would be subject to a Regulation A ongoing reporting regime that would, in addition to filing summary information on a recently completed offering and annual reports on proposed new Form 1-K, require issuers to file semiannual updates on proposed new Form 1-SA, current event reporting on proposed new Form 1-U, and to provide notice to the Commission of the suspension of their ongoing reporting obligations on Part II of proposed new Form 1-Z. All of these reports would be filed electronically on EDGAR.

We are concerned that uniform ongoing reporting requirements for all issuers of Regulation A securities could disproportionately affect issuers in smaller offerings.[388] For that reason, we do not propose to require any ongoing reporting for issuers conducting Tier 1 offerings, other than the summary information discussed above, which is already required under the existing rules.[389] Section 3(b)(2)(F) requires issuers to file audited financial statements with the Commission annually, which does not apply to

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387 Proposed new Form 1-Z (exit report) is discussed in Section II.E.4. below.

388 *See also* Kaplan Voekler Letter 1 (recommending that, in light of the relative costs to issuers in smaller dollar amount offerings, the Commission not require ongoing reports for Regulation A offerings of up to $5 million in securities annually).

current Regulation A.[390] While Section 3(b)(2) directs the Commission to "add a class of securities exempted pursuant to this section," it does not also direct the Commission to supplant the provisions associated with the existing class of securities exempted under Section 3(b)(1) and Regulation A. We therefore propose to preserve this aspect of current Regulation A for Tier 1 offerings. As proposed, however, issuers in smaller offerings would have the option to conduct a Tier 2 offering and subject themselves to the more expansive ongoing reporting regime and otherwise comply with the proposed Tier 2 requirements.[391]

We believe the proposed approach to ongoing reporting should support a regular flow of information about issuers conducting Tier 2 offerings, which would benefit investors and foster the development of a market in such securities, without imposing unnecessary costs on issuers that elect to conduct a Tier 1 offering. We believe our proposal strikes an appropriate balance between the investor protections associated with the provision of ongoing information about an existing or contemplated investment to potential investors and our goal of facilitating capital formation for smaller companies by not requiring too heavy a reporting obligation.

The following are the proposed ongoing reporting requirements for Tier 2 offerings:

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389 *See* proposed Rule 257(a).

390 As noted in Section I.A. above, current Regulation A was issued under Section 3(b)(1) of the Securities Act.

391 An issuer offering up to $5 million in a Tier 2 offering would, in addition to providing ongoing reports to the Commission on the proposed annual and semiannual basis, with interim current event updates, be required to file audited financial statements in the offering statement, *see* Section II.C.3.b(2). above, and may be required to file a Form 1-Z to terminate its ongoing reporting obligations as described in Section II.E.4. below.

a. Annual Reports on Form 1-K

Proposed new Form 1-K would be comprised of two parts: Part I (Notification) and Part II (Information to be included in the report).

(1) Part I (Notification)

As with Part I of Form 1-A,[392] Part I of Form 1-K would be an online XML-based fillable form that would include certain basic information about the issuer, prepopulated on the basis of information previously disclosed in Part I of Form 1-A, which can be updated by the issuer at the time of filing. Additionally, if, at the time of filing the Form 1-K, an issuer has terminated or completed a qualified Regulation A offering, we propose to require the issuer to provide certain updated summary information about itself and the offering in Part I, including, *e.g.*, the date the offering was qualified and commenced, the number of securities qualified, the number of securities sold in the offering, the price of the securities, any fees associated with the offering, and the net proceeds to the issuer. As discussed above, this information is generally already required to be disclosed under current Regulation A on Form 2-A, which we propose to eliminate.

The portion of the fillable form relating to a completed Regulation A offering would appear when the issuer indicates in Part I that the offering has terminated or been completed. Issuers would only be required to fill out the XML-based portion of Part I that relates to the summary information on a terminated or completed offering once. Alternatively, an issuer that elects to terminate its ongoing reporting obligation under Regulation A after terminating or completing an offering, in a fiscal year other than the fiscal year in which the offering statement was qualified, but before reporting the

[392] *See* discussion in Section II.C.3.a. above.

required summary information on Form 1-K,[393] could satisfy its obligation to file the summary offering information in Part I of Form 1-K by filing a Form 1-Z (exit report) that includes such information.[394]

The summary information disclosed would facilitate analysis of Regulation A offerings by the Commission, other regulators, third-party data providers, and market participants, while facilitating the capture of important summary information about an offering that would enable the Commission to monitor the use and effectiveness of Regulation A as a capital formation tool.[395] The fillable form would enable issuers to provide the required information in a convenient medium and only capture relevant data about the recently terminated or completed Regulation A offering. The required disclosure would be publicly available on EDGAR. As with proposed requirements for Part I of Form 1-A, Part I of Form 1-K would not require the issuer to obtain specialty software.

(2) Part II (Information to be included in the report)

As with Part II of Form 1-A, Part II of Form 1-K would be submitted electronically by the issuer as a text file attachment containing the body of the disclosure document and financial statements, formatted in HTML or ASCII to be compatible with the EDGAR filing system. Part II would contain information about the issuer and its

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393 An issuer that has completed a Regulation A offering under Tier 2 in a fiscal year other than the fiscal year in which the offering was qualified could, however, continue filing the ongoing reports required in Tier 2 offerings in order to, for example, continually provide updated information to its shareholder or to broker-dealers for purposes of proposed Exchange Act Rule 15c2-11. *See* discussion in Section II.E.2. below.

394 For a discussion of the requirements for terminating an ongoing reporting obligation under Regulation A and proposed new Form 1-Z, *see* Section II.E.4. below.

395 *See also* discussion in Section II.E.4.a. below.

business based on the financial statement and narrative disclosure requirements of Form 1-A. Form 1-K would further permit issuers to incorporate by reference certain information previously filed on EDGAR, but require issuers to include a hyperlink to such material on EDGAR.[396] Form 1-K would cover:

- Business operations of the issuer for the prior three fiscal years (or, if in existence for less than three years, since inception);
- Transactions with related persons, promoters, and certain control persons;
- Beneficial ownership of voting securities by executive officers, directors, and 10% owners;
- Identities of directors, executive officers, and significant employees, with a description of their business experience and involvement in certain legal proceedings;
- Executive compensation data for the most recent fiscal year for the three highest paid officers or directors;
- MD&A of the issuer's liquidity, capital resources, and results of operations covering the two most recently completed fiscal years;[397] and
- Two years of audited financial statements.

We anticipate that issuers would generally be able to use the offering materials as a basis to prepare their ongoing disclosure.

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396 The hyperlink to EDGAR need only be active at the time of filing of the Form 1-K.

397 As proposed, Form 1-K would not include the additional MD&A disclosure required in Form 1-A for issuers that have not received revenue from operations during each of the three fiscal years immediately before the filing of the offering statement. *See* discussion in Section II.C.3.b(1). above.

We propose that Form 1-K includes financial statements prepared on the same basis, and subject to the same requirements as to audit standards and auditor independence, as the financial statements required in the Regulation A offering circular for Tier 2 offerings.[398] Form 1-K would be required to be filed within 120 calendar days after the issuer's fiscal year end. A manually-signed copy of the Form 1-K would have to be executed by the issuer and related signatories before or at the time of filing and retained by the issuer for a period of five years.[399] Issuers would be required to produce the manually signed copy to the Commission, upon request.[400] Any amendments to the form would have to comply with the requirements of the applicable items and be filed under cover of Form 1-K/A.[401]

b. Semiannual Reports on Form 1-SA

We are proposing semiannual interim reporting for Regulation A issuers. We believe this would strike an appropriate balance between the need to provide information to the market and the cost of compliance for smaller issuers. Issuers would be required to provide semiannual updates on proposed Form 1-SA that, much like Form 10-Q, would consist primarily of financial statements and MD&A.[402] Unlike Form 10-Q, however, Form 1-SA would not, among other things, require disclosure about quantitative and qualitative market risk, controls and procedures, updates to risk factors, or defaults on senior securities, as we believe such disclosure is not applicable to, or

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398 *See* Section II.C.3.b(2). above.

399 *See* General Instruction C. to proposed Form 1-K.

400 *Id*.

401 *See* proposed Rule 257(c) (also requiring the signature on behalf of an authorized representative of the issuer and the inclusion of any specified certifications).

402 *See* Part I (Financial Information) of Form 10-Q, 17 CFR 249.308a.

appropriately-tailored for, issuers in the context of an ongoing report under Regulation A.[403] In addition, Form 1-SA would require disclosure of updates otherwise reportable on Form 1-U. Financial statements included in semiannual reports would not be required to be audited or reviewed by independent auditors. Form 1-SA would permit issuers to incorporate by reference certain information previously filed on EDGAR, but require issuers to include a hyperlink to such material on EDGAR.[404]

We propose to require that Form 1-SA be filed within 90 calendar days after the end of the issuer's second fiscal quarter. A manually-signed copy of the Form 1-SA would have to be executed by the issuer and related signatories before or at the time of filing and retained by the issuer for a period of five years.[405] Issuers would be required to produce the manually signed copy to the Commission, upon request.[406] Any amendments to the form would have to comply with the requirements of the applicable items and be filed under cover of Form 1-SA/A.[407]

c. Current Reports on Form 1-U

In addition to the annual report on Form 1-K and semiannual report on Form 1-SA, we further propose to require issuers to submit current reports on Form 1-U. Issuers would be required to submit such reports in the following events:

- Fundamental changes in the nature of business;[408]

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403 *See* Item 3 and Item 4 of Part I of Form 10-Q.

404 The hyperlink to EDGAR need only be active at the time of filing of the Form 1-SA.

405 *See* General Instruction C. to proposed Form 1-SA.

406 *Id*.

407 *See* proposed Rule 257(c).

408 A fundamental change in the nature of an issuer's business would include major and substantial changes in the issuer's business or plan of operations or changes reasonably expected to result in such changes, such as significant acquisitions or dispositions, or the entry into, or termination of, a

- Bankruptcy or receivership;
- Material modification to the rights of securityholders;
- Changes in the issuer's certifying accountant;
- Non-reliance on previous financial statements or a related audit report or completed interim review;
- Changes in control of the issuer;
- Departure of the principal executive officer, principal financial officer, or principal accounting officer; and
- Unregistered sales of 5% or more of outstanding equity securities.

As proposed, the requirement that issuers file a Form 1-U in the event they experience, or would reasonably expect to experience, a fundamental change in the nature of their business would incorporate aspects of each of Item 1.01, 1.02 and 2.01 of Form 8-K under the Exchange Act and change the threshold for reporting from a materiality to a fundamental change standard.[409] Under the proposal, Form 1-U would be required to be filed within four business days after the occurrence of any such event, and, where applicable, permit issuers to incorporate by reference certain information previously filed on EDGAR, but require issuers to include a hyperlink to such material on EDGAR.[410] A manually-signed copy of the Form 1-U would have to be executed by the issuer and related signatories before or at the time of filing and retained by the issuer for a period of

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material definitive agreement that has or will result in major and substantial changes to the nature of an issuer's business or plan of operations.

409 *See* Form 8-K, Item 1.01 (Entry into a Material Definitive Agreement), Item 1.02 (Termination of a Material Definitive Agreement), and Item 2.01 (Completion of Acquisition or Disposition of Assets), 17 CFR 249.308.

410 The hyperlink to EDGAR need only be active at the time of filing of the Form 1-U.

five years.[411] Issuers would be required to produce the manually signed copy to the Commission, upon request.[412] Any amendments to the Form 1-U would have to comply with the requirements of the applicable items, and be filed under cover of Form 1-U/A.[413]

d. Special Financial Reports on Form 1-K and Form 1-SA

While not currently a requirement of Regulation A, we propose to require issuers conducting Tier 2 offerings to provide special financial reports analogous to those required under Exchange Act Rule 15d-2.[414] The special financial report would require audited financial statements for the issuer's last completed fiscal year to be filed not later than 120 calendar days after qualification of the offering statement if the offering statement did not include such financial statements. The special financial report would require semiannual financial statements for the first six months of the issuer's fiscal year, which may be unaudited, to be filed 90 calendar days after qualification of the offering statement if the offering statement did not include such financial statements and the offering statement was qualified in the second half of the issuer's current fiscal year. The special financial report would be filed under cover of Form 1-K if it included audited year-end financial statements and under cover of Form 1-SA if it included semiannual financial statements for the first six months of the issuer's fiscal year. The financial statement and auditing requirements would follow the requirements of those forms. Similarly to the special financial report under Exchange Act Rule 15d-2, the issuer would indicate on the front page of the applicable form that only financial statements are

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411 *See* General Instruction C to proposed Form 1-U.

412 *Id*.

413 *See* proposed Rule 257(c).

414 17 CFR 240.15d-2.

included. This report would serve to close lengthy gaps in financial reporting between the financial statements included in Form 1-A and the issuer's first periodic report due after qualification of the offering statement.

e. Reporting by Successor Issuers

Where in connection with a succession by merger, consolidation, exchange of securities, acquisition of assets or otherwise, securities of an issuer that is not subject to the reporting requirements of Regulation A, as proposed to be amended, are issued to the holders of any class of securities of an issuer that is subject to ongoing reporting under Tier 2, we propose to require the issuer succeeding to that class of securities to continue filing reports required for Tier 2 offerings on the same basis as would have been required of the original issuer. The successor issuer may, however, suspend or terminate its reporting obligations on the same basis as the original issuer under proposed Rule 257(d).[415]

Request for Comment

88. Would the proposed requirement that issuers conducting Tier 2 offerings file annual, semiannual, and current reports provide a meaningful benefit for investors by helping to foster a transparent market for securities issued under Regulation A? Should this requirement apply to all issuers of securities under Regulation A, regardless of whether the issuer is conducting a Tier 1 or Tier 2 offering? Alternatively, should we not impose ongoing reporting requirements beyond the statutory mandate of annual audited financial

[415] *See* Section II.E.4. below for a discussion of the suspension or termination of disclosure obligations.

statements? Or should we require only annual reporting of the type of information required by proposed Form 1-K, without interim periodic reporting or current updates? Should we require only annual reporting and current updates? If we require interim periodic reporting, should it be quarterly instead of the proposed semiannual reporting requirement? Should quarterly or semiannual financial statements be required to be reviewed by an independent auditor?

89. While not currently proposed, should we exempt issuers conducting Tier 1 offerings from the requirement to report certain summary information about the issuer and the offering after termination or completion of the offering? Alternatively, should issuers conducting Tier 1 offerings be required to report on a more frequent basis than currently proposed? Why or why not?

90. If we exempt some issuers from ongoing reporting, should we do so on the basis of criteria other than offering size, such as issuer size or whether the issuer has taken steps to foster a secondary market for their securities? Why or why not?

91. Should the rules require issuers that conduct a Tier 2 offering to file their annual report on new Form 1-K within 120 calendar days of the fiscal year end, and their semiannual report on new Form 1-SA with 90 calendar days of the end of the second fiscal quarter, as proposed? Or should we require such issuers to file reports on a different timetable? For example, should the timetable be the same as for non-accelerated filers under the Exchange Act, who are required to file annual reports within 90 calendar days of the fiscal

year end and interim periodic reports within 45 calendar days of the end of a fiscal quarter? What effect, if any, would altering the proposed filing deadlines for annual and semiannual reporting have on the costs to issuers of preparing such reports? Please provide supporting data, if possible.

92. As proposed, does the new Form 1-K provide for the disclosure of adequate information about the issuer on an annual basis? Similarly, does the new Form 1-SA provide for the disclosure of adequate information about the issuer on a semiannual basis? Or should the form(s) require more (or less) disclosure? If so, what additional disclosure should the form(s) require, or what items of proposed disclosure should not be required? Please explain.

93. Should we require current updates, as proposed on new Form 1-U? If not, please explain why. If we require current reporting, should we include more, fewer, or different triggering events for current reporting than are currently proposed? Should the requirement to provide current reporting apply to all Regulation A issuers? Is there an appropriate segment of Regulation A issuers, other than as proposed, for which current reporting would be the most useful or should otherwise be required?

94. Does the proposed requirement that issuers disclose material transactions that would result in, or would reasonably be expected to result in, fundamental changes to the issuer's business or corporate events on new Form 1-U provide enough guidance to issuers? If not, should we provide more guidance as to what constitutes a material transaction or corporate event? If so, please provide suggestions.

95. As proposed, should we permit issuers to incorporate by reference certain information into the Form 1-K, Form 1-SA and Form 1-U that was previously filed on EDGAR under Regulation A, while also requiring issuers to include a hyperlink to such exhibit on EDGAR? Why or why not? Should we permit issuers to incorporate by reference information from other documents, such as Exchange Act reports or Securities Act registration statements?

96. As proposed, should we require special financial reporting similar to that which is required for a registered offering under Exchange Act Rule 15d-2? As proposed, should the rules require audited financial statements for the issuer's last completed fiscal year to be filed 120 calendar days after qualification of the offering statement if the offering statement did not include such financial statements or, alternatively, require semiannual financial statements for the first six months of the issuer's fiscal year to be filed 90 calendar days after qualification of the offering statement if the offering statement did not include such financial statements and the issuer's first required periodic report would be a Form 1-SA? Why or why not?

97. As proposed, should issuers that succeed to a class of securities, in connection with a succession by merger, consolidation, exchange of securities, acquisition of assets or otherwise, that are currently subject to a Tier 2 ongoing reporting obligation, as proposed to be amended, be required to continue filing reports on the same basis as would have been required of the original issuer? Why or why not? Please explain.

98. Would the proposed ongoing reporting requirements and termination provisions of Regulation A induce companies to migrate to the Regulation A capital raising and reporting regime, such that we may see a decline in smaller reporting companies subject to full Exchange Act reporting?[416] If so, what effect would any population shift of issuers in the registered and reporting regime under the Securities Act and Exchange Act migrating to the Regulation A exemptive scheme have on investor protection?

2. Exchange Act Rule 15c2-11 and other implications of ongoing reporting under Regulation A

Exchange Act Rule 15c2-11 governs broker-dealers' publication of quotations for securities in a quotation medium other than a national securities exchange.[417] The Commission adopted Rule 15c2-11 in 1971 to prevent fraudulent and manipulative trading schemes that had arisen in connection with the distribution and trading of certain unregistered securities.[418] The rule prohibits broker-dealers from publishing quotations (or submitting quotations for publication) in a "quotation medium" for covered over-the-counter securities without first reviewing basic information about the issuer, subject to certain exceptions.[419] A broker-dealer also must have a reasonable basis for believing that the issuer information is accurate in all material respects and that it was

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416 *See* discussion of proposed termination of ongoing reporting requirements under Regulation A in Section II.E.4. below.

417 17 CFR 240.15c2-11.

418 SEC Rel. No. 34-9310 (Sept. 13, 1971) [36 FR 18641]. *See* 17 CFR 240.15c2-11(e)(1) (defining quotation medium as any "interdealer quotation system" or any publication or electronic communications network or other device which is used by brokers or dealers to make known to others their interest in transactions in any security, including offers to buy or sell at a stated price or otherwise, or invitations of offers to buy or sell).

419 *See* SEC Rel. No. 34-29094 (April 17, 1991) [56 FR 19148].

obtained from a reliable source.

A broker-dealer can, however, satisfy its obligations under Rule 15c2-11 if it has reviewed and maintained in its records certain specified information. The particular information that is required by the rule varies depending on the nature of the issuer, including, among other things:

- for an issuer that has filed a registration statement under the Securities Act, a copy of the prospectus;
- for an issuer that has filed an offering statement under the Securities Act pursuant to Regulation A, a copy of the offering circular; or
- for an issuer subject to ongoing reporting under Sections 13 or 15(d) of the Exchange Act, the issuer's most recent annual report and any quarterly or current reports filed thereafter.[420]

We believe that the proposed ongoing reports for Tier 2 offerings under Regulation A, which would update the narrative and financial statement disclosures previously provided in Form 1-A on an annual and semi-annual basis, with additional provisions for current reporting, should also satisfy a broker-dealer's obligations under Rule 15c2-11 to review and maintain records of basic information about an issuer and its securities. We propose to amend Rule 15c2-11 to permit an issuer's ongoing reports filed in a Tier 2 offering under Regulation A to satisfy a broker-dealer's obligations to review specified information about an issuer and its security before publishing a quotation for a

[420] A broker-dealer can also satisfy its review requirements under Rule 15c2-11 by reviewing certain information published pursuant to a Rule 12g3-2(b) exemption for foreign issuers that claim the registration exemption or information specified in paragraph (a)(5) of the Rule for non-reporting issuers.

security (or submitting a quotation for publication) in a quotation medium.[421] The single comment we have received to date on the interaction of Rule 15c2-11 and Regulation A also advocated this approach.[422]

We are also soliciting comment on other potential effects that Tier 2 ongoing reporting under Regulation A could have under other provisions of the federal securities laws. For example, it may be appropriate for timely ongoing Regulation A reporting under Tier 2 to constitute "adequate current public information" for purposes of paragraph (c) of Rule 144.[423] Currently, most non-reporting issuers can satisfy the Rule 144 current public information requirement if there is publicly available the information specified in paragraphs (a)(5)(i) to (a)(5)(xiv) and (a)(5)(xvi) of Rule 15c2-11.[424] This information consists of:

- The exact name of the issuer and any predecessor;
- The address of its principal executive offices;
- The state of incorporation, if it is a corporation;
- The exact title and class of the security;
- The par or stated value of the security;
- The number of shares or total amount of the securities outstanding as of the end of the issuer's most recent fiscal year;

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421 In addition, we are proposing a technical amendment to Rule 15c2-11 to amend subsection (d)(2)(i) of the rule to update the outdated reference to the "Schedule H of the By-Laws of the National Association of Securities Dealers, Inc." which is now known as the "Financial Industry Regulatory Authority, Inc." and to reflect the correct rule reference.

422 McCarter & English Letter.

423 17 CFR 230.144(c).

424 17 CFR 230.144(c)(2). Issuers that are insurance companies are subject to different requirements.

- The name and address of the transfer agent;
- The nature of the issuer's business;
- The nature of products or services offered;
- The nature and extent of the issuer's facilities;
- The name of the chief executive officer and members of the board of directors;
- The issuer’s most recent balance sheet and profit and loss and retained earnings statements;
- Similar financial information for such part of the two preceding fiscal years as the issuer or its predecessor has been in existence;
- Whether the broker or dealer initiating or resuming quotation or any associated person is affiliated, directly or indirectly with the issuer; and
- Whether the quotation is being submitted or published directly or indirectly on behalf of the issuer, or any director, officer or any person, directly or indirectly the beneficial owner of more than 10 percent of the outstanding units or shares of any equity security of the issuer, and, if so, the name of such person, and the basis for any exemption under the federal securities laws for any sales of such securities on behalf of such person.[425]

With the exception of the last two items, all of this information would be included in our proposed ongoing Regulation A reporting for Tier 2 offerings.

We are also soliciting comment on whether ongoing Regulation A reporting for Tier 2 offerings should satisfy the information requirements of paragraph (d)(4) of Rule

144A.[426] Under that provision, holders of Rule 144A securities must have the right to obtain from the issuer, upon request, a very brief statement of the nature of the issuer's business and the products and services it offers, the issuer's most recent balance sheet and profit and loss and retained earnings statements, and similar financial statements for each of the two preceding fiscal years, which information must be "reasonably current."[427]

Request for Comment

99. In a Tier 2 offering, should the review of an issuer's most recent annual report and any semiannual or current reports filed under Regulation A, as contemplated in this proposal, satisfy a broker-dealer's obligation to review company information in order to quote a security in the over-the-counter market pursuant to Exchange Act Rule 15c2-11? Why or why not? Should the annual or other forms require additional information in order for a broker-dealer to be able to rely on such information for purposes of quotations under Rule 15c2-11?

100. Should ongoing Regulation A reports in Tier 2 offerings be deemed to provide "adequate current public information" about the issuer for purposes of paragraph (c) of Rule 144? Why or why not? What impact would broadening Rule 144 in this way have on affiliate resales of securities of Regulation A issuers? What impact would broadening Rule 144 in this way have on investors?

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425 17 CFR 240.15c2-11(a)(5).

426 17 CFR 230.144A(d)(4).

101. Should ongoing Regulation A reports in Tier 2 offerings satisfy the informational requirements of paragraph (d)(4) of Rule 144A? Why or why not? Are investors or Regulation A issuers likely to benefit?

3. Exchange Act Registration of Regulation A Securities

Under Section 15(d) of the Exchange Act, an issuer that has had a Securities Act registration statement declared effective must comply with the periodic reporting requirements of the Exchange Act.[428] Qualification of a Regulation A offering statement does not have the same effect. An issuer of Regulation A securities would not take on Exchange Act reporting obligations unless it separately registered a class of securities under Section 12 of the Exchange Act, or conducted a registered public offering.

An issuer registering a class of securities under Section 12 of the Exchange Act must file either a Form 10[429] or Form 8-A[430] with the Commission. Form 10 is the general form an issuer must use for Exchange Act registration, while Form 8-A is a short-form registration statement. An issuer must use a Form 10 if, at the time it files its registration statement, it is not already subject to a Section 13 or Section 15(d) reporting obligation. An issuer may use Form 8-A if it is already subject to the provisions of either Section 13 or Section 15(d). Additionally, when an issuer that is not already subject to the provisions of either Section 13 or 15(d) plans to list its securities on a national

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427 *Id.*

428 While issuers with a Section 15(d) reporting obligation are required to file the same periodic reports as issuers that have registered a class of securities under Section 12, Section 15(d) reporting issuers are not subject to additional Exchange Act obligations (*e.g.*, proxy rules, short-swing profit rules, and beneficial ownership reporting) that apply to Exchange Act registrants.

429 17 CFR 249.210. Foreign private issuers must file a Form 20-F, 17 CFR 249.220f, or, where available, a Form 8-A.

430 17 CFR 249.208a.

securities exchange contemporaneously with the effectiveness of a Securities Act registration statement, the Commission staff will not object if that issuer files a Form 8-A in lieu of a Form 10, in order for the issuer to avoid having to restate the contents of its Securities Act registration statement in its Exchange Act registration statement.[431]

Issuers conducting offerings under Regulation A that seek to list the securities on a national securities exchange or otherwise enter the Exchange Act registration system would be required to file Form 10 in order to do so. We solicit comment, however, on whether we should provide a simplified means for Regulation A issuers to register a class of securities under the Exchange Act by, for example, permitting such issuers to file a Form 8-A rather than a Form 10 in conjunction with, or following, the qualification of a Regulation A offering statement on Form 1-A, as some commenters have suggested.[432] The 2010 Government-Business Forum on Small Business Capital Raising made a similar recommendation.[433] Proponents of this approach argue that it would facilitate IPOs and encourage Exchange Act registration and the listing of securities on national securities exchanges, which would provide benefits to both issuers and investors.[434]

We also invite comment on ways to facilitate secondary market trading in the securities of Regulation A issuers, such as by encouraging the development of "venture

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431 *See* SEC Rel. No. 34-38850 (Sept. 2, 1997) [62 FR 39755], at 39757 ("[A]n issuer registering an initial public offering will be permitted to use Form 8-A even though it will not be subject to reporting until after the effectiveness of that Securities Act registration statement.").

432 ABA Letter; WR Hambrecht + Co. Letter.

433 *See* Final Report of the 29th Annual SEC Government-Business Forum on Small Business Capital Formation, Recommendation 5, at 18 (Nov. 18, 2010) (suggesting that issuers be permitted to file reports under Section 13 of the Exchange Act for a one-year period following a Regulation A offering, and thereafter file a Form 8-A to register the securities under Section 12 of the Exchange Act) (*available at*: http://www.sec.gov/info/smallbus/gbfor29.pdf).

434 ABA Letter; WR Hambrecht + Co. Letter.

exchanges" or other trading venues that are focused on attracting such issuers. The Commission's Advisory Committee on Small and Emerging Companies, for example, has recommended the establishment of separate U.S. equity markets for small and emerging companies, which it believes could encourage initial public offerings of the securities of these companies.[435] One commenter similarly expressed support for the creation of an equity market venture exchange populated with small and emerging growth companies.[436] In recent years, the Commission has approved more flexible listing standards for an exchange designed for smaller issuers,[437] and some alternative trading systems today trade small company stocks.[438] We solicit comment on how these or similar market models might be used by Regulation A issuers, and how they can be made more viable for facilitating secondary markets for small issuers.

Request for Comment

102. While not currently proposed, should we permit issuers to register under the Exchange Act classes of securities that are qualified under Regulation A by allowing them to file a Form 8-A rather than a Form 10? Why or why not? Would providing a short form registration encourage more Regulation A issuers to list their securities on national securities exchanges? Conversely, would permitting eligible issuers to use their Regulation A offering statement

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435 *Recommendation Regarding Separate U.S. Equity Market for Securities of Small and Emerging Companies*, Securities and Exchange Commission, Advisory Committee on Small and Emerging Companies (February 1, 2013), *available at*: http://www.sec.gov/info/smallbus/acsec/acsec-recommendation-032113-emerg-co-ltr.pdf.

436 Paul Hastings Letter.

437 *See* SEC Rel. No. 34-64437 (May 6, 2011) [76 FR 27710].

438 *See*, *e.g.*, Global OTC (f/k/a ArcaEdge), Shares Post Financial Corporation, Second Market, Inc., and OTC Link LLC.

in conjunction with a Form 8-A reduce the likelihood that such issuers would use the Securities Act registration process, including the "IPO on-ramp" provisions of Title I of the JOBS Act? Would it serve the intended purpose of Regulation A to make such an accommodation?

103. The disclosure and financial statement requirements of Regulation A, currently and as proposed to be amended, require fewer items of disclosure or less detailed information than Securities Act registrants are required to provide. Would it cause confusion in the market or otherwise create risks for investors if issuers could transition from Regulation A disclosure in Form 1-A to Exchange Act registration without filing Form 10 or providing all the information otherwise called for by Form 10 or Form S-1? Alternatively, while not currently proposed, should simplified Exchange Act registration be available only for issuers that prepare an offering circular based on Part I of Form S-1?

104. What effect, if any, would the ongoing reporting obligations of Section 13 of the Exchange Act have on an issuer considering the potential use of Form 8-A in conjunction with a Regulation A offering as the means by which to become an Exchange Act reporting issuer? Would ongoing reporting under Section 13 of the Exchange Act be an attractive alternative for Regulation A issuers? Or some subset of Regulation A issuers? Please explain.

105. While not currently proposed, should we make Form 8-A available in connection with issuers that are subject to ongoing reporting requirements under Regulation A? Why or why not? Do the proposed ongoing reporting

requirements in Regulation A, in addition to the requirement to meet the listing standards of, and be certified by, a national securities exchange provide an adequate justification for the extension of the Form 8-A accommodation to issuers subject to such an obligation?[439] Or should we provide a different means of simplified Exchange Act registration for issuers subject to an ongoing reporting obligation under Regulation A? Please explain.

106. Would encouraging the development of "venture exchanges" or other trading venues that are focused on attracting such issuers facilitate secondary market trading in the securities of Regulation A issuers? If so, how? How could the Commission adjust the regulatory regime to provide for a more viable secondary market for small issuers, with sufficient participation by liquidity providers, that maintains investor protections and fair and orderly markets?

4. Exit Report on Form 1-Z

a. Summary Information on Terminated or Completed Offerings

As discussed in Section II.E.1. above, we propose to rescind Form 2-A, but to continue to require Regulation A issuers to file the information generally disclosed in Form 2-A with the Commission electronically on EDGAR. Consistent with the related portion of proposed new Form 1-K,[440] the Form 2-A information would be converted into an online XML-based fillable form with indicator boxes or buttons and text boxes and filed electronically with the Commission as Part I of proposed new Form 1-Z (exit

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439 *See* discussion of proposed Regulation A ongoing reporting requirements in Section II.E. above.

440 *See also* discussion in Section II.C.1. (Electronic Filing; Delivery Requirements) and Section II.C.3.a. (Part I (Notification)) above.

report). Issuers conducting Tier 1 offerings would be required to provide this information on Form 1-Z not later 30 calendar days after termination or completion of the offering, while issuers conducting Tier 2 offerings would be required to provide this information on Form 1-Z at the time of filing the exit report, if not previously provided on Form 1-K as part of their annual report.[441] The summary offering information disclosed on Form 1-Z would be publicly available on EDGAR, but not otherwise required to be distributed to investors.

The XML-based fillable form would enable issuers to provide information in a convenient medium and capture relevant data about the recently terminated or completed Regulation A offering. As with the related portions of Form 1-K discussed above, the fillable form would be available online and not require issuers to obtain specialty software. The summary information disclosed would, however, facilitate analysis of Regulation A offerings by the Commission, other regulators, third-party data providers, and market participants. Additionally, facilitating the capture of important summary information about an offering would enable the Commission to monitor the use and effectiveness of Regulation A as a capital formation tool.

As noted above in the related proposals for Form 1-K, the summary information collected in Form 1-Z would include the date the offering was qualified and commenced, the number of securities qualified, the number of securities sold in the offering, the price of the securities, any fees associated with the offering, and the net proceeds to the issuer.

b. Termination or Suspension of Tier 2 Disclosure Obligations

In light of the proposed ongoing reporting obligations for Tier 2 offerings, we are

[441] *See* Section II.E.1.a. above for a discussion of the requirements for proposed new Form 1-K.

proposing to permit issuers that conduct a Tier 2 offering to terminate or suspend their ongoing reporting obligations on a basis similar to the provisions that allow issuers to suspend their ongoing reporting obligations under Section 13 and Section 15(d) of the Exchange Act.[442] We acknowledge that, similar to the Exchange Act reporting context, there may be circumstances when an issuer would like to exit the reporting system. We received a comment letter that suggested we adopt a provision similar to Section 15(d) of the Securities Act that would permit an issuer to automatically terminate its Regulation A reporting obligation as to any fiscal year, other than the year in which the offering was made, if at the beginning of such fiscal year, the securities of the class sold in reliance on Regulation A are held of record by fewer than 300 persons.[443] We propose to permit an issuer in a Tier 2 offering that has filed all ongoing reports required by Regulation A for the shorter of (i) the period since the issuer became subject to such reporting obligation, or (ii) its most recent three fiscal years and the portion of the current year preceding the date of filing Form 1-Z to immediately suspend its ongoing reporting obligation under Regulation A at any time after completing reporting for the fiscal year in which the offering statement was qualified, if the securities of each class to which the offering statement relates are held of record by fewer than 300 persons and offers or sales made in reliance on a qualified offering statement are not ongoing.[444] In such circumstances, an issuer's obligation to continue to file ongoing reports in a Tier 2 offering under Regulation A would be suspended immediately upon the filing of a notice to the Commission on Part II of proposed new Form 1-Z. A manually-signed copy of the

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442 *See* Exchange Act Section 15(d), 15 U.S.C. 78*o*(d); Exchange Act Rule 12h-3, 17 CFR 240.12h-3.

443 ABA Letter.

Form 1-Z would have to be executed by the issuer and related signatories before or at the time of filing and retained by the issuer for a period of five years.[445] Issuers would be required to produce the manually signed copy to the Commission, upon request.[446]

We further propose that issuers' obligations to file ongoing reports in a Tier 2 offering under Regulation A would be automatically suspended upon registration of a class of securities under Section 12 of the Exchange Act or registration of an offering of securities under the Securities Act, such that Exchange Act reporting obligations would always supersede ongoing reporting obligations under Regulation A. If an issuer terminates or suspends its reporting obligations under the Exchange Act and the issuer would be eligible to suspend its Regulation A reporting obligation by filing a Form 1-Z at that time, the ongoing reporting obligations would terminate automatically and no Form 1-Z filing would be required to terminate the issuer's Regulation A reporting obligation. If the issuer would not be eligible to file a Form 1-Z at that time, it would need to recommence its Regulation A reporting with the report covering any financial period not completely covered by a registration statement or Exchange Act report.[447]

Request for Comment

107. As currently proposed, should we modify the current requirement in Regulation A that issuers file a Form 2-A to report sales and the termination of sales made under Regulation A to instead require issuers conducting Tier 1 offerings to report such information only after the termination or completion

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444 *See* proposed Rule 257(d)(2).

445 *See* Instruction to proposed Form 1-Z.

446 *Id.*

447 *See* proposed Rule 257(d)(1)(and (e).

of the offering on Part I of proposed new Form 1-Z and issuers in Tier 2 offerings to report such information on either Part I of Form 1-Z or proposed new Form 1-K? Why or why not?

108. Is there any additional information about an issuer's recently completed or terminated Regulation A offering that should be required to be disclosed? Alternatively, should we not require any disclosure of summary information about an issuer's recently completed Regulation A offering? Why or why not?

109. Should we permit issuers to suspend their reporting obligations in a Tier 2 offering under Regulation A, as proposed, when they take on Exchange Act reporting obligations? Should we otherwise alter the proposed provisions regarding the suspension or termination of an issuer's ongoing reporting obligations in Tier 2 offering? Should issuers in Tier 2 offerings be able to suspend or terminate ongoing reporting under Regulation A on some other basis? For example, should we permit issuers to terminate their ongoing reporting obligations immediately upon completion of the offering, provided, at that time, they have less than 300 holders of record? Why or why not? Should we require a Form 1-Z filing for issuers that would be eligible to immediately file that form upon the suspension or termination of their Exchange Act reporting obligations?

110. Should we alter the number of record holders below which an issuer in a Tier 2 offering can suspend or terminate its ongoing reporting obligations from the proposed 300 record holders? Or should we alter the threshold below which

certain types of issuers that are subject to a Tier 2 ongoing reporting obligation would be able to suspend or terminate reporting (*e.g.*, 2,000 or 500 holders of record)? For example, similar to the provisions of Title VI of the JOBS Act, should we allow banks and bank holding companies to terminate their ongoing Regulation A reporting obligations by falling below a higher threshold of record holders (*e.g.*, 1,200 holders of record)?[448] Or should we increase or decrease the number of record holders below which all issuers in Tier 2 offerings, irrespective of issuer-type, could suspend or terminate their ongoing reporting obligations? Why or why not? Please explain.

F. Insignificant Deviations from a Term, Condition or Requirement

Currently, Rule 260 provides that certain insignificant deviations from a term, condition or requirement of Regulation A will not result in the issuer's loss of the exemption from registration under Section 5 of the Securities Act.[449] Under Rule 260, the provisions of current Rule(s) 251(a) (issuer eligibility), 251(b) (aggregate offering price), 251(d)(1) (offers) and 251(d)(3) (continuous or delayed offerings) of Regulation A are, however, deemed to be significant to the offering as a whole, and any deviations from these provisions would result in the issuer's loss of the exemption. We have not received any comment on Rule 260, nor do we propose to amend the rule. We do, however, solicit comment on whether the provision should be amended to, for example, alter the list of significant deviations.

Request for Comment

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448 *See* Title VI of the JOBS Act, Pub. L. No. 112-106, —601 (Capital Expansion).

449 17 CFR 230.260.

111. Should we amend Rule 260 to alter the list of deviations that would be deemed significant to the offering as a whole? Why or why not? If so, which provision(s) should be amended? Alternatively, are there other provisions within Rule 260 that should be amended? If so, please state which provisions and describe why they should be amended.

G. Bad Actor Disqualification

Under Securities Act Section 3(b)(2)(G)(ii), the Commission has discretion to issue rules disqualifying certain "felons and other 'bad actors'" from using the new exemption. Such rules, if adopted, must be "substantially similar" to those adopted to implement Section 926 of the Dodd-Frank Act, which requires the Commission to adopt disqualification rules for securities offerings under Rule 506 of Regulation D. The Commission adopted the disqualification provisions required by Section 926 in Rule 506(d), and a related disclosure requirement in Rule 506(e).[450]

All commenters on potential "bad actor" disqualification provisions in the context of Title IV of the JOBS Act suggest that the Commission apply the same standards for bad actor disqualification under Regulation A as under Rule 506.[451] One commenter further suggested that the Commission adopt uniform disqualification rules across Regulation D, Section 4(a)(5), and the expanded Regulation A exemption.[452]

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450 SEC Rel. No. 33-9414 (July 10, 2013) [78 FR 44729]. The Commission recently proposed rules substantially similar to those adopted pursuant Section 926 of the Dodd-Frank Act in the proposing release for securities-based crowdfunding transactions under Title III of the JOBS Act. *See* SEC Rel. No. 33-9470, at 284.

451 ABA Letter; WR Hambrecht + Co. Letter; NASAA Letter 2; Kaplan Voekler Letter 2. *See also* Final Report of the 31st Annual SEC Government-Business Forum on Small Business Capital Formation, Recommendation 13B, at 25 (Nov. 15, 2012) (*available at*: http://www.sec.gov/info/smallbus/gbfor31.pdf).

452 NASAA Letter 2.

Regulation A currently provides for the disqualification of "bad actors" in Rule 262.[453] We propose to amend Rule 262 to include bad actor disqualification provisions in substantially the same form as recently adopted under Rule 506(d), but without the categories of covered persons specific to fund issuers, which would not be eligible to use Regulation A under the proposal.[454] Such "bad actor" disqualification requirements would disqualify securities offerings from reliance on Regulation A if the issuer or other relevant persons (such as underwriters, placement agents, and the directors, officers and significant shareholders of the issuer) have been convicted of, or are subject to court or administrative sanctions for, securities fraud or other violations of specified laws.

Under the proposed amendment, the disqualification provisions would apply to the following categories of persons ("covered persons"):

- the issuer and any predecessor of the issuer or affiliated issuer;
- any director, executive officer, or other officer participating in the offering, general partner, or managing member of the issuer;
- any beneficial owner of 20% or more of the issuer's outstanding voting equity securities, calculated on the basis of voting power;
- any promoter connected with the issuer in any capacity at the time of filing of the offering statement or any offers or sales after qualification;
- any underwriter or person that has been or will be paid (directly or indirectly) remuneration for solicitation of purchasers in connection with sales of securities in the offering;

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453 17 CFR 230.262.

454 *See* proposed Rule 262.

- any general partner or managing member of any such solicitor; and
- any director, executive officer or other officer participating in the offering of any such underwriter or solicitor or of a general partner or managing member of any such underwriter or compensated solicitor.

An offering would be disqualified from reliance on the Regulation A exemption if any covered person had been the subject of the following disqualifying events:

- Criminal convictions (felony or misdemeanor) entered within five years before the filing of the offering statement in the case of issuers, their predecessors and affiliated issuers, and ten years in the case of other covered persons:
  - in connection with the purchase or sale of any security;
  - involving the making of a false filing with the Commission; or
  - arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, investment adviser, or paid solicitor of purchasers of securities;[455]
- Court injunctions and restraining orders, including any order, judgment, or decree of any court of competent jurisdiction, entered no more than five years before the filing of the offering statement, that, at the time of such filing, restrains or enjoins such person from engaging or continuing to engage in any conduct or practice:
  - in connection with the purchase or sale of any security;
  - involving the making of a false filing with the Commission; or

- arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, investment adviser, or paid solicitor of purchasers of securities;[456]

- Final orders issued by state securities, banking, credit union, and insurance regulators, federal banking regulators, the U.S. Commodity Futures Trading Commission, and the National Credit Union Administration that at the time of filing of the offering statement either:
  - bar the covered person from association with any entity regulated by the regulator issuing the order, or from engaging in the business of securities, insurance or banking, or from savings association or credit union activities; or
  - are based on a violation of any law or regulation that prohibits fraudulent, manipulative, or deceptive conduct within the last ten years;[457]
- Commission disciplinary orders entered pursuant to Section 15(b) or 15(B)(c) of the Exchange Act or Section 203(e) or (f) of the Investment Advisers Act of 1940 (the "Advisers Act") that, at the time of filing of the offering statement:
  - suspend or revoke a person's registration as a broker, dealer, municipal securities dealer, or investment adviser;

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455 *See* proposed Rule 262(a)(1).

456 *See* proposed Rule 262(a)(2).

457 *See* proposed Rule 262(a)(3).

- place limitations on the activities, functions, or operations of such person; or
- bar such person from being associated with any entity or from participating in the offering of any penny stock;[458]

- Commission cease and desist orders entered no more than five years before the filing of the offering statement that, at the time of such filing, order the person to cease and desist from committing or causing a violation or future violation of any scienter-based anti-fraud provision of the federal securities laws or Section 5 of the Securities Act;[459]
- Suspension or expulsion from membership in, or suspension or a bar from association with a member of, an SRO, *i.e.*, a registered national securities exchange or a registered national or affiliated securities association for any act or omission to act constituting conduct inconsistent with just and equitable principles of trade;[460]
- Stop orders applicable to a registration statement and orders suspending the Regulation A exemption for an offering statement that an issuer filed or in which the person was named as an underwriter no more than five years before the filing of the offering statement, and proceedings pending at the time of such filing as to whether such a stop or suspension order should be issued;[461] and

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458 *See* proposed Rule 262(a)(4).

459 *See* proposed Rule 262(a)(5).

460 *See* proposed Rule 262(a)(6).

461 *See* proposed Rule 262(a)(7).

- U.S. Postal Service false representation orders including temporary or preliminary orders entered no more than five years before the filing of the offering statement.[462]

The proposed triggering events are substantially the same as the triggering events included in Rule 506(d).[463] We believe that creating a uniform set of bad actor triggering events should simplify diligence, particularly for issuers that may engage in different types of exempt offerings. It could also foster the creation of third-party databases or other data sources regarding bad actors that could aid issuers in conducting diligence. As noted above, however, the proposed rules in Regulation A would specify that an order must bar the covered person at the time of filing[464] of the offering statement, as opposed to the requirement in Rule 506(d) that the order must bar the covered person at the time of the relevant sale. This clarification accords with the current provisions of Rule 262 and is appropriate in the context of Regulation A because there is no filing requirement before the time of first sale in Rule 506.[465]

We further propose a reasonable care exception under Regulation A on a basis consistent with Rule 506.[466] Under proposed Rule 262(b)(4), an issuer would not lose the

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462 *See* proposed Rule 262(a)(8).

463 17 CFR 230.506(d).

464 In order to simplify the application of the rules, we do not propose to require that an order bar the covered person at the time of non-public submission of the offering statement. As a practical matter, if a covered person is involved with a proposed Regulation A offering at the time of non-public submission or filing, the issuer would be ineligible to qualify the offering in reliance on Regulation A under either circumstance.

465 Under Rule 503 of Regulation D, issuers must file a notice of sales on Form D no later than 15 calendar days after the first sale of securities. 17 CFR 230.503(a).

466 *See* proposed Rule 262(b)(4).

benefit of the Regulation A exemption if it could show that it did not know, and in the exercise of reasonable care could not have known, of the existence of a disqualification.

Proposed Rule 262 is very similar in substance to existing Rule 262, although the format is different. In its current form, Rule 262 provides three different categories of offering participants and related persons, with different disqualification triggers for each category. The amendments we propose are based on a simplified framework of potentially disqualified persons and disqualifying events, which aligns with Rule 506(d). The covered persons are the same as under current Rule 262, except that the proposal includes references to managing members of limited liability companies and, like Rule 506(d), would cover compensated solicitors of investors in addition to underwriters; executive officers and other officers participating in the offering, rather than all officers, of the issuer and any underwriter or compensated solicitor; and beneficial owners of 20% or more of the issuer's outstanding voting equity securities, calculated on the basis of voting power, rather than beneficial owners of 10% of any class of the issuer's equity securities. The proposals would also add two new disqualification triggers: proposed Rule 262(a)(3), which covers final orders and bars of certain state and other federal regulators, and proposed Rule 262(a)(5), which covers Commission cease-and-desist orders relating to violations of scienter-based anti-fraud provisions of the federal securities laws or Section 5 of the Securities Act. Finally, the proposals include a "reasonable care" exception modeled on the Rule 506(d) provision. We believe these changes to Rule 262 are appropriate in light of the Section 3(b)(2)(G)(ii) mandate and the

benefits of creating a more uniform set of standards for all exemptions that include bad actor disqualification.[467]

Under the proposal, offerings that would have been disqualified from reliance on Regulation A under Rule 262 as currently in effect would continue to be disqualified. Triggering events that are not currently covered by Rule 262—namely, the events specified in proposed Rule 262(a)(3) and 262(a)(5)—and that pre-date effectiveness of any rule amendments would not cause disqualification, but would be required to be disclosed on a basis consistent with new Rule 506(e). Specifically, issuers would be required to indicate in Part I of Form 1-A that disclosure of triggering events that would have triggered disqualification, but occurred before the effective date of the Regulation A amendments, will be provided in Part II of Form 1-A.[468]

In addition to soliciting comment on the proposed amendments to Rule 262, we are also soliciting comment more broadly on the interpretation of the phrase "voting equity securities," as it appears in "any beneficial owner of 20% or more of the issuer's outstanding voting equity securities, calculated on the basis of voting power," a category of covered persons in Rule 506(d) and proposed Rule 201(r)(2) of Regulation Crowdfunding, as well as in Rule 262, as proposed to be amended. When we adopted Rule 506(d), we did not define "voting equity securities," but rather indicated that our initial intention would be to consider securities as voting equity securities if

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467 If adopted, the amendments to Rule 262 would also effectively modify the bad actor disqualification provisions of Rule 505 of Regulation D, which incorporate Rule 262 by reference. We are proposing technical amendments to Rule 505 to update the citations to Rule 262.

468 As discussed in Section II.C.3.a. above, Part I of Form 1-A focuses, in part, on issuer eligibility, and forces issuers to make an eligibility determination at the outset of filling out Form 1-A, while also facilitating quick eligibility determinations by Commission staff reviewing Regulation A offering materials.

"securityholders have or share the ability, either currently or on a contingent basis, to control or significantly influence the management and policies of the issuer through the exercise of a voting right."[469] In light of numerous questions and concerns raised about the implications of such an interpretation, however, we are reconsidering our initial views. In particular, we are concerned that our initial interpretation may be overbroad, and that a "bright-line" test may be more workable and would facilitate compliance. We are therefore soliciting comment about alternative interpretations of the phrase "voting equity securities" as it appears in current and proposed bad actor disqualification rules.

Request for Comment

112. Should we amend Rule 262, as proposed, to align with Rule 506(d)? Are there proposed amendments to the covered persons or disqualification triggering events of Rule 262 that we should not make? Why not? Are there other amendments consistent with the statutory mandate of Section 3(b)(2)(G)(ii) that we should consider?

113. How should the phrase "voting equity securities" as it appears in "any beneficial owner of 20% or more of the issuer's outstanding voting equity securities, calculated on the basis of voting power" in Rule 506(d), proposed Rule 201(r)(2) of Regulation Crowdfunding, and Rule 262 as proposed to be amended, be interpreted? Should we interpret it consistently with the definition of "voting securities" in Rule 405, as equity securities "the holders of which are presently entitled to vote for the election of directors"? Are there

[469] SEC Rel. No. 33-9414 (July 10, 2013) [78 FR 44729], text accompanying fn. 62.

factors other than the current ability to vote for directors (or their equivalents) that should be taken into account?

H. Relationship with State Securities Law

Commenters have suggested that the cost of state securities law compliance, which they identify as an obstacle to the use of existing Regulation A, would discourage market participants from using the new exemption. In addition, as discussed previously, Section 402 of the JOBS Act required the Comptroller General to conduct a study on the impact of state "blue sky" laws on offerings conducted under Regulation A, and to report its findings to Congress. The resulting GAO report to Congress indicates that state securities laws were among several central factors that may have contributed to the lack of use of Regulation A.[470]

NASAA recently proposed a coordinated review process for Regulation A offerings, which, if implemented, could potentially reduce the state law disclosure and compliance obligations of Regulation A issuers.[471] As proposed, the coordinated review program would permit issuers to file Regulation A offering materials with the states using an electronic filing depository system currently in development by NASAA. The administrator of the coordinated review program would select a lead disclosure examiner and, where applicable, a lead merit examiner, which would be responsible for drafting and circulating a comment letter to the participating jurisdictions, and for seeking resolution of those comments with the issuer and its counsel. The draft review protocol

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470 *See* Section I.C. above.

471 *See* NASAA Release, dated October 30, 2013, Notice of Request for Public Comment: Proposed Coordinated Review Program for Section 3(b)(2) Offerings (the comment period for NASAA's proposal was scheduled to close on November 30, 2013), *available at*:

also contemplates that certain NASAA statements of policy would be modified or would not apply to offerings undergoing coordinated review. There are a number of open questions about the proposal: whether NASAA will adopt a coordinated review program as proposed; if the proposal were to be adopted in the future, how many states would elect to participate; when such a program, if adopted, could be implemented; and if adopted as proposed, whether the protocol would address the concerns related to state securities law compliance identified by the GAO and commenters.[472] NASAA has stated that its members broadly support the proposed program and would be able to implement it promptly.[473]

In the absence of any such coordinated review, issuers would be required to analyze and comply with separate registration or qualification requirements, or to identify and comply with applicable exemptions, in each state in which they intend to offer or sell securities under revised Regulation A, as is currently the case under Regulation A. Depending on the nature of any such coordinated review process, state securities laws could impose additional requirements and limitations on offerings beyond those imposed by Regulation A, either currently or as proposed to be amended.[474]

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http://www.nasaa.org/27427/notice-request-public-comment-proposed-coordinated-review-program-section-3b2-offerings/.

472 *See, e.g.*, GAO-12-839, at 14 (discussing the varying standards and degrees of stringency applied during the qualification and review process in merit review states); *see also* Paul Hastings Letter.

473 Letter from Andrea Seidt, President, NASAA, December 12, 2013 ("NASAA Letter 3"). If the proposed coordinated review program were not adopted by every state, we could consider adoption of a "qualified purchaser" definition that would provide preemption as to the non-participating states.

474 For example, under the proposed coordinated review protocol, Regulation A offerings would be subject to most aspects of current NASAA policies regarding lock-up of shares held by promoters and disclosure and procedural requirements for loans and other material transactions involving issuer affiliates.

As a result, most commenters strongly supported some form of state securities law preemption.[475] Section 18 of the Securities Act generally provides for exemption from state law registration and qualification requirements for certain categories of securities, defined as "covered securities."[476] Although Section 401(b) of the JOBS Act does not itself exempt offerings made under Section 3(b)(2) and the related rules from state law registration and qualification requirements, it did add Section 18(b)(4)(D) to the Securities Act. That provision states that Section 3(b)(2) securities are covered securities for purposes of Section 18 if they are "offered or sold on a national securities exchange" or "offered or sold to a qualified purchaser, as defined by the Commission pursuant to [Section 18(b)(3)] with respect to that purchase or sale." Section 18(b)(3) provides that "the Commission may define the term 'qualified purchaser' differently with respect to different categories of securities, consistent with the public interest and the protection of investors."

Some commenters suggested that the Commission preempt state securities laws by permitting Section 3(b)(2) securities to be listed and traded on a national securities

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475 Karr Tuttle Letter; Letter from Robert J. Tresslar, Title Company Data Provider, Property Tax Lien Investor, June 28, 2012 "Tresslar Letter"; McCarter & English Letter; ABA Letter; Letter from Paul Getty, Managing Director, Satwik Ventures LLC, Nov. 7, 2012 ("Satwik Ventures Letter"); Campbell Letter; WR Hambrecht + Co. Letter; Kaplan Voekler Letter 2; Fallbrook Letter; Paul Hastings Letter. *See also* Final Report of the 29th Annual SEC Government-Business Forum on Small Business Capital Formation, Recommendation 7B, at 19 (Nov. 18, 2010) (*available at*: http://www.sec.gov/info/smallbus/gbfor29.pdf); Final Report of the 30th Annual SEC Government-Business Forum on Small Business Capital Formation, Recommendation 8, at 30 (Nov. 17, 2011) (*available at*: http://www.sec.gov/info/smallbus/gbfor30.pdf); Final Report of the 31st Annual SEC Government-Business Forum on Small Business Capital Formation, Recommendations 12 and 14, at 25 (Nov. 15, 2012) (*available at*: http://www.sec.gov/info/smallbus/gbfor31.pdf); ECTF Report (Recommendations 1.2, 1.3, and 1.4).

476 *See* Section 18(c), 15 U.S.C. 77r(c). State securities regulators retain authority to impose certain filing and fee requirements and general antifraud enforcement authority with respect to covered securities. *See* Section 18(c), 15 U.S.C. 77r(c).

exchange,[477] others suggested preemption by means of a "qualified purchaser" definition,[478] while others still suggested some combination of both approaches.[479]

Commenters advocating listing and trading of Section 3(b)(2) securities on a national securities exchange have suggested we permit such listing without attendant registration of the securities under Section 12(b) of the Exchange Act[480] or through short-form Exchange Act registration on Form 8-A.[481] Commission action would not be required to effect the preemption of state securities laws for Regulation A securities that are listed or traded on an exchange. Under Section 18(b)(1) of the Securities Act, any securities that are listed or authorized for listing on a national securities exchange are exempt from state securities law registration and qualification requirements.[482] Section 401(b) of the JOBS Act in effect restated this provision specifically for Regulation A securities, by adding Section 18(b)(4)(D)(i) to the Securities Act.[483] We expect, however, that this approach to preemption will have limited impact, because many Regulation A issuers would not meet the standards for listing on a national

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477 *See, e.g.*, Karr Tuttle Letter.

478 *See, e.g.*, Tresslar Letter; McCarter & English Letter; Campbell Letter; Kaplan Voekler Letter 2; *see also* Final Report of the 31st Annual SEC Government-Business Forum on Small Business Capital Formation, Recommendations 12 and 14, at 25 (Nov. 15, 2012); ECTF Report (Recommendation 1.3).

479 *See, e.g.*, ABA Letter; Satwik Ventures Letter; WR Hambrecht + Co. Letter.

480 Karr Tuttle Letter (suggesting a lower tier of exchange-listed security).

481 WR Hambrecht + Co. Letter (suggesting upper tier exchange listing, but on a shorter form Exchange Act registration statement); *see also* Final Report of the 29th Annual SEC Government-Business Forum on Small Business Capital Formation, Recommendation 5, at 18 (Nov. 18, 2010) (*available at*: http://www.sec.gov/info/smallbus/gbfor29.pdf).

482 Section 18(b)(1), 15 U.S.C. 77r(b)(1).

483 Section 18(b)(4)(D)(i) uses the language "offered or sold on a national securities exchange," whereas Section 18(b)(1) uses the language, "listed, or authorized for listing, on a national securities exchange."

securities exchange.[484]

From those commenters advocating preemption through a qualified purchaser definition, suggested definitions included:

- Any purchaser in a Regulation A offering;[485]
- Any purchaser meeting a specified net worth standard, set at or lower than the current "accredited investor" definition in Rule 501 of Regulation D;[486]
- Any purchaser meeting a net worth or income test based on thresholds below accredited investor thresholds, combined with an investment cap;[487] or
- Any purchaser who purchased through a registered broker-dealer.[488]

One commenter stated that it did not object to the Commission's defining "qualified purchaser" for Section 3(b)(2) securities, but objected to a definition based on transactions effected through a broker-dealer or on purchaser criteria commensurate with or less stringent than current "accredited investor" thresholds.[489] In its view, Congress intended a qualified purchaser definition under Section 18(b)(3) of the Securities Act to

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484 *See also* ECTF Report. As discussed in Section II.E.3. above, we solicit comment on whether we should facilitate the listing of Regulation A securities on a national securities exchange by permitting issuers to file a short-form Exchange Act registration statement on Form 8-A concurrently with the qualification of a Regulation A offering statement.

485 Campbell Letter.

486 Tresslar Letter; McCarter & English Letter; ABA Letter; Satwik Ventures Letter; WR Hambrecht + Co. Letter. *See also* Final Report of the 31st Annual SEC Government-Business Forum on Small Business Capital Formation, Recommendation 14, at 25 (Nov. 15, 2012) (*available at*: http://www.sec.gov/info/smallbus/gbfor31.pdf).

487 Kaplan Voekler Letter 2.

488 ABA Letter; WR Hambrecht + Co. Letter; Paul Hastings Letter (suggesting that, in addition to primary offerings, the qualified purchaser definition apply in connection with secondary trading in Regulation A securities, where the issuer is subject to an ongoing reporting obligation under Regulation A); *see also* ECTF Report (Recommendation 1.2).

489 NASAA Letter 2; *see also* NASAA Letter 3 (indicating NASAA's concerns with the Commission's use of either the "qualified purchaser" or "accredited investor" definition in the context of implementing rules for Section 3(b)(2) of the Securities Act).

require investor qualifications greater than those provided in the accredited investor definition, and sales through broker-dealers do not provide adequate protections.[490] This commenter suggested that "qualified purchaser" could be defined based on existing definitions of "qualified purchaser" in the Investment Company Act[491] or "qualified client" in Rule 205 under the Investment Advisers Act.[492]

In light of the issues raised by commenters and in the GAO study, we are concerned that the costs associated with state securities law compliance may deter issuers from using Regulation A, even if the increased cap on offering size and other proposals intended to make Regulation A more workable are implemented. This could significantly limit the possible impact of an amended Regulation A as a tool for capital formation. We believe that the addition of Section 18(b)(4)(D)(ii) of the Securities Act, which specifically refers to a "qualified purchaser" definition that would apply to transactions under the new 3(b)(2) exemption, suggests that it is appropriate for us to consider including such a definition in our rulemaking to implement Title IV of the JOBS Act.

We also believe that Regulation A, as we propose to amend it, would provide substantial protections to purchasers. Under the proposed amendments, a Regulation A offering statement would continue to provide substantive narrative and financial disclosures about the issuer, including an MD&A discussion. The proposed electronic

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490 NASAA Letter 2; *see also* NASAA Letter 3. Section 18(b)(3) was enacted under the National Securities Markets Improvement Act of 1996 (NSMIA), Pub. L. 104-290, 110 Stat. 3416 (Oct. 11, 1996).

491 15 U.S.C. 80a-2(a)(51). For natural persons to be "qualified purchasers" under this definition, they must own at least $5 million in investment assets.

492 17 CFR 275.205-3. For natural persons to be "qualified clients," they must have at least $1 million in assets under management with the investment adviser or have a net worth of more than $2 million, excluding the value of their primary residence.

filing requirement, including the structured data in Part I of the offering circular, would provide ready access to key information about the issuer and the offering, and would facilitate analysis of the offering in relation to comparable opportunities. We expect that Regulation A offering statements would continue to receive the same level of Commission staff review as registration statements. Additional investor protections would be afforded by Regulation A's limitations on eligible issuers and "bad actor" disqualification provisions, which we are proposing to expand.

The requirements for Tier 2 offerings would provide further protection, because the financial statements contained in the offering circular would be required to be audited, the issuer would have an obligation to provide ongoing reporting to purchasers, and such purchasers would be limited in the percentage of income or net worth that could be invested in a single offering. Ongoing reporting would assure a continuing flow of information to investors and could support the development of secondary markets for Regulation A securities, offering the prospect of reduced investor risk through liquidity.

The approach to investor protection for Tier 2 of Regulation A is in some ways similar to the approach taken under Title III of the JOBS Act and our recently proposed rules for securities-based crowdfunding transactions under Section 4(a)(6) of the Securities Act.[493] In Section 4(a)(6), Congress outlined a new exemption for securities-based crowdfunding transactions intended to take advantage of the internet and social media to facilitate capital-raising by the general public, or crowd. In that provision, Congress directly preempted state securities laws relying, in part, on a variety of investor protections, including disclosure requirements, the use of regulated

[493] *See* Section 4(a)(6)(ii) of the Securities Act, 15 U.S.C. 77d(a)(6)(ii), and SEC Rel. No. 33-9470.

intermediaries and limitations on the amount of securities an investor could acquire through this type of offering required by the JOBS Act. [494]

Like the proposed provisions for securities-based crowdfunding, Regulation A—both as currently in effect and as proposed to be amended—is available to all types of investors, and therefore we believe it should include certain appropriate investor protections. We believe that the substantial investor protections embedded in the issuer eligibility conditions, limitations on investment, disclosure requirements, qualification process and ongoing reporting requirements of proposed Tier 2 of Regulation A, in combination, could address potential concerns that may arise as a result of the preemption of state securities law registration and qualification requirements.

We therefore propose to define the term "qualified purchaser" for certain purposes under Regulation A. As proposed, "qualified purchasers" in a Regulation A offering would consist of:

i) All offerees; and

ii) All purchasers in a Tier 2 offering.[495]

We believe that this approach would protect offerees and investors in Regulation A securities, while streamlining compliance and reducing transaction costs.

We believe it would be appropriate to preempt blue sky requirements with respect to all offerees in a Regulation A offering, in order to make Regulation A a workable approach to capital raising. Issuers relying on Regulation A should be able to communicate with potential investors about their offerings using the internet, social

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494 *See, generally*, the requirements for issuers and intermediaries and state securities law preemption set forth in Title III of the JOBS Act, Pub. L. No. 112-106, 126 Stat. 306, §§ 301-305.

495 *See* Proposed Rule 256.

media, and other means of widespread communication, without concern that such communications might trigger registration requirements under state law. We believe this is consistent with Section 3(b)(2)(E) of the Securities Act and the "testing the waters" provisions of Rule 254 of existing Regulation A, which we are proposing to expand, and that it would result in reduced costs to issuers seeking capital while maintaining investor protections.[496]

Alternatively, we could import existing "qualified purchaser" definitions from other regulatory regimes. These other regimes may not, however, account for the regulatory protections and limited offering size of Regulation A, or the likelihood that issuers that target investors meeting these other standards could choose to rely on other Securities Act exemptions, such as Regulation D, rather than Regulation A. We could also consider the involvement of a regulated intermediary or advisor in a transaction as, or as part of, the basis for such a definition. Such intermediaries may, however, increase costs to issuers and investors without commensurate investor protection benefits. Finally, we could consider a broad definition such that any purchaser in any Regulation A offering would be treated as a "qualified purchaser." Our preliminary view is that the investment limitations, enhanced disclosure and ongoing reporting obligations associated with Tier 2 would meaningfully bolster the protections otherwise embedded in

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[496] We understand that some state securities regulators do not require the registration of broadly advertised offerings such as internet offerings, if the advertisement indicates, directly or indirectly, that the offering is not available to residents of that state. *See, e.g.*, Washington State Dep't of Financial Institutions, Securities Act Policy Statement – 16, *available at*: http://dfi.wa.gov/sd/securitiespolicy.htm#ps-16; *see also* NASAA Reports ¶ 7,040 (regarding NASAA resolution, dated January 7, 1996, which encourages states to take appropriate steps to exempt from securities registration offers of securities over the Internet).

Regulation A, and justify a difference in treatment to offerings conducted pursuant to Tier 1.

We believe the proposed "qualified purchaser" definition for Tier 2 offerings would help to make Regulation A a more workable means of capital formation. We are soliciting comment, however, on whether we should adopt such a definition or an alternative definition and, if so, what it should require. In particular, we are mindful that, if NASAA and its members are able to implement a coordinated review program for Regulation A offerings, the costs to issuers of state law registration and qualification requirements and the time required for qualification may be substantially lower in the future. We solicit comment below on whether, rather than adopting a definition of "qualified purchaser" for Regulation A as proposed, we should wait to determine whether such a coordinated review program can be finalized, adopted and successfully implemented and, if so, whether such a program would sufficiently address current concerns about the costs of blue sky compliance.[497] We solicit comment on the extent to which state securities law registration and qualification requirements may affect the use of Regulation A, as proposed to be amended. We will also consult with the states and consider any changes to the states' processes and requirements for reviewing offerings before we adopt final amendments.

Request for Comment

114. Should we preempt state securities law registration and qualification requirements for certain Regulation A offerings by adopting a definition of

[497] If the proposed coordinated review program were not adopted by every state, we could consider whether a "qualified purchaser" definition that would provide preemption as to the non-participating states would be appropriate.

"qualified purchaser," as proposed? Why or why not? Please explain. In responding to this question and the questions below, please address both the practical implications of preemption for capital formation and the impact on investor protection.

115. Is there any potential alternative approach by which we might address the concern raised by commenters and the GAO that state securities regulation poses a significant impediment to the use of Regulation A?[498] In particular, could NASAA's proposed coordinated review program be effectively implemented in the near term? If NASAA implements a coordinated review program, should we consider changes to the proposed "qualified purchaser" definition or other provisions of the proposed rules? Are there other methods to streamline state review, such as a process based on review or qualification in a single state?

116. Does proposed Tier 2 of Regulation A include sufficient investor protections to justify the preemption of state securities law registration and qualification requirements for offerings sold to "qualified purchasers," defined as proposed or otherwise? If not, are there additional investor protections that would justify such preemption? What are they?

117. As proposed, should we adopt a "qualified purchaser" definition for purposes of Regulation A to include all offerees and all purchasers in a Tier 2 offering? Is it appropriate, as proposed, to treat all offerees as qualified purchasers? Is it appropriate to treat all purchasers in a Tier 2 offering as

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[498] *See* related discussion and requests for comment in Section II.I. below.

qualified purchasers, or should we impose additional limitations (based on, for example, an income threshold, a net worth threshold and/or an investment assets threshold)? Should we base the definition of "qualified purchasers" on the Investment Company Act definition of that term, or on the definition of "qualified client" under the Investment Advisers Act? Alternatively, should we define all accredited investors as qualified purchasers, as has been previously proposed?[499] Why or why not?

118. Are there other approaches we should consider to defining "qualified purchaser" for Regulation A offerings? For example, should we define "qualified purchaser" as any offeree or purchaser in a Regulation A offering by an issuer that meets certain criteria—for example, specified financial criteria or operating or other criteria indicative of reduced risk? Or should we define it based on attributes of the offering that may reduce risk to investors (*e.g.*, firm commitment underwritten offerings or offerings through a registered broker-dealer)? Alternatively, should we consider a "qualified purchaser" definition that reflects some attributes of the purchaser, issuer and offering?

119. Should we consider defining "qualified purchaser" unconditionally, as all offerees and all purchasers in any Regulation A offering? Would such a definition better address potential burdens to capital formation under Regulation A? If so, how? Would such a definition provide sufficient investor protections to support the preemption of state securities law

[499] *See* SEC Rel. No. 33-8041 (Dec. 19, 2001) [66 FR 66839].

registration and qualification requirements? If not, what would support unconditional preemption of state securities laws? Please explain.

120. In addition to providing blue sky preemption for Tier 2 offerings, should we also consider providing preemption for some or all resales of Regulation A securities? Would the need to comply with blue sky laws prevent the development of a liquid secondary market for Regulation A securities?

121. Would the preemption of state securities law registration and qualification requirements provided by Section 18(b)(1) of the Securities Act for securities that are listed or authorized for listing on a national securities exchange be a viable option for many Regulation A issuers? Why or why not?

I. Regulation A in Comparison to Other Methods of Capital Formation

As noted above, in developing the proposals, we have attempted to create a workable exemption that both promotes small company capital formation and provides for meaningful investor protections. In that context, we are mindful that issuers have a range of possible approaches to capital-raising, including Securities Act registration and other exemptions from registration, such as the statutory exemption under Section 4(a)(2) of the Securities Act, Rules 504, 505 and 506 under Regulation D[500] and Section 4(a)(6) of the Securities Act and the proposed rules for a crowdfunding exemption.[501]

Request for Comment

122. How does Regulation A, as proposed to be amended, compare—in terms of the type of companies that may use the exemption, its requirements, and its potential effectiveness—to other methods of capital raising that issuers may choose for small offerings? How would it compare to the proposed crowdfunding exemption? Either by reference to today's proposals or more generally, are there ways in which Regulation A could be amended that would make it a more usable exemption?

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500 The Regulation D market is large, in recent years approaching the size of the registered market. *See* Vladimir Ivanov and Scott Bauguess, *Capital Raising in the U.S.: An Analysis of Unregistered Offerings Using the Regulation D Exemption*, 2009-2012 (July 2013), *available at*: http://www.sec.gov/divisions/riskfin/whitepapers/dera-unregistered-offerings-reg-d.pdf.

501 *See* SEC Rel. No. 33-9470.

J. Additional Considerations Related to Smaller Offerings

As noted above, in recent years, Regulation A offerings have been rare. Commenters[502] and the GAO identified a number of factors that have influenced the use of Regulation A in its current form, including the process of filing the offering statement with the Commission, state securities law compliance, the types of investors businesses seek to attract, and the cost-effectiveness of Regulation A relative to other exemptions.[503] In developing the proposals, we have attempted to create a more efficient and effective method to raise capital that incorporates important investor protections. We also have been cognizant of how issuers seeking to raise relatively smaller amounts of capital could consider a range of possible approaches to capital-raising.[504]

Under our proposal, offerings for up to $5 million that are conducted under Tier 1 would benefit from the proposed updates to Regulation A's filing and qualification processes, but the proposed amendments would not otherwise substantially alter the existing exemption for such offerings.[505] We are mindful of the possibility that additional changes to Tier 1 could expand its use by, and thus potentially benefit, issuers conducting smaller offerings. An intermediate tier between proposed Tier 1 and Tier 2 could also potentially help increase the effectiveness of Regulation A for smaller

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502 *See, e.g.,* Karr Tuttle Letter; Lacey Letter; Kaplan Voekler Letters 1 and 2; McCarter & English Letter; ABA Letter; Alpine Ventures Letter; Campbell Letter; WR Hambrecht + Co. Letter; and Oggilby Letter.

503 *See* fn. 35 above.

504 These methods include, for example, Rules 504, 505 and 506 under Regulation D and Section 4(a)(6) of the Securities Act and the proposed rules for a crowdfunding exemption. *See* Section II.I. above.

505 *See* Kaplan Voekler Letter 1 (suggesting updating the filing and qualification processes of, but otherwise preserving a separate $5 million tier based on, existing Regulation A in the revised exemption); *see also* Beacon Investment Letter (suggesting existing Regulation A be preserved as a separate exemption from the implementing rules for Title IV of the JOBS Act).

offerings by, among other things, permitting additional modifications to requirements in light of the size of the offering. We are soliciting comment on additional considerations with respect to Tier 1 and an intermediate tier for offerings incrementally larger than Tier 1 offerings and how they would affect investor protection and capital formation.

Request for Comment

123. As proposed, and as is currently the case for Regulation A, state law registration and qualification requirements would not be preempted for Tier 1 offerings. Issuers in offerings of up to $5 million could also elect to proceed under Tier 2, which would provide for preemption by complying with the additional requirements for Tier 2 (investment limitations, audited financial statements in the offering statement and ongoing reporting). Are there circumstances in which we should provide for preemption for Tier 1 offerings? If so, what are the circumstances? Should we consider including in Tier 1 certain elements of Tier 2, such as investment limitations, audited financial statements in the offering statement, or ongoing reporting, or some combination of these requirements in order to provide for preemption? Should we consider including requirements that draw on those for other approaches to capital-raising? If so, which requirements should we include and why? If we require ongoing reporting for issuers that have conducted Tier 1 offerings, should the substance or frequency of the requirements be different from the requirements proposed for Tier 2, such as requiring only an annual report consisting of annual financial statements and a cover sheet or

only an annual report, or an annual report and current updates but no semiannual report?

124. Should we consider adding an intermediate tier for offerings exceeding $5 million but significantly less than the $50 million (*e.g.*, $10 million) limitation for Tier 2? Why or why not? If so, what would be an appropriate annual offering limitation for any such intermediate tier? What requirements of Tier 1 and Tier 2 (*e.g.*, audited financial statements, investor limitations) should or should not apply to any such intermediate tier? Should those requirements be modified with respect to the intermediate tier? If so, how? Should we consider other requirements? How would such requirements compare to requirements for other avenues of capital-raising that an issuer might choose? Should offerings made using this intermediate tier be preempted from state law registration and qualification requirements? If so, under what circumstances should we provide for preemption?

125. If an issuer undergoes a registration or qualification process that complies with the coordinated review protocol proposed and being developed by NASAA,[506] assuming such a program is adopted and fully implemented, should an offering under Tier 1 or any potential intermediate tier also be subject to review, in whole or in part, by the Commission's staff? Why or why not? Should the Commission's rules specify the scope or other requirements of any such coordinated review? What standards would apply to the review and what would the review entail (*e.g.*, would the state review for

[506] *See* discussion in Section II.H. above.

compliance with state law requirements, compliance with requirements of the federal securities laws and Commission rules and forms, or both)?

126. Should we provide for preemption in a Tier 1 offering or an offering conducted pursuant to the requirements for any potential intermediate tier if an issuer undergoes a registration or qualification process in a single state? If we develop a process based on registration or qualification in a single state for Tier 1 offerings or for offerings conducted pursuant to the requirements for an intermediate tier, how should it be determined which state would review and qualify the offering? Should we specify how the issuer would determine the state for review (e.g., the state of the issuer's principal place of business or the state in which the issuer is incorporated)? If an offering were subject to a single state review, should the offering also be subject to review, in whole or in part, by the Commission's staff? Why or why not? Would the answer depend on whether the state had a disclosure or merit review program? Should the Commission's rules specify the scope or other requirements of any such state review? What role, if any, would other states have in any such state review? What standards would apply to the review and what would the review entail (e.g., would the state review for compliance with state law requirements, compliance with requirements of the federal securities laws and Commission rules and forms, or both)? How would allowing a single state review or qualification process affect the filing choices made by issuers and the regulatory choices made by states? Would such a process enhance or diminish the comparability and consistency of state regulatory frameworks? If

so, how? What would be the impact of such a process on investor protection and capital formation?

K. Regulation A Offering Limitation

As noted above, Section 401 of the JOBS Act requires the Commission to review the $50 million offering limit not later than two years after enactment of the JOBS Act and every two years thereafter and, if the Commission decides not to increase the amount, requires that it report its reasoning to Congress.[507] The first such review must be completed by April 5, 2014. We solicit comment on whether the Commission should adopt an offering amount under Regulation A, as proposed to be amended, that is higher than the $50 million limitation for offerings in a twelve-month period provided in Section 3(b)(2) of the Securities Act.

Request for Comment

127. As proposed to be amended, and consistent with Section 3(b)(2), should we limit offerings conducted in reliance on Regulation A in a twelve-month period to $50 million? Or should the Commission adopt an offering limit under Regulation A that is higher than $50 million in a twelve-month period?[508] Why or why not? If so, what would be an appropriate threshold for offerings in a twelve-month period conducted in reliance on Regulation A, as proposed to be amended?

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507 *See* discussion in Section I.D. above.

508 *See* Section 3(a)(5) of the Securities Act (requiring the review of the Section 3(b)(2) offering limit every two years after enactment of Title IV of the JOBS Act). 15 U.S.C. 77c(b)(5).

L. Technical and Conforming Amendments

We propose to amend existing Rules 251-263[509] under Regulation A.[510] The proposed rule amendments take into account changes to Regulation A associated with the addition of Section 3(b)(2)[511] to the Securities Act,[512] and the proposals detailed in this release.

In connection with these actions, we propose to revise Form 1-A,[513] to rescind Form 2-A,[514] and to create four new forms, Form 1-K (annual updates), Form 1-SA (semiannual updates), Form 1-U (current reporting), and Form 1-Z (exit report).

We also propose to revise Rule 4a-1[515] under the Trust Indenture Act[516] to increase the dollar ceiling of the exemption from the requirement to issue securities pursuant to an indenture, and to amend Rule 15c2-11[517] of the Exchange Act[518] to permit an issuer's ongoing reports filed under Regulation A to satisfy a broker-dealer's obligations to review and maintain certain information about an issuer's quoted securities. In addition, we are proposing a technical amendment to Exchange Act Rule 15c2-11 to amend subsection (d)(2)(i) of the rule to update the outdated reference to the "Schedule H of the By-Laws of the National Association of Securities Dealers, Inc."

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509 17 CFR 230.251 through 230.263.

510 17 CFR 230.251 through 230.263.

511 15 U.S.C. 77c(b)(2).

512 15 U.S.C. 77a *et seq*.

513 17 CFR 239.90.

514 17 CFR 239.91.

515 17 CFR 260.4a-1.

516 15 U.S.C. 77aaa *et seq*.

517 17 CFR 240.15c2-11.

518 15 U.S.C. 78a *et seq*.

which is now known as the "Financial Industry Regulatory Authority, Inc." and to reflect the correct rule reference.

As a result of the proposed revisions to Regulation A, conforming and technical amendments would be made to Rule 157(a),[519] in order to reflect amendments to Section 3(b) of the Securities Act, and Rule 505(b)(2)(iii),[520] in order to reflect the proposed changes to Rule 262 of Regulation A. Additionally, Item 101(a)[521] of Regulation S-T[522] would be revised to reflect the mandatory electronic filing of all issuer initial filing and ongoing reporting requirements under proposed Regulation A. The portion of Item 101(c)(6)[523] of Regulation S-T dealing with paper filings related to a Regulation A offering, and Item 101(b)(8)[524] of Regulation S-T dealing with the optional electronic filing of Form F-X by Canadian issuers, would therefore be rescinded.

III. GENERAL REQUEST FOR COMMENT

We solicit comment, both specific and general, on each component of the proposals. We request and encourage any interested person to submit comments regarding:

- the proposals that are the subject of this release;
- additional or different revisions to Regulation A; and
- other matters that may have an effect on the proposals contained in this release.

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519 17 CFR 230.157(a).

520 17 CFR 230.505(b)(2)(ii).

521 17 CFR 232.101(a).

522 17 CFR 232.10 *et seq*.

523 17 CFR 232.101(c)(6).

Comment is solicited from the point of view of both issuers and investors, as well as of capital formation facilitators, such as broker-dealers, and other regulatory bodies, such as state securities regulators. Any interested person wishing to submit written comments on any aspect of the proposal is requested to do so. With regard to any comments, we note that such comments are of particular assistance to us if accompanied by supporting data and analysis of the issues addressed in those comments. We urge commenters to be as specific as possible.

IV. ECONOMIC ANALYSIS

As discussed above, Title IV of the JOBS Act requires the Commission to adopt rules under Section 3(b)(2) of the Securities Act exempting from Securities Act registration the offer and sale of securities that, in the aggregate, shall not exceed $50 million in a twelve-month period. Congress enacted Section 3(b)(2) against a background of public commentary suggesting that Regulation A, an existing exemption for offerings of up to $5 million in a twelve-month period adopted under Section 3(b)(1) of the Securities Act, should be expanded and updated to make it more useful to small companies.

We are mindful of the costs imposed by, and the benefits to be obtained from, our rules. Securities Act Section 2(b) and Exchange Act Section 3(f) require us, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation. Exchange Act Section 23(a)(2) requires us, when adopting rules under the Exchange Act,

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[524] 17 CFR 232.101(b)(8).

to consider the impact that any new rule would have on competition and not to adopt any rule that would impose a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

The discussion below addresses the economic effects of the proposed rules, including the likely costs and benefits of the proposed rules, as well as the likely effect of the proposed rules on efficiency, competition and capital formation. The proposed rules include provisions mandated by the statute as well as provisions that rely on the Commission's discretionary authority. As a result, while many of the costs and benefits of the proposed rules stem from the statutory mandate of Title IV, certain costs and benefits are affected by the discretion we propose to exercise in connection with implementing this mandate. For purposes of this economic analysis, we address the costs and benefits resulting from the mandatory statutory provisions and our exercise of discretion together, because the two types of benefits and costs are not separable. We also analyze the potential costs and benefits of significant alternatives to what is proposed.

We request comment on all aspects of our economic analysis, including the potential costs and benefits of the proposed rules.

A. Economic Baseline[525]

The baseline for our economic analysis of proposed amendments to Regulation A, including the baseline for our consideration of the effects of the proposed rules on efficiency, competition and capital formation, is a description of market conditions today, in which companies seeking to raise capital through securities offerings must register the offer and sale of securities under the Securities Act unless they can rely on an exemption from registration under the federal securities laws. The baseline also includes a description of investors in offerings of similar amounts and a discussion of liquidity considerations that impact issuers' choice of capital markets.

1. Current methods of raising up to $50 million of capital

While there are a number of factors that companies consider when determining how to raise capital, a key consideration is whether to issue securities through a registered public offering or through an offering that is exempt from Securities Act registration and ongoing Exchange Act financial reporting requirements. The choice of offering method may also depend on the size of the issuer and the amount of new capital sought. Registered offerings entail initial and ongoing fixed costs that can weigh more heavily on smaller companies, providing incentive to remain private and to pursue capital outside of public markets. As we describe throughout this economic analysis, the proposed amendments to Regulation A are intended to provide small issuers access to

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525 Several rules mandated by the JOBS Act have been proposed by the Commission and one has been adopted recently. These rules may affect the economic baseline for proposed Regulation A, but because of data limitations the analysis below cannot account for potential changes that may result from other Commission actions. For example, pursuant to Title II the Commission recently amended Rule 506 of Regulation D to permit issuers relying on the exemption in Rule 506(c) to use general solicitation or general advertising, subject to certain conditions. *See* SEC Rel. No. 33-9415. This recent change could increase the use of Regulation D, but the sample of Regulation D offerings analyzed below does not include offerings utilizing this amendment.

sources for capital unavailable through other offering exemptions without imposing the full registration and ongoing reporting requirements of a registered public offering. This section describes the various currently available offering methods and prevalence of their use.

a. Exempt offerings

Currently, small companies can raise capital by relying on an exemption from registration under the Securities Act, such as Section 3(a)(11),[526] Section 4(a)(2),[527] Regulation D[528] and Regulation A.[529] Each of these exemptions, however, includes restrictions that may limit its utility for small companies. For example, the exemption under Securities Act Section 3(a)(11) is limited to intrastate offerings, and Regulation D offerings may limit or prohibit participation by unaccredited investors. Additionally, offerings relying on Regulation A require submission of offering materials to, and qualification of the offering statement by, the Commission, and may require qualification

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526 Under Securities Act Section 3(a)(11), except as expressly provided, the provisions of the Securities Act (including the registration requirement under Securities Act Section 5) do not apply to a security that is "part of an issue offered and sold only to persons resident within a single State or Territory, where the issuer of such security is a person resident and doing business within, or, if a corporation, incorporated by and doing business within, such State or Territory." 15 U.S.C 77c(a)(3)(a)(11).

527 Securities Act Section 4(a)(2) provides that the provisions of the Securities Act shall not apply to "transactions by an issuer not involving a public offering." 15 U.S.C. 77d(4)(a)(2).

528 Regulation D contains three rules providing exemptions from the registration requirements, allowing some companies to offer and sell their securities without having to register the securities with the SEC. 17 CFR 230.504, 505, 506.

529 *See* release text Section I.B. above for a description of the current terms and conditions of Regulation A.

or registration in multiple states.[530] The table below summarizes the main features of each exemption.

[530] *See* Rutheford B. Campbell, *Regulation A: Small Business' Search for a Moderate Capital*, 31 DEL. J. CORP. L. 77, 106 (2005). *See also* GAO-12-839, "Factors that May Affect Trends in Regulation A Offerings", (July 3, 2012).

Type of Offering	Offering Limit[531]	Solicitation	Issuer and Investor Requirements	Filing Requirement	Resale Restrictions	Blue Sky Law Preemption
Section 3(a)(11)	None	No limitations	All issuers and investors must be resident in state	None	Restricted in some cases[532]	No
Section 4(a)(2)	None	No general solicitation	All investors must meet sophistication and access to information test	None	Restricted securities	No
Regulation A	$5 million with $1.5 million limit on secondary sales	"Testing the waters" permitted before filing; general solicitation permitted after qualification	U.S. or Canadian issuers, excluding investment companies, blank-check companies, and reporting companies	File "testing the waters" materials, Form 1-A, Form 2-A	No	No
Rule 504 Regulation D	$1 million	General solicitation permitted in some cases[533]	Excludes investment companies, blank-check companies, and reporting companies	File Form D[534]	Restricted in some cases[535]	No
Rule 505 Regulation D	$5 million	No general solicitation	Unlimited accredited investors and 35 non-accredited investors	File Form D[536]	Restricted securities	No
Rule 506 Regulation D	None	General solicitation permitted in some cases[537]	Unlimited accredited investors. Limitations on unaccredited investors[538]	File Form D[539]	Restricted securities	Yes

531 Aggregate offering limit on securities sold within a twelve-month period.

532 Resale restrictions are determined by state securities laws, which typically restrict in-state resales for a one-year period.

533 No general solicitation or advertising are permitted unless registered in a state requiring the use of a substantive disclosure document or sold under state exemption for sales to accredited investors with general solicitation.

534 Filing is not a condition of the exemption.

535 Restricted unless registered in a state requiring use of a substantive disclosure document or sold under state exemption for sale to accredited investors.

536 Filing is not a condition of the exemption.

537 No general solicitation or advertising is permitted under Rule 506(b). General solicitation and general advertising permitted under Rule 506(c), provided all purchasers are accredited investors and the issuer takes reasonable steps to verify accredited investor status.

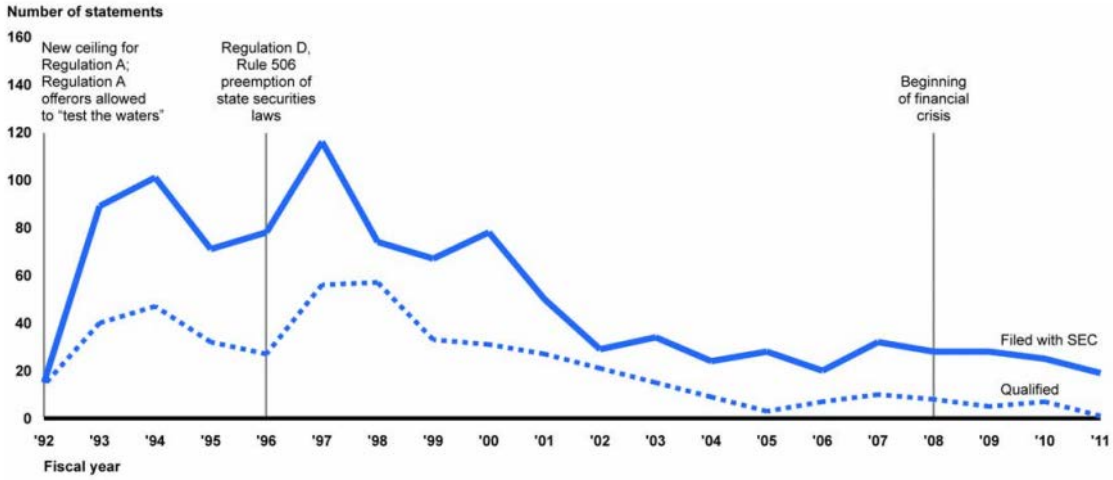
538 Under Rule 506(b), offerings may involve an unlimited number of accredited investors and up to 35 non-accredited investors. Under Rule 506(c), all purchasers must be accredited investors.

While we do not have adequate data on offerings relying on an exemption under Section 3(a)(11) or Section 4(a)(2), certain data available related to Regulation D and Regulation A filings allow us to gauge how frequently issuers currently use these exemptions when raising capital.

(1) Regulation A offerings

Companies rarely rely on existing Regulation A when raising capital. The chart below, from the GAO study,[540] reports the number of filed and qualified Regulation A offerings in fiscal years 1992 to 2011.[541] Specifically, the GAO notes that the number of filed Regulation A offerings decreased from 116 in 1997 to 19 in 2011. The number of qualified offerings dropped from 57 in 1998 to 1 in fiscal year 2011.

Data from GAO Study: Regulation A offerings filed and qualified, 1992-2011



539 Filing is not a condition of the exemption.

540 *See Factors That May Affect Trends in Regulation A Offerings*, U.S. Government Accountability Office (Jul. 3, 2012), *available at* http://www.gao.gov/products/GAO-12-839 ("GAO Report").

541 A Regulation A offering is considered "filed" when the Commission receives a potential issuer's offering materials through Form 1-A. A Regulation A offering is considered qualified after the Commission has reviewed the offering materials and certified that all conditions have been met. Therefore, offerings that are filed and not qualified are either pending, withdrawn, or abandoned.

Based on information submitted in 1,001 Form 1-A filings between 1993 and 2012, there were 914 unique Regulation A issuers during this period. Of these, 439 offerings by 393 unique issuers were qualified by SEC staff. Examination of these filings shows that 80% of the offerings were for equity. Although issuers may include up to $1.5 million in secondary sales under existing regulations, more than 95% of Regulation A offerings included only primary shares. Analysis of industry composition indicates that many of the issuers operate in the financial industry (49%). In the year of the offering, the median financial industry issuer had assets and annual revenue of $29.3 million and $2.9 million respectively, while the median non-financial industry issuer had assets of $188,000 and annual revenue of $34,000.

Section 402 of the JOBS Act required the GAO to study the impact of blue sky laws on Regulation A offerings. The GAO examined (1) trends in Regulation A filings, (2) differences in state registration of Regulation A filings, and (3) factors that may have affected the number of Regulation A filings. In its July 2012 report on Regulation A, the GAO cited four central factors affecting the use of Regulation A offerings: (1) costs associated with compliance with state securities regulations, or "blue sky laws"; (2) the availability of alternative offering methods exempt from registration, such as Regulation D offerings; (3) costs associated with the filing and qualification process with the SEC; and (4) the type of investors businesses sought to attract.

As identified by the GAO, compliance with state securities laws may currently affect the use of existing Regulation A. While state securities law filing fees are likely not significant in any particular state (filing fees are, on average, approximately $1000 in every state), such fees can become non-trivial when the offering extends across multiple

states.[542] For example, state securities law filing fees averaged $35,000 in initial public offerings under $50 million.[543] Legal and compliance costs for issuers seeking to offer securities in multiple states may be significant for issuers due to myriad differences in securities laws and applicable procedures across states. Inconsistencies in state laws and exemptions, as well as in the process of registration or qualification of an offering under state law, can result in an expensive, drawn-out process for issuers that could adversely affect their efforts to raise capital in a timely and cost-effective manner.

The GAO also identified costs associated with the filing and qualification process for Regulation A offerings as a potential reason for its current limited use. As described above, a business that relies on Regulation A must file an offering statement with the Commission that is subject to review by Commission staff and must be qualified before the offering can proceed. From 2002 through 2012, Regulation A filings took an average of 241 days to qualify.[544] While some of this timeframe reflects delays associated with the paper filing method, most of the delay results from the concurrent review by state securities regulators and the fact that the review process may encompass several rounds of discussion between Commission staff and issuers. It may also take longer to qualify when issuers fail to provide all required information in their filings or to address all

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542 *See* Paul Hastings Letter, at 2 and Exhibit A (citing estimated costs of state securities law filings under Section 3(b)(2) of $50,000 to $70,000); *Cf.* Regulation D Rule 506 Blue Sky Filing Chart available at http://americansaferetirements.com/agents/wp-content/uploads/2012/09/Blue-Sky-Filing-Chart-Reg-D-506-.pdf.

543 This calculation is based on data provided by Capital IQ and is obtained from S-1 filings from 1996 – 2012 which reports six categories of IPO-related fees, shown in more detail in the "IPO-related fees" table below.

544 This estimate is based on the initial Form 1-A filing and the last Form 1-A filing through which the offering was qualified. The median number of calendar days for an offering to be qualified was approximately 189. The fastest offering qualified in 4 calendar days and the slowest offering took 693 calendar days.

questions from previous correspondence with the Commission. Issuer size may also be related to the speed at which offerings are qualified. For example, larger companies (i.e., those with total assets greater than the median ($1.4 million) for all qualified Regulation A offerings) navigate the qualifying process on average 97 days faster than smaller companies.[545]

Unlike other exemptions, existing Regulation A permits offerings to an unlimited number of unaccredited investors, provided that the total amount sold does not exceed $5 million in a twelve-month period. Further, securities sold under existing Regulation A have no restrictions on resale. As discussed below, Regulation A issuers currently have limited involvement in secondary markets.

(2) Regulation D offerings

Based on information available to us, it appears that the most common way to issue up to $50 million of securities is in reliance on a Regulation D offering exemption. Regulation D includes three rules providing exemptions from the registration requirements of the Securities Act. Specifically, as described in the table above, eligible issuers can rely on Rule 504 to raise up to $1 million within a twelve-month period, Rule 505 to raise up to $5 million within a twelve-month period, and Rule 506 to raise an unlimited amount. As the table notes, the three rules have different requirements that affect their use. In total, based on analysis of issuer offering details reported on Form D, Regulation D accounts for approximately $900 billion in annual capital raising.[546]

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545 *Id.* It is also possible that because most of the larger Regulation A issuers are financial institutions, such as banks and trusts, which are regulated and disclose more information than other Regulation A issuers, they are able to prepare offering materials relatively quickly and easily, based on information they are required to provide to other regulators.

546 These exclude issuances of pooled investment vehicles.

During the 2009 to 2012 period, most issuers chose to raise capital by relying on Rule 506, even when their offering permitted reliance on Rule 504 or Rule 505.[547]

During 2012, there were nearly 22,000 Regulation D offerings reported on Form D. Of these, approximately 12,000 would meet the conditions of Regulation A, as proposed to be amended, which excludes offerings by reporting companies, foreign issuers and investment companies, and offerings of interests in claims on natural resources. The following table reports the breakdown of Regulation D filings from 2012 for all issuers that would be eligible to use Regulation A, as proposed to be amended.[548]

Regulation D offerings during 2012 by issuers eligible to rely on Regulation A[549]

	Rule 504	**Rule 505**	**Rule 506**		
Offering size	<$1M	<$5M	<$5M	$5M-$50M	>$50M
Current Reg A Eligible	Yes	Yes	Yes	No	No
Proposed Reg A Eligible	Yes	Yes	Yes	Yes	No
Number of filings	385	142	7,202	2,784	330
Median offering amount ($ millions)	0.4	1.0	1.0	10.0	88.9
Average offering amount ($ millions)	0.5	1.3	1.4	13.7	481
Average amount raised (% of offering) [550]	62.2	67.9	72.1	72.7	76.4
Portion with unaccredited investors (% of deals)	62.1	36.8	7.8	5.0	8.2
Average fees (% of funds raised)	0.1	0.2	0.7	0.7	0.8
Median number of investors	4	4	5	8	12

Excludes offerings by reporting companies, foreign issuers and investment companies, offerings of interests in natural resources, and issuers who failed to sell any securities.

547 This tendency could, in part, be attributed to two features of Rule 506: Blue sky law preemption and an unlimited offering amount. *See also Factors That May Affect Trends in Regulation A Offerings*, U.S. Government Accountability Office (Jul. 3, 2012), *available at* http://www.gao.gov/products/GAO-12-839.

548 These numbers are calculated using data from raw Form D's filed with the Commission. We have adjusted for amended filings by dropping old filings if an amended filing exists. This analysis excludes filings from issuers relying on Regulation D as a pooled investment fund.

549 *Id.*

550 The total offering amount is not always equivalent to the total amount raised at the time of filing. Regulation D permits filing a Form D before completion of the fundraising round. Thus for most companies, the difference between the total offering amount and amount raised results from filing a Form D before securing all funds promised. In addition, some companies (usually pooled investment funds) use Form D for open-ended offerings.

As shown in the table above, most Regulation D offerings that would be eligible for Regulation A under the proposed rules are relying on Rule 506 of Regulation D. A comparison of Rule 506 offerings over $50 million to those below $50 million shows that larger offerings involve more investors and have generally raised a greater percentage of the amount of capital sought at the time of the Form D filing. This evidence indicates potentially higher success rates for larger offerings, although this cannot be confirmed because there is no requirement for issuers to file an amended Form D at the completion of an offering.

Most Regulation D issuers elect not to disclose their revenue range in their Form D filings. The following table shows the breakdown of the issuers potentially eligible to rely on Regulation A that did not disclose, and those that elected to disclose a revenue range for offerings made in 2012.

Amount raised through Regulation D offerings in 2012 by issuers eligible to rely on Regulation A, by issuer revenue range.[551]

Revenue Range	Frequency Offering < $5M	Frequency Offering $5M- $50M	Avg. Raised ($ millions) Offering <$50M
Not Applicable[552]	141	92	4.7
Decline to Disclose	4,543	2091	4.3
No revenues	1,353	264	1.4
$1-$1,000,000	1,168	118	1.0
$1,000,001-$5,000,000	315	64	2.1
$5,000,001-$25,000,000	132	93	3.8
$25,000,001-$100,000,000	53	41	7.7
Over $100,000,000	24	21	6.9

Excludes offerings by reporting companies, foreign issuers and investment companies, offerings of interests in natural resources, and issuers who failed to sell any securities.

551 *Id.*

552 These could be Regulation D issuers (non-registered investment companies) that manage assets and report net asset value, for example, REITS, or spillover from the "No revenues" category.

If issuers that disclose a revenue range are representative of all Form D filers, then nearly half of the issuers that file Form D have no revenues. The portion of issuers without revenues is noteworthy because debt is not likely to be a feasible source of capital for companies without regular cash flows.

b. Registered Offerings

Companies seeking to raise capital without being subject to the restrictions under exempt offerings can register the offer and sale of securities under the Securities Act.

The following figure shows the frequency of IPOs each year for companies issuing above or below $50 million.[553] Consistent with many previous observations about the recent IPO market, the number of IPOs, particularly those under $50 million, has fallen dramatically since the late 1990s.[554]

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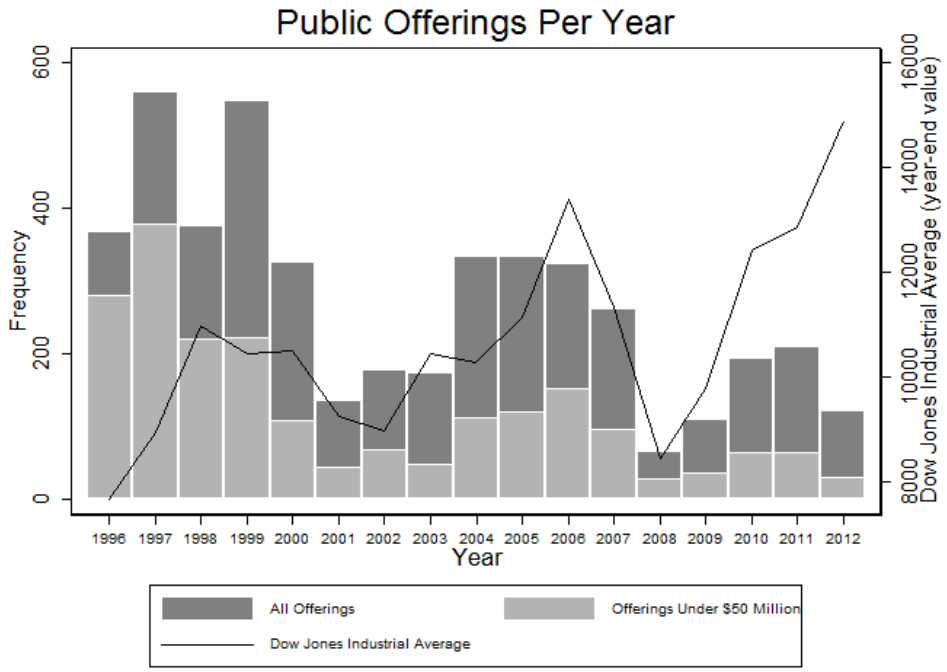
553 There were approximately 25 registered initial public offerings up to $50 million in 2012 according to data from Capital IQ.

554 *See, e.g.,* D. Weild and E. Kim, *A wake-up call for America*, 2009. In 2011, the Treasury Department hosted a conference on access to capital to better understand how to restore access to capital for emerging companies. The conference featured the findings of an IPO task force comprised of a number of experienced venture capitalists, investment bankers, and lawyers. Their findings provide a number of possible explanations for the decline in the number of IPOs, including that 92% of the surveyed CEOs listed the "Administrative Burden of Public Reporting" as being one of the most significant challenges of an IPO.

Frequency of all initial public offerings and offerings under $50 million by year.[555]



One possible reason for the decreasing number of IPOs under $50 million is that public offerings may be too costly to be a viable alternative for some small companies.[556] In particular, commissions paid to underwriters average 7% for IPOs, 5% for seasoned public issuances, and 1% for bond issuances.[557] Issuers conducting registered public offerings must also pay Commission registration fees and FINRA filing fees, legal and accounting fees and expenses, transfer agent and registrar fees, costs associated with

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555 The data is provided by Capital IQ and this sample excludes offerings from blank check companies and non-Canadian foreign issuers.

556 *See also* Gao, Xiaohui, Jay R. Ritter, and Zhongyan Zhu. *Where have all the IPOs gone?*, Working Paper, University of Florida, 2012 (suggesting, among other things, that acquisitions have partially supplanted the traditional IPO as an exit path for smaller companies).

557 *See, e.g.*, H. Chen and J. Ritter (2000), *The Seven Percent Solution*, Journal of Finance 55, pp. 1105−1131; S. Corwin (2000), *The Determinants of Underpricing for Seasoned Equity Offers*, Journal of Finance 58 pp. 2249−2279; L. Fang (2005), *Investment Bank Reputation and the Price and Quality of Underwriting Services*, Journal of Finance 60, pp. 2729−2761.

periodic reporting requirements and other regulatory requirements and various other fees. Two surveys concluded that regulatory compliance costs of IPOs average $2.5 million initially, followed by an ongoing $1.5 million per year.[558]

Because of the fixed-cost nature of many of the fees associated with public offerings, size may be one of the most important determinates of whether an offering is made available to the public. As shown in the scatter plot below, there is a downward trend in IPO-related fees (excluding underwriter and printing costs and reported as a percentage of offering proceeds) as offering size increases.[559]

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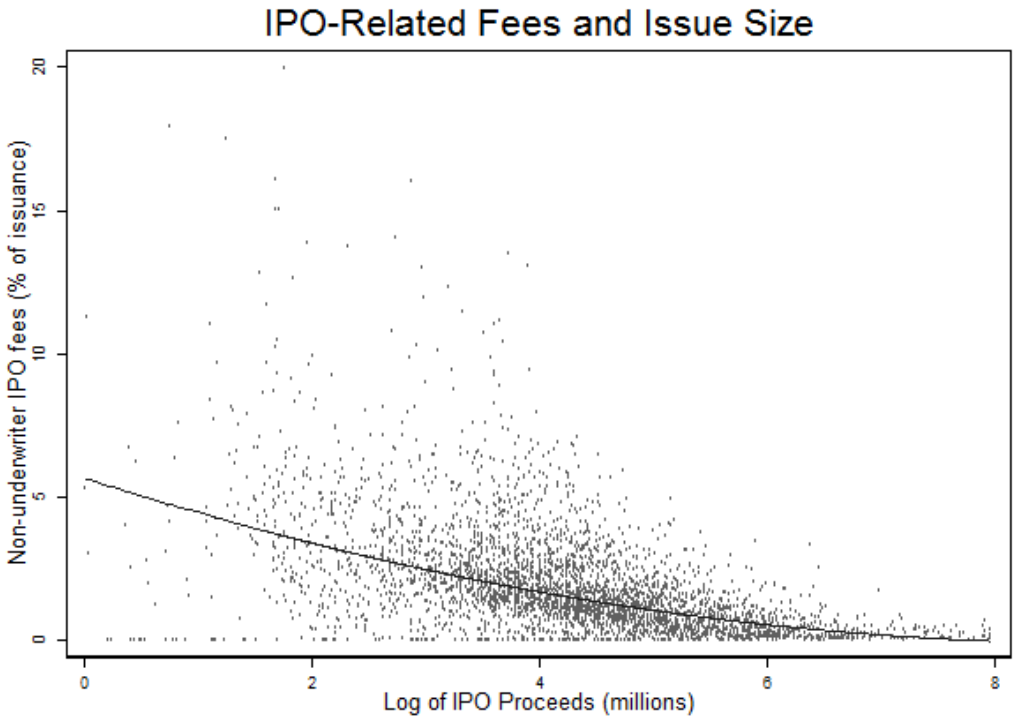
558 *See* IPO Task Force, *Rebuilding the IPO On-Ramp*, 9 (Oct. 20, 2011), *available at* http://www.sec.gov/info/smallbus/acsec/rebuilding_the_ipo_on-ramp.pdf ("IPO Task Force").

559 Fee information is compiled by Capital IQ and is obtained from S-1 filings from 1996 – 2012 which reports six categories of IPO-related fees. The analysis includes four of the fees: legal, accounting, blue sky, and registration, which we collectively refer to as "compliance fees".

Portion of IPO-related fees paid relative to net proceeds after excluding fees paid to underwriters.



For offerings below $50 million, the fixed cost components of legal and accounting-related fees, as a percentage of offering size, are particularly burdensome. In the table below, which reports the six fee types reported in Form S-1, offerings less than $50 million incur compliance related fees that are on average nearly twice those incurred by larger offerings, measured as a percentage of proceeds.

IPO-related fees as a percentage of offering size for offerings completed from 1996 to 2012.

	All Offerings (N=4868)	Offerings $5- $50 million (N = 2017)	Offering > $50million (N = 2851)
Total Fees	9.55%	11.15%	8.44%
Compliance Fees	1.39%	1.91%	1.03%
Registration Fees	0.03%	0.04%	0.02%
Blue Sky Fees	0.03%	0.07%	0.01%
Accounting Fees	0.53%	0.72%	0.40%
Legal Fees	0.80%	1.08%	0.60%
Underwriter Fees	6.45%	6.87%	6.17%

Printing Fees	0.32%	0.47%	0.22%

Analysis excludes offerings from non-Canadian foreign issuers and blank-check companies.

Additional statistical analysis[560] of these fees using regression methodologies shows that fees have increased by approximately six basis points per year since 1996, and that these fees have increased disproportionately more for small offerings than for large offerings. For example, fees related to offerings over $50 million increased by approximately 50 basis points from 2000 to 2010, while fees related to offerings below $50 million increased by 100 basis points over the same period.

In addition to increased compliance costs, there are a number of other possible explanations for the decline in IPOs. For example, one benefit of a public listing is the increased liquidity that results from access to retail investors; however, catering to retail owners can involve investor relations challenges and liability-related costs.[561] A second explanation for the decline of IPOs could result if current offerings are concentrated in high-technology sectors that are sensitive to R&D-related disclosure requirements, which could potentially cause issuers to rely more on private capital sources.[562] Access to capital may also be especially time-sensitive for the types of companies most likely to make small offerings, rendering these companies unwilling to go through a potentially

560 We tested for statistical significance in the relationship between fees and issue size using regression analysis of fees disclosed in S-1 filings. The data is from Capital IQ, which tabulates S-1 and other filings. Due to the abnormal distribution of IPO-related fees, we use quantile regressions. Fees were calculated as described in the table above. The sample eliminates all observations by issuers who would be ineligible for the proposed Regulation A exemption. Finally, we determine that fees have increased more rapidly for smaller issuers by including an interaction term of issuance date with offering size.

561 For instance, the 2011 IPO Task-Force survey results indicate that 88% of CEOs that had completed an IPO listed "Managing Public Communications Restrictions" as one of the most significant challenges brought on by becoming a reporting company.

562 Campbell, Tim S. (1979), *Optimal investment financing decisions and the value of confidentiality*, Journal of Financial and Quantitative Analysis: pp. 913-924.

lengthy registration process. It is also possible that directors and officers of companies looking to raise less than $50 million may not want to subject themselves to the increased liability and takeover threats that come with dispersed ownership.[563] Finally, the decline of public offerings could result from macro-economic effects on investment opportunities in the economy and the cost of capital.[564]

Companies that have completed an IPO often continue to raise capital through follow-on offerings. In 2012, public follow-on offerings accounted for $155 billion, $4 billion of which came from offerings less than $50 million,[565] which is significantly more than the amount raised through IPOs over the same period, suggesting that follow-on offerings (also known as "seasoned equity offerings") comprise a prevalent source of capital for companies.[566]

c. Private debt offerings

Companies with regular cash flows often rely on debt as a source of capital; however, borrowing may not be a cost effective option for many early-stage companies as they may face large information asymmetries with investors, irregular cash-flow projections, insufficient assets to offer as collateral, and high external monitoring costs.[567] For example, an internet start-up company without steady revenues might have

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563 Burkart, Mike, Denis Gromb, and Fausto Panunzi (2000), *Agency conflicts in public and negotiated transfers of corporate control,* The Journal of Finance 55.2, pp. 647-677.

564 Lowry, Michelle (2003), *Why does IPO volume fluctuate so much?*, Journal of Financial Economics 67.1, pp. 3-40.

565 There were approximately 211 public follow-on offerings in 2012 according to data from Thompson Reuters SDC.

566 These estimates are based on our analysis of data on seasoned equity offerings from Thompson Financials SDC Platinum and excludes offerings from non-Canadian foreign issuers.

567 Robb, Alicia M., and David T. Robinson, *The capital structure decisions of new firms*, No. w16272, National Bureau of Economic Research, 2010.

trouble securing a loan or a line of credit from a bank because it would have difficulty signaling the quality of its business model and ability to repay. Conversely, an owner of a restaurant franchise could reasonably rely on regular cash flows and its own credit history to support a loan application. Additionally, some companies may find loan requirements imposed by financial institutions difficult to meet. For example, financial institutions generally require a borrower to provide collateral and/or a guarantee by owners,[568] which some companies may not be able to or may be reluctant to provide.[569]

2. Liquidity considerations

As described above, various financing options are available to small companies looking to raise up to $50 million of capital. For many companies, access to liquid markets is an important consideration as they compare the merits of these options.

There are important differences in liquidity for securities issued in a registered offering or under Regulation D or Regulation A. Securities in registered offerings that meet listing requirements benefit from the liquidity of listing on a national securities exchange. Conversely, securities sold under Regulation D are relatively illiquid due to restrictions that prohibit resale in the public market for up to a year. Although securities issued under Regulation A are freely tradable, they typically trade in over-the-counter markets (if at all), as these issuers may not meet listing standards of a national securities

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568 Approximately 92% of all small business debt to financial institutions is secured, and owners of the firm guarantee about 52% of that debt. *See* Berger, Allen N., and Gregory F. Udell. *Relationship lending and lines of credit in small firm finance.* Journal of Business (1995): 351-381.

569 Some of these companies might instead rely on trade credit, which can be an important source of capital for young firms. *See, e.g.* Petersen, Mitchell A., and Raghuram G. Rajan, *Trade credit: theories and evidence*, Review of Financial Studies 10.3 (1997): 661-691; and Murfin, Justin, and Ken Njoroge, *The Implicit Costs of Trade Credit Borrowing by Large Firms.*, working paper.

exchange or be willing or able to bear the costs of ongoing reporting.[570] In fact, a much larger proportion of the qualified Regulation A offerings from 2001 to 2012 are quoted in the OTC market than listed on a national securities exchange; although most of these offerings are not currently quoted on OTC markets.[571]

More generally, OTC-traded securities are significantly less liquid than those listed on a national securities exchange.[572] Existing studies of bid-ask spreads, trading volume, and price volatility find statistically lower liquidity in OTC securities and a comparison group[573] of similar securities listed on a national securities exchange.[574]

There is also evidence that illiquidity is especially expensive for companies that trade on OTC markets.[575] A recent study finds OTC-traded securities differ from listed securities in that they are primarily held by retail investors and have a larger illiquidity return premium.[576] One explanation for the higher liquidity premium is the likelihood of increased asymmetric information,[577] as the cost of illiquidity is largest for securities whose issuers choose not to disclose financial information and that are primarily held by

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570 *See, e.g.*, Sanger and Peterson, 1990; Harris, Panchapagesan, and Werner, 2008; Macey, O'Hara, and Pompilio, 2008.

571 This conclusion is based on a review of three databases with coverage of OTC markets: CapitalIQ, iMetrix, and OTC quote.

572 *See, e.g.*, Sanger and Peterson, 1990; Harris, Panchapagesan, and Werner, 2008; Macey, O'Hara, and Pompilio, 2008.

573 Choosing a comparison set of companies with similar characteristics, such as market capitalization, helps isolate the effect of trading venue on liquidity.

574 Ang, A., Shtauber, A., & Tetlock, P. *Asset pricing in the Dark: The Cross Section of OTC Stocks* (July 1, 2013). Netspar Discussion Paper No. 11/2010-093, *available at* SSRN: http://ssrn.com/abstract=1817542 or http://dx.doi.org/10.2139/ssrn.1817542. Review of Financial Studies, forthcoming. The study analyzes 486 OTC stocks and compares them with a benchmarked (size-based) sample of listed stocks.

575 *Id.*

576 *Id.*

retail investors.[578] The desire of issuers to alleviate this illiquidity discount may explain why many OTC quoted companies that are not required to report financial information under the Exchange Act voluntarily provide limited financial information to investors.[579]

3. Investors in offerings of up to $50 million

The various methods of raising up to $50 million in capital may attract different types of investors. For example, as discussed above, Regulation A and public offerings have no limit on the number of unaccredited investors that can participate. In contrast, offerings under Rule 506(b) of Regulation D are limited to a maximum of 35 unaccredited investors.

Data from Form D filings suggests that unaccredited investors are not significantly involved in Regulation D offerings of up to $50 million. While unaccredited investors can and do participate in Regulation D offerings, offerings involving unaccredited investors are typically smaller than those that do not involve unaccredited investors. In 2012, we estimate that there were approximately 220,000 investor participations in nearly 11,000 Regulation D offerings of below $50 million by issuers that would be eligible for exemption under Regulation A, as proposed to be amended.[580] Of these offerings, approximately 9.4% involved at least one unaccredited

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577 Lev, Baruch. *Toward a theory of equitable and efficient accounting policy*. Accounting Review (1988): 1-22.

578 Ang, A., Shtauber, A., & Tetlock, P. 2011. *Asset pricing in the Dark: The Cross Section of Over-the-Counter Stocks*. Review of Financial Studies, forthcoming. The study analyzes 486 OTC stocks and compares them a benchmark group of listed stocks.

579 Analysis by staff in the Division of Economic and Risk Analysis found that in 2012, there were more than 700 companies quoted through the OTC Markets Group platform that provided limited financial information to qualify as OTC Pink Limited Information securities, which are quoted in a tier above firms that do not provide financial information.

580 These numbers are based on analysis by the Division of Economic and Risk Analysis of initial Form D filings submitted during calendar year 2012. The estimated total number of investor

investor. Offerings to exclusively accredited investors averaged 12 investors per offering and raised an average of $3.7 million per offering. In contrast, an average of 107 investors participated in offerings that involved at least one unaccredited investor and raised an average of $1.5 million.[581]

As of 2010, 8.7 million U.S. households, or 7.4% of all U.S. households, qualified as accredited investors based on the net worth standard in the definition of "accredited investor,"[582] which is substantially larger than the total number of investors that reported as having participated in an unregistered offering, but considerably less than the total number of retail investors, which we estimate could be as high as 33 million.[583] Thus the current pool of investors eligible to participate in Regulation A offerings and public offerings is substantially larger than the estimated total number of accredited investors or current levels of investor participation in the private offering market.

B. Analysis of Proposed Rules

1. General Considerations

The impact of the proposed rules on the level and efficiency of capital formation will depend on the extent to which companies use the new offering method to raise capital that would not otherwise have been available to them. It will also depend on the extent to which companies elect to rely on Regulation A, as proposed to be amended, in place of existing offering methods. As discussed above, many companies finance their

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participations is likely greater than the actual number of Regulation D investors because investors could have participated in more than one offering.

581 Because some investors participate in multiple offerings, these numbers likely overestimate the actual number of unique investors in these reported offerings.

582 *See* analysis presented in SEC Rel. No. 33-9415 (July 10, 2013) [78 FR 44771].

583 *Id*.

operations and investments with credit from banks and other financial entities.[584] Other companies, particularly early-stage and high growth companies, seek capital through equity-based financing because they do not have sufficient collateral or the revenue streams necessary to support the fixed repayment schedule of debt financing.[585] These companies often seek capital from institutional or accredited investors through offerings that are exempt from registration because the minimum fixed costs of going public through a registered offering can be disproportionately large for small issuers.[586] But private offerings impose restrictions on resale, offering amounts, or participating investors in ways that can limit the ability to raise capital and may not be attractive to some small companies or investors.

The proposed amendments to Regulation A are intended to provide small issuers access to sources for capital unavailable through other offering exemptions without imposing the full registration and ongoing reporting requirements of a registered public offering. Hence, it is likely that companies seeking to raise capital through an offering conducted under Regulation A, as proposed to be amended, would have been able to access to capital through private offerings or registered public offerings. In this respect, the impact of the proposed Regulation A amendments on capital formation could be redistributive in nature, but with potentially significant positive effects on capital formation and allocative efficiency by providing the issuers less costly access to capital

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584 Berger, Allen N., and Gregory F. Udell, 1998, *The economics of small business finance: The roles of private equity and debt markets in the financial growth cycle*, Journal of Banking & Finance 22.6, pp. 613-673.

585 *Id*.

586 *See* Section I.A. above.

than alternative offering methods and by providing unaccredited (retail) investors with additional investment opportunities.

The potential future use of an amended Regulation A depends largely on the perceived trade-off between the costs of qualification and ongoing disclosure requirements and the potential benefits to issuers from access to a broad investor base and secondary market liquidity.[587] For example, companies considering a traditional IPO may alternatively consider issuing securities pursuant to Regulation A, as amended, if they believe that the benefits of reduced disclosure requirements offset the potential loss of secondary market liquidity that may result from an issuer's inability to have its securities quoted on platforms that are available only for Exchange Act-registered securities. Alternatively, companies considering seeking capital from institutional or accredited investors through a private offering might consider an offering under amended Regulation A if they believe that there is a more dispersed investor base, which could include retail investors, willing to provide capital at a lower cost.

We preliminarily believe that an approach that generally preserves existing Regulation A while also introducing an option that allows issuers to raise greater amounts of capital without state review but with additional disclosure requirements is a prudent first step to adapting Regulation A for larger offerings. We believe this approach balances the trade-offs among compliance costs, investor protection, and benefits

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[587] The Commission also recognizes that other important considerations could affect the use of Regulation A as proposed to be amended. In particular, as explained above, the GAO study of Regulation A offerings found that blue sky law compliance was a primary factor in the infrequent reliance on Regulation A. Because we are proposing to define qualified purchasers in a way that has the potential to include a large percentage of Regulation A investors, we believe that compliance costs associated with blue sky laws will be eliminated for most offerings, making them similar to Regulation D offerings and registered offerings in this respect.

associated with liquidity and access to investors. We recognize, however, that this approach may limit the use of Regulation A for certain issuers, and we accordingly are requesting comment on additional considerations for smaller offerings. For example, the ongoing reporting obligations of a Tier 2 offering may be proportionately more burdensome for smaller issuers that are looking to raise substantially less than $50 million, and may not provide the same benefit to smaller issuers that are not pursuing secondary market liquidity. For these issuers, it may also not be reasonable to pursue a Tier 1 offering because the $5 million maximum issuance threshold may be insufficient in light of costs associated with the existing offering process. We recognize that observing market behavior under the proposed approach would provide information that would allow us to assess the need for modifications to the proposed approach, which also could be made when the Commission considers the efficacy of the $50 million threshold, as mandated by Congress every two years.

The disclosure requirements that we are proposing account for the trade-offs identified above and are guided by current and past market experiences. For example, prior to 1999, securities traded over-the-counter (OTC) and quoted on the OTC Bulletin Board (OTCBB) interdealer quotation system were not required to be Exchange Act reporting companies. In January 1999, the SEC approved an OTCBB eligibility rule that required companies whose securities are quoted on OTCBB to file periodic financial reports under the Exchange Act or with their primary regulator if not the SEC.[588] One study evaluating this change found improved liquidity at companies that were already

[588] *See* Order Granting Approval of Proposed Rule Change and Amendment No. 1 from the National Association of Securities Dealers, Inc. Relating to Microcap Initiatives-Amendments to NASD

providing periodic reports, or that chose to comply with Exchange Act reporting requirements to remain eligible for quotation on OTCBB.[589] Approximately three-fourths of the companies that were not already reporting chose not to satisfy the new eligibility requirement by becoming an Exchange Act reporting company and instead entered less regulated and less liquid OTC markets, indicating that, for these companies, the expected costs associated with mandatory public reporting under the Exchange Act outweighed the expected liquidity benefits.[590]

The Tier 2 reporting requirements are substantially less than Exchange Act reporting requirements, but greater than what is currently required for an exemption from registration under the existing Regulation A rules and those under Regulation D. The following table shows a selection of commonly filed reports for Exchange Act registered companies and the analogous form, if any, that would be required for securities issued under Regulation A, as proposed to be amended, or Regulation D.

Overview comparison of differences in reporting requirements for offerings exempt under Regulation D, Regulation A, Regulation A as proposed to be amended and registered offerings.

Common disclosure types	Regulation D	Current Regulation A	Proposed Regulation A Tier 1	Proposed Regulation A Tier 2	Registered[591]

Rules 6530 and 6540, Exchange Act Release No. 34-40878 (Jan. 4, 1999), 64 FR 1255 (Jan. 8, 1999).

589 Bushee, Brian J., and Christian Leuz, (2005), *Economic consequences of SEC disclosure regulation: evidence from the OTC bulletin board*, Journal of Accounting and Economics 39.2 , pp. 233-264.

590 *Id.*

591 This comparison does not cover offerings by foreign private issuers.

Offering document or notice	D[592]	1-A	1-A	1-A	S-1
Auditors	–	–	–	No requirement for a PCAOB-registered Auditor	PCAOB-registered Auditor
Report of material events	–	–	–	1-U	8-K
Interim report	–	–	–	1-SA	10-Q
Annual report	–	–	–	1-K	10-K
Termination of registration	–	2-A	1-Z	1-Z	15

Tier 2 reporting requirements are also greater than what is proposed to be required under Tier 1. We believe that it is appropriate to require some additional disclosure from issuers of larger offerings up to $50 million in order to better protect investors under the new Regulation A regime.

We recognize that even if the proposed rules reduce compliance costs and require sufficient disclosure to enable investors, particularly retail investors, to make informed capital allocation decisions, some issuers may still prefer other offering exemptions. Preferences for other offering exemptions could be particularly strong given that general solicitation is now permissible in certain cases under Rule 506(c). In particular, it is possible that issuers relying on Rule 506(c) may now be in a better position to identify institutional and accredited investors, such that seeking capital from a broader retail investor base is not required or desired. In addition, eliminating the ban on general solicitation for certain Rule 506 offerings may encourage new trading platforms for privately placed securities once their resale restrictions are lifted. While secondary

[592] Form D is a notice of sale under Regulation D, not a disclosure document, although certain disclosures are required. Regulation D does not require filing of a disclosure document with the Commission, and does not generally impose disclosure requirements except when sales are made to purchasers that are not accredited investors. *See* Rule 502(b), 17 CFR 230.502(b).

markets for private offerings are unlikely to achieve the same level of liquidity of OTC or other listing venues, it is nonetheless possible that trading platforms could achieve levels of liquidity sufficient to allow certain types of securityholders (like founders and other affiliated owners) to exit once resale restrictions are lifted.

2. Scope of Exemption

a. Eligible Issuers

Under the proposed rules, and consistent with current Regulation A eligibility requirements, eligible issuers include any companies organized and with their principal place of business inside the United States or Canada excluding investment companies, reporting companies, blank check companies, and issuers of claims on natural resources, and certain disqualified "bad actors". We also propose to exclude some issuers that are currently eligible to rely on Regulation A. Specifically, the Commission is proposing to exclude from eligibility issuers that are subject to a denial, suspension, or revocation order by the Commission pursuant to Section 12(j) of the Exchange Act within the five years immediately preceding the filing of the offering statement and issuers that have not filed required ongoing reports pursuant to Regulation A, as proposed to be amended, in the two-year period immediately preceding the filing of a new offering statement.

The proposed changes to the Regulation A eligibility requirements would have benefits and costs. In particular, we believe that the proposed exclusion from eligibility of issuers that have not complied with ongoing reporting requirements in the two-year period immediately preceding the filing of a new offering statement would incentivize issuers that intend to rely on Regulation A in the future to comply with ongoing reporting requirements, which would allow investors to make better informed investment

decisions. This exclusion, however, should not impose additional burdens or costs on issuers that would not have already been incurred with the proposed ongoing reporting requirements of Regulation A.

The Commission is also proposing to exclude from eligibility issuers that are subject to a denial, suspension, or revocation order by the Commission pursuant to Section 12(j) of the Exchange Act within the five years immediately preceding the filing of the offering statement. This exclusion may incentivize Exchange Act registrants to comply with their obligations, and would prevent companies with a history of reporting non-compliance from relying on Regulation A. We also recognize that this exclusion could prevent offerings by issuers that intend to comply with Regulation A requirements despite a history of Exchange Act non-compliance, which could limit capital formation in certain situations.

The proposed rules continue to exclude non-Canadian foreign issuers from use of Regulation A, but, as discussed above, we are soliciting comment about the alternative of amending Regulation A to expand eligibility to additional foreign issuers. Allowing participation by non-Canadian foreign issuers could increase competition between foreign and domestic issuers for U.S.-based investor capital. This increased competition could raise the cost of capital for Regulation A issuers to the extent that there is not a commensurate increase in the supply of Regulation A capital. It is also possible, however, that expanding eligibility to use Regulation A to non-Canadian foreign issuers could attract additional investor capital to the market such that the change would not have a material impact on domestic issuers' cost of capital.

The proposed rules also continue to exclude blank-check companies. We believe that this exclusion is appropriate given the potential difficulty for retail investors to evaluate the investment opportunities posed by these issuers, particularly because the issuers do not explicitly identify investment opportunities at the time of offering. The continued exclusion of blank check companies could prevent some legitimate early-stage companies that would otherwise be eligible issuers from relying on Regulation A.

We are not proposing to amend the existing exclusion of companies subject to the ongoing reporting requirements of Section 13 or 15(d) of the Exchange Act ("reporting companies"). As an alternative, we could amend Regulation A to expand the category of eligible issuers to include reporting companies. Although reporting companies do occasionally rely on exemptions for private placements, we believe that many reporting companies generally would not benefit from eligibility to rely on Regulation A as proposed to be amended. In particular, reporting companies are subject to Exchange Act reporting requirements that are more extensive than those proposed for Regulation A, so would not benefit from the reduced disclosure requirements; although reporting companies could potentially benefit from the liability standards conferred by reliance on Regulation A, and such issuers that do not have the class of securities being offered already listed, or are not simultaneously listing, on a national securities exchange could potentially benefit from blue sky law preemption. Nonetheless, we believe that the benefits of amending Regulation A to permit reporting companies to rely on the exemption are minimal.[593]

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[593] This exemption does not bar reporting companies from suspending or terminating their reporting obligations and then relying on Regulation A. This option could appeal even to large reporting companies if they are not looking to raise more than $50 million of new capital. Many follow-on

The proposed rules also continue to exclude investment companies and BDCs. If, as an alternative, the Commission were to permit investment companies to use Regulation A, offerings from investment companies could increase investment opportunities for retail investors. Additionally, the Commission recognizes that permitting investment companies to rely on Regulation A could enhance capital formation indirectly. Specifically, if the use of proposed Regulation A decreased the cost of capital for investment companies and those savings were passed through to the company recipients of the investment companies' capital, expanding the eligibility for Regulation A to investment companies could potentially enhance capital formation.[594]

b. Eligible Securities and Maximum Offering Size

Consistent with the statute, the proposed rules increase the maximum offering size from $5 million to $50 million of "equity securities, debt securities, and debt securities convertible or exchangeable to equity interests, including any guarantees of such securities." The proposed rules exclude asset-backed securities ("ABS") from eligibility. As discussed above, the Commission does not believe that ABS issuers are the intended beneficiaries of the mandated expansion of Regulation A. ABS are designed to pool the risk of already-issued loans and other financial assets, and, in this respect, do not constitute new capital formation. We recognize, however, that allowing ABS offerings under Regulation A could, in certain cases, lower the cost of capital for underlying

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offerings, for example, are for less than $50 million, as discussed above. This could have both benefits (in the form of reduced transaction costs and compliance costs for issuers) and costs (in the form of reduced accountability and reduced information available to investors).

594 Brewer, Elijah, et al. (1996), *Performance and access to government guarantees: The case of small business investment companie*s, Economic Perspectives – Federal Reserve Bank of Chicago 20, pp. 16-30.

borrowers whose loans are eventually securitized by ABS issuers and therefore indirectly facilitate capital formation.[595]

Although there are potential indirect benefits from allowing ABS offerings under Regulation A, we believe that, in practice, Regulation A would have little appeal to ABS issuers if available. Most ABS offerings are much larger than the maximum allowable offer size under the proposed rules. Average ABS offering sizes are generally well over $50 million.[596] Because of their large size, unregistered ABS offerings—for which Regulation A might be an alternative offering method—currently target Qualified Institutional Buyers (QIBs) under Rule 144A. For these reasons, we do not believe excluding ABS from eligibility for Regulation A will have an adverse effect on capital formation.

As explained above, we are proposing to increase the maximum offering size of Regulation A offerings by introducing two tiers of offerings. Tier 1 offerings may be up to $5 million and Tier 2 offerings may be up to $50 million. As compared to the current rules, the increase in the offering limit for some Regulation A offerings should significantly lower issuance costs as a proportion of proceeds to the extent that issuers face certain fixed costs or costs that do not otherwise scale in proportion to offering size.

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595 This indirect effect may result because, due to bank accounting standards and capital requirements, securitization allows banks sponsoring ABS issuers to move assets off balance sheet, freeing up capital for additional loans. The resulting increase in capital available for lending could lead to lower borrowing costs for all borrowers down the capital supply chain. *See, e.g.*, Pennacchi, George G. (1995), *Loan sales and the cost of bank capital*, The Journal of Finance 43, no. 2, pp. 375-396.; Carlstrom, Charles T., and Katherine A. Samolyk (1995), *Loan sales as a response to market-based capital constraints*, Journal of Banking & Finance 19, no. 3, pp. 627-646.

596 Our analysis indicates that from 2011-2013, 2.9% of ABS issuances were below $50 million. This calculation uses the AB Alert and CM Alert databases and includes only private label (non-GSE) ABS deals.

This could make Regulation A, as proposed to be amended, more cost effective and attractive for issuers than existing Regulation A.[597]

Increasing the maximum offering size could lead to improved liquidity of the securities sold in offerings under Regulation A as proposed to be amended, to the extent that larger issuances permit greater breadth of ownership.[598] This would be of particular benefit to companies that have a greater interest in floating their securities in the public market for the purpose of creating liquidity than in raising capital. Greater investor participation, particularly retail investor participation, could increase investors' demand for liquidity, resulting in more frequent trading and further increases in liquidity. As a result of improved liquidity, current and potential investors in larger Regulation A offerings could more easily unwind their investments and at lower cost, thus making such investments more attractive.

The increase in maximum offering size could also increase the potential feasibility and value of intermediation services, such market making and analyst coverage, with respect to Regulation A securities. These services require sufficient investor demand for securities and information following the issuance because market makers and analysts are generally compensated on a per transaction or subscription basis. The presence of these intermediation services could also have a positive impact on

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597 Section 401 of the JOBS Act also requires the Commission to review the $50 million offering limit not later than two years after enactment of the JOBS Act and every two years thereafter and, if the Commission decides not to increase the amount, requires that it report its reasoning to Congress. This requirement will benefit issuers and investors by establishing a regular schedule for the Commission to review whether the offering limit remains appropriate or should be increased.

598 Grullon, Gustavo, George Kanatas, and James P. Weston, *Advertising, breadth of ownership, and liquidity*, Review of Financial Studies 17.2, pp. 439-461. The study shows that large issuances permit greater analyst coverage, which leads to higher breadth of ownership.

investor participation and aftermarket liquidity of Regulation A offerings, providing further demand for such services. It is also possible, however, that even the large increase in maximum offering size included in the statute and proposed rules would not be sufficient to make such services economically feasible. [599]

Lastly, the increased maximum offering size could make Regulation A more attractive to larger or more mature companies that are in less need of capital than business start-ups. For these issuers, secondary market liquidity may be the primary goal of an offering, and it is possible that their resulting market capitalization could be much greater than the maximum offering size.[600] It is not clear whether existing OTC markets would be able to supply the liquidity necessary for large issuers.

c. Limitations on secondary sales

We propose to permit sales by selling securityholders of up to $1.5 million in Tier 1 offerings and to $15 million in Tier 2 offerings in any twelve-month period, which represents 30% of the total maximum offering size.[601] This percentage is consistent with the current Regulation A rules, which permit secondary sales of up to $1.5 million, or 30% of the $5 million maximum offering size. The proposed rules would also eliminate current Rule 251(b), which prohibits resales by affiliated parties unless the issuer has had

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599 For instance, one prominent study finds that firm size is an important predictor of analyst coverage. *See* Barth, Mary E., Ron Kasznik, and Maureen F. McNichols., *Analyst coverage and intangible assets.* Journal of Accounting Research 39.1 (2001): 1-34.

600 For instance, an issuer that floats 20% of its shares at $50 million would be valued at $250 million following the issuance. For this issuer, secondary market liquidity may facilitate subsequent offerings by founders, employees, affiliates, and other pre-issuance shareholders who are seeking a partial or full exit of their holdings.

601 So, for example, an offering under $5 million but involving secondary sales in excess of $1.5 million would require exemption under section 3(b)(2) of the Exchange Act and would therefore be a Tier 2 offering.

operating income in at least one of the last two years.[602] As discussed above, selling securityholder access to Regulation A has historically been an important part of the exemptive scheme, and for some issuers, secondary market liquidity and the ability for significant company insiders and affiliates to exit all or a portion of their holdings in the issuer may be a more important consideration than the ability to raise new capital.[603] Hence, we believe that removing the limitation on affiliate resales would have negligible costs and could enhance capital formation and allocative efficiency of capital; however, it is also possible that the limit on resales would not be a constraint on selling securityholders in most instances. The table below shows that if the proposed $15 million resale cap for Regulation A Tier 2 offerings had been applied to registered offerings conducted in 2012, only a small fraction of offerings below $50 million would have been affected.

Overview by offering size of the percent of registered offerings conducted in 2012 that would have been affected by a $15 million limit on secondary sales.

	Initial Public Offerings[604] (millions)			**Follow-on Public Offerings[605] (millions)**		
	<$5	**$5-$50**	**>$50**	**<$5**	**$5-$50**	**>$50**
Average percentage of proceeds to existing shareholders sales	0.0%	1.4%	13.4%	2.8%	5.1%	21.7%
Percentage offerings with proceeds to existing shareholders > $15 million	n/a	0.8%	26.5%	n/a	0.0%	6.2%

602 Tier 1 offerings may still be subject to state law limitations on secondary sales and sales from affiliates.

603 *For example, see* Rydqvist, Kristian, and Kenneth Högholm (1995), *Going public in the 1980s: evidence from Sweden,* European Financial Management 1.3, pp. 287-315.

604 These estimates use data provided by Capital IQ and are calculated by comparing the total IPO proceeds to the proceeds from the IPO that went to incumbent shareholders as disclosed on Form S-1.

605 These estimates use SCD data provided by Thompson Analytics and, as above, these numbers are calculated by comparing total offering proceeds to the proceeds that went to incumbent shareholders.

Permitting these secondary sales provides exit options for company founders, employees, and institutional investors, such as private equity or venture capital investors, which can have a positive effect on capital formation. For instance, because these investors consider available exit options before participating in a new venture, permitting secondary sales increases the incentives to make the original investment.[606] Allowing these exits could also facilitate an optimal re-allocation of human capital. In particular, entrepreneurs and venture capitalists have valuable talents and allowing them to exit may free their attention for new projects and business ventures, and allow them to make investments not otherwise possible.[607] In turn, their exits facilitate new investment opportunities for investors with different skills and risk preferences, and potentially a more appropriate investor base for an issuer.

As an alternative, we could increase the cap on secondary sales above the proposed $1.5 million for Tier 1 offerings and $15 million for Tier 2 offerings. Increasing the cap on secondary sales could provide additional exit options for incumbent shareholders, which could indirectly increase capital formation because exiting investors could more quickly redeploy their capital into new projects and business ventures.

It is also possible that increasing the cap on secondary sales could lead to better monitoring of the underwriter or placement agent if used, as the selling securityholders

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606 Cumming, Douglas J., and Jeffrey G. MacIntosh (2003), *Venture-capital exits in Canada and the United States*, The University of Toronto Law Journal 53.2, pp. 101-199.

607 Zhang, Junfu (2011), *The advantage of experienced start-up founders in venture capital acquisition: Evidence from serial entrepreneurs*, Small Business Economics 36.2, pp. 187-208. Also *see*, Gompers, P., A. Kovner, J. Lerner, D. Scharfstein (2006), *Skill vs. luck in entrepreneurship and venture capital: Evidence from serial entrepreneurs*, No. w12592. National Bureau of Economic Research.

have incentives to ensure that the underwriter values the securities and conducts the offering so as to maximize the value of their investment.[608] Finally, increasing the cap on secondary share offerings could result in more dispersed ownership, resulting in better liquidity in the secondary resale market. As described above, an increase in the portion of securities sold to the public generally increases investor participation and the breadth of ownership. The exit of a large shareholder that accounts for an increase in public float has the benefit of changing the composition of shareholders to those that do not have access to non-public information about the issuer's operations and that predominantly trade based on liquidity needs or publicly available information. Studies show that this can result in lower spreads because it minimizes the inventory risk that dealers face.[609]

Increasing the permitted amount of secondary sales could also result in potential costs. In particular, it is often argued that the incentives of company management are better aligned with other shareholders when managers hold a significant equity interest in the company.[610] Specifically, it can be important for insiders to retain some ownership stake to ensure that the incentives of directors and officers are aligned.[611] Hence, it is possible that affiliate sales, if too large, could be detrimental to purchasing investors. However, there is no conclusive evidence that affiliate sales are associated with poor

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608 Ljungqvist, Alexander, and William J. Wilhelm (2003), *IPO pricing in the dot-com bubble*, The Journal of Finance 58.2, pp. 723-752.

609 Bharath, S. and Amy Dittmar (2010), *Why Do Firms Use Private Equity to Opt Out of Public Markets?*, Review of Financial Studies 23(5), pp. 1771-1818.

610 *See, e.g.*, Jensen, Michael C., and William H. Meckling (1978), *Theory of the firm: Managerial behavior, agency costs and ownership structure*, Journal of Financial Economics 3.4, pp. 305-360.

611 Core, John E., Robert W. Holthausen, and David F. Larcker (1999), *Corporate governance, chief executive officer compensation, and firm performance*, Journal of Financial Economics 51.3, pp. 371-406.; Mehran, Hamid (1995), *Executive compensation structure, ownership, and firm performance*, Journal of Financial Economics 38.2, pp. 163-184.

post-offering performance in the context of IPOs,[612] and there is some evidence that affiliate sales are associated with positive post-IPO performance, as the selling affiliates have incentives to monitor and limit rent capture by underwriters.[613]

There may also be investor protection benefits in some cases from precluding affiliate sales by limiting transactions between informed investors (affiliates) and uninformed investors, such as retail investors. These potential benefits may be limited, as buyers are aware that they are less informed than affiliates and consequently, security prices should generally reflect these asymmetries at the time of the offering.[614] Investors also may prefer to transact with affiliates in an offering because affiliates assume additional liability for misstatements in the offering documents. Thus affiliates may be sensitive to the risks of exploiting uninformed investors during an offering in which they are selling securities. For example, some empirical evidence suggests venture capitalists avoid reputational consequences of selling over-valued securities to uninformed investors during IPOs.[615] Furthermore, we believe that state oversight of affiliate sales in Tier 1 offerings and the proposed investment limitation and financial statement and disclosure requirements for Tier 2 offerings could provide additional investor protection.

Using an operating income criterion for permitting secondary sales could promote investor confidence with respect to issuer viability by reducing the incidence of insiders

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612 Mikkelson, Wayne H., M. Megan Partch, and Kshitij Shah. *Ownership and operating performance of companies that go public.* Journal of Financial Economics 44.3 (1997): 281-307.

613 Ljungqvist, Alexander, and William J. Wilhelm (2003), *IPO pricing in the dot-com bubble*, The Journal of Finance 58.2, pp. 723-752.

614 Easley, David, and Maureen O'Hara (2004), *Information and the cost of capital*, The Journal of Finance 59.4, 1553-1583.

615 Lin, Timothy H., and Richard L. Smith (1998), *Insider reputation and selling decisions: the unwinding of venture capital investments during equity IPOs*, Journal of Corporate Finance 4.3, pp. 241-263.

offloading investments in companies that are not financially viable. However, the Commission believes that doing so may result in an under- or over-inclusion of companies that are viable investment opportunities because there is no single criterion that would provide an accurate measure of the financial health of all companies that could rely on Regulation A.[616]

d. Investment Limitation

Regulation A currently does not place any limitations on the amount of securities that may be purchased by an investor. As explained above, we are proposing that purchasers of Tier 2 offerings be limited to investing no more than 10% of the greater of the investor's annual income and net worth.[617] By limiting investment size in Tier 2 Regulation A offerings in that way, the proposed rules could limit potential losses to investors; however, they could also limit potential gains.

The proposed rules would permit issuers to rely on investors' representation that they are investing no more than 10% of their net worth and annual income. The ability to rely on investor representations should help to mitigate potential costs that issuers could incur in relation to this requirement. At the same time, we realize that investors might make inaccurate representations, whether intentionally or not, which could expose these investors to the risk of increased losses.

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616 Indeed, one study suggests that standard accounting measures are often poor indicators of financial health in small companies. Davila, Antonio, and George Foster (2005), *Management accounting systems adoption decisions: evidence and performance implications from early-stage/startup companies,* The Accounting Review 80.4, pp. 1039-1068.

617 Annual income and net worth would be calculated for individual purchasers as provided in the accredited investor definition in Rule 501 of Regulation D. *See* 17 CFR 230.501. For example, individuals' net worth calculations would exclude the value of their primary residence.

It is also possible that preventing investors from investing more than 10% of the greater of their income and net worth in a Tier 2 Regulation A offering could limit capital formation, particularly if potential purchasers of Tier 2 offerings are not able to meet minimum investment sizes that may be required by some issuers.[618] While these issuers could require smaller minimum investment sizes, doing so may entail searching for, and involving more, investors that contribute to a smaller portion of the offering, which could increase transaction costs. If issuers maintain minimum investment sizes, the proposed rules could limit investor participation in Tier 2 offerings.

Furthermore, in some settings, it may be beneficial for issuers to involve large investments from some types of investors in Regulation A offerings. For example, it could be beneficial to allow company officers to invest a substantial portion of their net worth in an offering as a mechanism to align the officers' incentives with those of the other securityholders. While we recognize that limiting investment size could result in less capital being raised by issuers in Regulation A offerings, we believe that preventing investors from exposing more than 10% of the greater of their income or net worth in a Tier 2 offering could enhance investor protection by limiting potential losses.

As an alternative, we could also require that purchasers of Tier 1 offerings, like purchasers of Tier 2 offerings, be limited to investing no more than 10% of the greater of their annual income and net worth. We believe, however, that because Tier 1 offerings would continue to be subject to additional state oversight, any benefit associated with limiting the investment size in Tier 1 offerings could potentially be eclipsed by state-level

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618 For example, in 2012 approximately half of the Regulation D offerings that would have been eligible for reliance on Regulation A included a minimum investment amount; the median minimum investment amount was $20,000.

protections. We also recognize that Tier 1 offerings would be subject to fewer reporting obligations and other investor protections than Tier 2 offerings, which could make investor losses due to fraud more likely under Tier 1.

e. Integration

We are proposing to allow companies to conduct other exempt offerings that would not be integrated with an offering made in reliance on Regulation A under the proposed amendments, as long as the company complies with the requirements of the exemption relied upon for the particular offering. We could have selected an alternative that would have aggregated the amounts offered in reliance on Regulation A with the amounts offered pursuant to other exempt offerings. Under such an alternative, the amounts raised in other exempt offerings would count toward the maximum offering amount under Regulation A. Compared to this alternative, the ability of issuers to conduct other exempt offerings that would not count toward the maximum offering amount under Regulation A would allow issuers to raise more capital.

f. Exclusion from Section 12(g)

As amended by the JOBS Act, Section 12(g) of the Exchange Act requires, among other things, that an issuer with total assets exceeding $10 million and a class of securities held of record by either 2,000 persons, or 500 persons who are not accredited investors, register such class of securities with the Commission.[619] As explained above, the JOBS Act includes a provision regarding the treatment under Section 12(g) of securities issued in securities-based crowdfunding transactions pursuant to Section 4(a)(6) of the Securities Act, but did not provide a similar provision in Section 3(b)(2).

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[619] *See* Section 501 of the JOBS Act.

We are not proposing to exempt Regulation A securities from the requirements of Section 12(g).

As discussed above and in more detail below, the intent of the proposed rules is to provide sufficient financial disclosure to help investors make informed decisions while limiting the costs imposed on issuers for doing so. We believe that the limited required initial and ongoing disclosures, as proposed, accomplish this objective. If Regulation A issuers cross the shareholder of record threshold described above, however, they would no longer benefit from the limited Regulation A disclosure environment and would be subject to the more comprehensive periodic reporting requirements under the Exchange Act. This may not have significant economic consequences for issuers that are prepared to list on a national securities exchange and would otherwise be required to register with the Commission under Section 12(b) and become subject to Exchange Act reporting requirements. For issuers that do not wish to list on a national securities exchange or do not meet listing requirements, the additional disclosure burden could provide incentive to take actions that would allow them to deregister and cease reporting.[620] In this case, the benefits of the Regulation A environment would be lost to the issuer's securityholders.

Because of the manner in which shareholders of record are tabulated, the likelihood of a Regulation A issuer triggering the 12(g) threshold is low if not triggered at the time of offering. In particular, beneficial owners of Regulation A issuers who hold their shares at a broker are not counted as a record holder. Their shares, held in "street name," are counted at the broker level, so that each brokerage at which there is a least

[620] Leuz, Christian, Alexander Triantis, and Tracy Yue Wang (2008), *Why do firms go dark? Causes and economic consequences of voluntary SEC deregistrations*, Journal of Accounting and Economics 45.2, pp. 181-208.

one beneficial owner would constitute one shareholder of record. Because of this treatment, the number of shareholders of record is often significantly less than the number of beneficial owners.[621]

g. Liability under Section 12(a)(2)

Consistent with current Regulation A, sellers of securities under Regulation A as proposed to be amended would be subject to liability to investors under Section 12(a)(2) for any offer or sale by means of an offering circular or an oral communication that includes a material misleading statement or material misstatement of fact. We believe that this would continue to benefit investors by encouraging issuers and selling securityholders to truthfully disclose all relevant facts associated with an offering, which in turn would allow potential investors to better assess the merits of the offering and make informed decisions. We do not expect this requirement to impose any significant costs beyond the liability already incurred by current Regulation A issuers.

In the context of registered transactions, Section 11 liability applies not only to the issuer and underwriter but also, in certain circumstances, to other specified persons, including the accountants, attorneys and other experts involved in preparing the registration statement. In contrast, Section 12(a)(2) liability applies by its terms only to sellers, and does not extend to "those who merely assist in another's solicitation efforts."[622] Therefore, we anticipate that auditors and placement agents may not demand as much compensation for bearing the legal risks associated with participation in Regulation A offerings as they would for offerings subject to Section 11 liability. We

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621 Langevoort, Donald, and Robert Thompson, '*Publicness' in Contemporary Securities Regulation after the JOBS Act*, Georgetown Law Journal, pp. 12-002.

622 Pinter v. Dahl 486 U.S. 622 (1988), at 651 fn. 21.

recognize, however, that Section 12(a)(2) liability may result in lower levels of scrutiny by such intermediaries and may therefore expose investors to additional risks.

3. Offering Statement

We are proposing a number of modifications to the offering statement required under Regulation A. Under current Regulation A, offering materials are submitted to the Commission in paper form. We are proposing to require electronic submission of offering materials so that these materials can more easily be made available to the public.

As discussed in detail above, electronic submission has numerous benefits to issuers and investors. For example, electronic filing allows offering materials to be more easily accessed and analyzed by regulators, investors, and financial market researchers. We anticipate the effect of providing electronic access to offering materials to the public will promote liquidity and pricing efficiency for the issued securities. We also recognize that electronic filing on EDGAR may impose costs on issuers, as discussed below.

We also are proposing a number of modifications to Form 1-A intended to streamline the type of information included in the offering circular. In general, we are proposing to maintain Form 1-A's three-part structure and to make various revisions and updates to the form. For Part I, the substantive additions to Regulation A items are: issuer eligibility, bad actor disqualification and disclosure, and a summary of key issuer financial information and offering details. Since most of this information is already contained in other offering materials, the additional reporting burden in Part I of the Form 1-A should not entail significantly higher costs in terms of time or out-of-pocket expenses.

Regulation A issuers currently are required to file their offering statements on paper. Paper documents are difficult to process both for the Commission and for investors, analysts, and other researchers. The proposed rules require issuer and offering details in Part I of Form 1-A to be reported in XML format that once filed with the Commission will be machine readable. This format will allow for more efficient reviews and the systematic tracking of offering particulars by investors, regulators, and other market participants such as financial market data aggregators.

The rule also proposes eliminating one of the three alternate models for providing narrative disclosure under Part II of the offering statement. Currently, issuers can choose between Model A (for issuers that are corporations only), Model B, and Part 1 of Form S-1 as described in the release. Elimination of Model A, wherein issuers provided disclosure in a question-and-answer format, is unlikely to affect most issuers, as historically, only about 20% of issuers have elected to use Model A. Eliminating Model A also addresses regulators' concerns about possible confusion that could result from the lack of uniformity of information presented in the question-and-answer in the format. Issuers continue to have the option of using Form S-1.

The proposed changes to Model B include statutorily required disclosures and a section containing management discussion and analysis of the issuer's liquidity, capital resources, and business operations. As discussed in more detail below, these additional items may impose costs on the issuer, while providing important information to investors.

Consistent with JOBS Act requirements with regard to ongoing reporting by Regulation A issuers, we are proposing to require offering materials to include audited financial statements, but only for issuers conducting a Tier 2 offering. The benefits of

audited financial statements should provide investors with greater confidence in the accuracy and quality of the financial statements of issuers seeking to raise larger amounts of capital. We understand that audited financial statements could entail significant costs to issuers, and that the costs of an audit may discourage the use of Regulation A as proposed to be amended. Based on a compilation of data submitted by reporting companies, the average cost of an audit for offerings of less than $50 million is approximately $114,000.[623] Additionally, the proposed rules do not require that the auditor be PCAOB registered, which could reduce the cost of an audit for some issuers.

The proposed amendments also include a limitation on the age of financial statements at the time of qualification or filing (on these dates, financial statement data must not be older than nine months). This provision ensures that qualification is based on information that closely reflects a company's current financial condition. The additional costs from these changes are somewhat mitigated by decreases in disclosure requirements regarding the issuer's business and transactions with related persons. The higher level of disclosure would, however, enable investors to have better information for making their investment decisions.

The proposed rules would also allow for continuous or delayed offerings of eligible securities by an eligible issuer under Regulation A, on a basis analogous to shelf registration under Rule 415 for registered offerings, although acquisition shelves would not be permitted under Regulation A. Unlike existing Regulation A, the proposed rules also restrict at-the-market shelf offerings. Issuers would need to update their offering

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[623] *See* Audit Analytics, *Auditor-Fees*, *available at* http://www.auditanalytics.com/0002/audit-data-company.php. The auditor fee database contains fee data disclosed by SEC reporting companies in electronic filings since January 1, 2001.

circulars annually and after the second fiscal quarter, the same timetable as is proposed to apply for ongoing reporting requirements.

The current Regulation A rules allow for continuous or delayed offerings under Rule 415, but Rule 415 only discusses registered offerings, which may have caused confusion in its application to Regulation A. The provisions in Regulation A as proposed explicitly allow for continuous or delayed offerings and would provide greater clarity. It would now be clear that eligible issuers would have greater flexibility to select the timing of their offerings based on macroeconomic conditions such as interest rates and market volatility, or other company specific factors that may contribute to a successful offering.[624] Issuers would not have to wait for the Commission or a state regulator to complete what can sometimes be a lengthy review process. These factors should contribute to more timely financing decisions and higher capital market efficiency. For example, existing research for Rule 415 offerings in the registered offering market shows that costs of intermediation in shelf offerings, and consequently the cost of raising equity through shelf registration, is lower than through traditional registration.[625]

Excluding at the market offerings will avoid situations where sales at fluctuating market prices result in a breach of the offering ceiling or the cap on secondary sales. Issuers could thus avoid losing their exemption under Regulation A due to unanticipated market factors. While eligible issuers have to file periodic updates and amendments as described above, they have the flexibility to file only a supplement to the offering circular

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[624] Bayless, Mark and Susan Chaplinsky, 1996, "*Is there a window of opportunity for seasoned equity issuance*?" Journal of Finance 51, 253–278.

[625] Bethel, Jennifer and Laurie Krigman, "*Managing the Cost of Issuing Common Equity: The Role of Registration Choice"*, Quarterly Journal of Finance and Accounting, 47 (4) (2008), pp. 57–85.

if there were no fundamental changes. Hence, the cost to issuers of having the flexibility to make a continuous or delayed offering could be minimal.

4. Solicitation of Interest ("Testing the Waters")

Consistent with Title IV of the JOBS Act, the proposed rules permit issuers to "test the waters" by soliciting interest in the offering. Regulation A issuers would be allowed to use all forms of communications with all potential investors in these communications. Under current Regulation A, testing the waters is permitted only until the offering statement is filed with the Commission, and solicitation material is required to be filed prior to or concurrent with first use. Under the proposal, testing the waters would be permitted both before and after filing of the offering statement, and testing the water materials would be required to be filed with the Commission at the time of initial submission of the offering statement, and would be updated thereafter.

In general, allowing issuers to gauge interest through testing the waters may reduce uncertainty regarding whether an offering could be completed successfully. If after testing the waters, the issuer is not confident that it will attract sufficient investment, the issuer can consider alternate methods of raising capital and thereby avoid the costs of an unsubscribed or under-subscribed offering. Allowing solicitation prior to filing enables issuers to determine market interest in their securities before incurring the costs of preparing and filing an offering statement.

By expanding the permissible scope of testing the waters, the proposed rules could have several benefits. In particular, allowing issuers to advertise their intention to raise capital prior to qualification of the offering statement could decrease the time required to raise the desired amount of capital. This option may be useful for smaller

companies, especially early-stage companies, which may find it too costly to solicit through intermediaries. Thus, at least for some companies, the proposed rules could lead to lower search costs and therefore lower issuance costs. The expansion of testing the waters could also increase the type and extent of information available to investors, which could lead to more efficient prices for the offered securities.

In addition, to the extent that the proposed rules permit testing the waters for an expanded period of time, investors who previously found it difficult to find investment opportunities in private offerings may be able to find and potentially invest in a larger and more diverse pool of investment opportunities, allowing investors to more efficiently allocate their capital. The net effect would be to enhance both capital formation and allocative efficiency. Further, requiring issuers to attach the offering statement to their testing the waters materials (or providing information about where it can be accessed) would allow investors to be fully aware of the details of the offering material in a timely manner that would support sound investment decisions.

We recognize that there would also be potential costs associated with expanding the use of testing the waters. In particular, to the extent that testing the waters increases under the proposed rules, the proposed rules could result in increased levels of inappropriate and potentially fraudulent activity, because solicitation of these offerings can be directed towards all investors, including non-accredited and unsophisticated investors. To some extent, these costs are mitigated by the application of Section 12(a)(2) and the general antifraud provisions of the federal securities laws. By expanding the scope of permissible testing the waters, the proposed amendments could also lead to investor confusion about how to process the different disclosure materials

they receive. For example, investors already aware of an impending offering through testing the waters materials may neglect to read the offering circular, which could be substantively different from the material distributed when testing the waters.

The Commission could require submission of testing the waters materials before or concurrent with first use, allowing regulators to better assess how testing the waters is used to gauge investor interest prior to filing of the offering statement. Requiring initial submission of testing the waters materials could increase costs for issuers that decide not to proceed with the offering after testing the waters. Requiring submission before filing the offering circular could decrease issuers' willingness to test the waters and could potentially limit the overall reliance on Regulation A. Any additional solicitation materials that could result from requiring early submission would also lead to an increase in the amount of material available for investors about the offering, which could increase confusion and the costs incurred by investors evaluating their investment opportunities.

5. Ongoing Reporting Requirements

Requiring limited ongoing disclosure could improve investor decision-making and ultimately benefit issuers by improving the price efficiency of securities issued through an amended Regulation A offering, to the extent that secondary markets for these securities develop. Ongoing financial disclosures and mandatory disclosures of key material events would allow existing and potential future investors to periodically update their expectations of the issuer's prospects and act accordingly. By standardizing the content, timing, and form of these disclosures, the proposed amendments would make it easier for investors to compare information across issuers than if disclosure decisions were otherwise left to voluntary, bilateral arrangements between issuers and investors, as

would be the case without mandatory disclosures. Hence, the proposed amendments to require ongoing disclosure under Regulation A would eliminate many potential differences in disclosures between issuers that could otherwise impair the capital allocation decisions of investors,[626] particularly to the extent that such securities trade in OTC markets.

More generally, the proposed ongoing disclosure requirements should result in fewer information asymmetries between issuers and their investors than currently exist for securities offered under the existing Regulation A or other exempt offering methods. The enhanced disclosure requirements should help improve the ability of investors with different risk preferences to identify investment opportunities best suited for their risk tolerance. They will provide investors with a useful benchmark with which to evaluate the performance of other companies, both within and outside of the proposed Regulation A market. This enhanced information environment should improve the allocative efficiency of capital and facilitate the subsequent transfer of issued securities in secondary markets, allowing for more efficient pricing and liquidity. [627]

In addition to the direct costs of preparing the mandatory disclosures, issuers of securities in a Regulation A offering under the proposed rules would be subject to potential indirect disclosure costs by revealing to their competitors and other market

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626 *See, e.g.*, Luigi Zingales (2009), *The Future of Securities Regulation*, Journal of Accounting Review, Vol 47, pp. 391-425.

627 *See* Graham, J., C. Harvey and S. Rajgopal (2005), *The Economic Implications of Corporate Financial Reporting*. Journal of Accounting and Economics 40, pp. 3-73; Durnev, A., R. Morck and B. Yeung (2003), *Value Enhancing Capital Budgeting and Firm-Specific Stock Returns Variation*, Journal of Finance 59, pp. 65-106.

participants information about their business not previously required to be disclosed.[628] For these issuers, ongoing reporting requirements under Regulation A may render alternative offering methods more appealing, such as Rule 506(c) of Regulation D, which allows general solicitation but does not impose any ongoing disclosure requirements.

Nonetheless, the indirect costs of increased disclosures are present for any issuer seeking improved liquidity through access to public capital markets and a broader investor base that includes unaccredited investors. Enhanced disclosure is likely to improve the liquidity of the securities of Regulation A issuers in the secondary market, particularly for securities that are traded in the OTC market.[629] As discussed above, there is a positive feedback effect from increased liquidity, whereby increased trading engenders more accurate pricing by incorporating a greater number of investors' views. More accurate pricing, in turn, encourages greater investor participation and greater liquidity, and provides investors with more accurate information. Increased price efficiency can also facilitate a lower cost of capital by lessening the discount investors otherwise place on illiquid securities and securities for which there is increased risk of asymmetric information. Hence, there would be significant indirect effects of improving capital formation.

a. Periodic Reporting Requirements

Currently, Regulation A issuers do not have ongoing reporting obligations. Under the proposed amendments, issuers that conducted Tier 2 offerings would be required to

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628 Campbell, Tim S (1979), "*Optimal investment financing decisions and the value of confidentiality*." Journal of Financial and Quantitative Analysis, pp. 913-924.

629 Ang, A., Shtauber, A., & Tetlock, P. (2011). *Asset pricing in the Dark: The Cross Section of Over-the-Counter Stocks*. Review of Financial Studies, forthcoming.

provide annual audited financial statements on Form 1-K. The Commission is further proposing that issuers that conducted Tier 2 offerings provide a semi-annual update on Form 1-SA and current event reporting on Form 1-U. These proposed requirements are more extensive, in terms of breadth and frequency, than those for current Regulation A offerings and those for other exempt offerings.[630] The proposed additional disclosures are intended to reduce the information asymmetries between companies that conduct Tier 2 offerings and their potential investors, both at the time of the offering, through the disclosure document, and on an ongoing basis, via ongoing reporting. While we considered whether we should require certain additional disclosures to be provided in structured data format, the proposed rules do not require these disclosures to be machine readable. Not requiring structured data should help to limit costs to issuers while still providing meaningful information to investors. While not requiring a structured data format could limit the ability for investors, academics, regulators and other market participants to analyze firms relying on Regulation A, as proposed to be amended, we do not believe it is advisable to impose such a requirement on issuers relying on the exemption.

b. Current Event Reporting Requirements

As discussed above, in addition to the proposed annual and semi-annual reporting requirements, the proposed rules include several event-based disclosure requirements, similar to the event-based reporting of reporting companies on Form 8-K. These events, like the ongoing financial performance of a company, can be important determinants in

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[630] Small private companies, such as those that might consider a Regulation A offering, typically do not disclose information as frequently or as extensively as public companies, if at all. Moreover,

an investor's capital allocation decision. The direct cost of reporting these events is often minimal, particularly to the extent that the disclosed information is simply the announcement of a new development, such as the sale of an unregistered security. Of the 26 relevant current reporting items on Form 8-K, listed in the table below, eleven are proposed to be required to be reported, in whole or in part, by issuers that conducted Tier 2 offerings.

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unlike public companies, small private companies are not required to have their financial statements audited or to hire an independent third party to certify the information disclosed.

8-K item number	Description of event triggering reporting obligation	Proposed Regulation A requirement
	Section 1 - Registrant's Business and Operations	
Item 1.01	Entry into a Material Definitive Agreement.	Sometimes
Item 1.02	Termination of a Material Definitive Agreement.	Sometimes
Item 1.03	Bankruptcy or Receivership.	Yes
Item 1.04	Mine Safety – Reporting of Shutdowns and Patterns of Violations.	No
	Section 2 - Financial Information	
Item 2.01	Completion of Acquisition or Disposition of Assets.	Sometimes
Item 2.02	Results of Operations and Financial Condition.	No
Item 2.03	Creation of a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement of a Registrant.	No
Item 2.04	Triggering Events That Accelerate or Increase a Direct Financial Obligation or an Obligation under an Off-Balance Shelf Arrangement	No
Item 2.05	Costs Associated with Exit or Disposal Activities.	No
Item 2.06	Material Impairments.	No
	Section 3 - Securities and Trading Markets	
Item 3.01	Notice of Delisting or Failure to Satisfy a Continued Listing Rule or Standard; Transfer of Listing.	N/A
Item 3.02	Unregistered Sales of Equity Securities.	Yes
Item 3.03	Material Modification to Rights of Security Holders	Yes
	Section 4 - Matters Related to Accountants and Financial Statements	
Item 4.01	Changes in Registrant's Certifying Accountant.	Yes
Item 4.02	Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review	Yes
	Section 5 - Corporate Governance and Management	
Item 5.01	Changes in Control of Registrant.	Yes
Item 5.02	Departure of Directors or Certain Officers; Election of Directors; Appointment of Certain Officers; Compensatory Arrangements of Certain Officers	Sometimes[631]
Item 5.03	Amendments to Articles of Incorporation or Bylaws; Change in Fiscal Year.	No
Item 5.04	Temporary Suspension of Trading Under Registrant's Employee Benefit Plans	No
Item 5.05	Amendments to the Registrant's Code of Ethics, or Waiver of a Provision of the Code of Ethics.	No
Item 5.06	Change in Shell Company Status.	No
Item 5.07	Submission of Matters to a Vote of Security Holders.	No
Item 5.08	Shareholder Director Nominations	No
	Section 6 -Asset-Backed Securities (N/A)	
	Sections 7 – 9 - Other	
Item 7.01	Regulation FD Disclosure.	No
Item 8.01	Other Events.	Optional
Item 9.01	Financial Statements and Exhibits.	Sometimes

We have chosen to require the reporting of key current events based on our assessment of their potential usefulness to investors in these types of offerings and issuers and based on the suggestions of commenters. For instance, we are proposing to require the disclosure of certain events that directly affect the rights of securityholders (Items 3.02 and 3.03). Because sales of securities provide important information about an

issuer's capital structure and could dilute existing shareholders, these events can have direct securities pricing implications. We are also proposing to require issuers to disclose changes in their certifying accountant or non-reliance on previously issued financial statements or a related audit report (Items 4.01 and 4.02). We believe that these items are relevant information for investors who rely on the information made available to them through the issuer's periodic reporting, and it is important for investors to know if financial statements could be incorrect or compromised in some way.

We also propose requiring disclosure of certain meaningful corporate events. Bankruptcy (Item 1.03) can have direct effects on valuation as it changes a number of obligations of the issuer,[632] the fiduciary duties of executive officers and directors,[633] and can potentially call into question the claims of existing securities to issuer assets and cash flows.[634] Similarly, reorganizations, such as takeovers (Item 5.01), debt restructuring and mergers (Items 1.01, 1.02, and 2.01), change companies' obligations and organizational structure in ways that can have a material impact on security prices.

Finally, we propose requiring the disclosure of changes in issuer management, which can have direct implications on the issuer's future prospects and security prices.[635] Therefore we believe disclosure of management changes would benefit investors.

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631 Form 1-U focuses on officers, as discussed in the release.

632 For example, the automatic stay provision suspends contractual obligations.

633 Firms nearing the "zone of insolvency" have a responsibility to maximize "enterprise value", which is generally not the same as firm value, as it can include the value of providing employment, among other things.

634 Renegotiation plans are subject to approval from a majority of owners of the "fulcrum" security which can be difficult to determine.

635 Murphy, Kevin J., and Jerold L. Zimmerman (1993), *Financial performance surrounding CEO turnover*. Journal of Accounting and Economics 16.1 pp. 273-315.

c. Termination or Suspension of Reporting Requirements

The proposed rules allow for a termination or suspension of an issuer's ongoing reporting obligations if the number of record holders of the class of securities to which the Regulation A offering statement relates falls below 300 persons or suspension upon registration of a class of securities under Section 12 of the Exchange Act or registration of an offering of securities under the Securities Act.

For Tier 2 issuers, which are subject to substantial ongoing reporting requirements, the option for suspending or terminating the Regulation A reporting obligations could be beneficial, especially for issuers that are not seeking secondary market liquidity, and smaller issuers for which the fixed costs of complying with the ongoing disclosure requirements would weigh more heavily.[636] The option to suspend or terminate periodic reporting might be costly for investors because it would decrease the amount of information available about the issuer, making it more difficult to monitor the issuer and accurately price its securities or to find a trading venue that would allow liquidation of the investment. Suspension or termination of reporting might particularly adversely affect minority investors if the lack of current financial or other material information, and/or the presence of large inside or affiliate shareholders could make it easier for controlling shareholders to expropriate capital from minority investors. In most cases we propose to require Tier 2 issuers to notify the Commission upon suspension or termination of reporting requirements through Form 1-Z, which for Tier 2 issuers, will request information regarding the reason for the suspension or termination. To the extent

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636 *See* Request for Comment 90 above (seeking comment on, among other things, whether we should exempt some issuers from ongoing reporting on the basis of whether such issuer has taken steps to foster a secondary market for their securities).

that ongoing reporting is suspended due to registration of a class of securities under the Exchange Act, investors may benefit from enhanced reporting under the Exchange Act requirements.

Although Tier 1 issuers are not subject to periodic and current event reporting requirements, we propose to require issuers of Tier 1 offerings to notify the Commission of their terminated reporting obligation using Form 1-Z upon completion of the offering. Under the proposed rules, Form 1-Z would take the place of Form 2-A, which is currently required upon completion of a Regulation A offering. For Tier 1 issuers, Form 1-Z will require issuers to provide updated information regarding some features of the completed offering, such as the final proceeds raised net of fees.[637] This information will allow the Commission to monitor whether issuers can reliably raise the projected amount of capital in Regulation A offerings. Form 1-Z would elicit limited summary information about the completed offering and the issuer, would not require any additional information from issuers that would not have been forecasted and provided in the offering materials of Tier 1 issuers and, therefore, should not impose substantial additional costs on the issuer.

6. Bad Actor Disqualification

We propose to amend Rule 262 to include bad actor disqualification provisions in substantially the same form recently adopted under Rule 506(d), but without the categories of covered persons specific to fund issuers, which are not proposed to be eligible to use Regulation A.[638] We believe that the proposed disqualification provisions are not likely to impose significant incremental costs on issuers and other covered

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637 We do not propose to require notification of the completion of a Tier 2 offering as the information will be included in other ongoing reporting materials required from issuers of Tier 2 offerings.

638 *See* proposed Rule 262.

persons because the proposed rules are substantially similar to the disqualification provisions under existing Regulation A and other exemptions.

The proposed rules likely would induce issuers to implement measures to restrict bad actor participation in offerings made in reliance on Regulation A, which could help reduce the potential for fraud in these types of offerings. If disqualification standards lower the risk premium associated with the presence of bad actors in securities offerings, any resulting reduction in fraud could also reduce the cost of raising capital to issuers that rely on Regulation A as proposed to be amended. In addition, the requirement that issuers determine whether any covered persons are subject to disqualification might reduce the need for investors to do their own investigations and could therefore increase efficiency.

The proposed disqualification provisions likely would also impose costs on issuers, other covered persons and investors. If issuers are disqualified from participating in offerings made in reliance on proposed Regulation A, they may experience increased costs in raising capital through alternative methods. These costs could hinder potential investment opportunities for such issuers, which could have negative effects on capital formation. In addition, issuers may incur personnel costs to avoid the participation of covered persons who are subject to disqualifying events. Issuers also might incur costs by restructuring share ownership to avoid beneficial ownership of more than 20% from individuals subject to disqualifying events. Finally, issuers might incur costs by devoting resources to seeking disqualification waivers.

As discussed above, we are also proposing a reasonable care exception under Regulation A on a basis consistent with Rule 506.[639] We anticipate that the reasonable care exception also would impose benefits and costs. For example, a reasonable care exception could encourage capital formation by enabling Regulation A offerings to go forward, where issuers might have been deterred from relying on Regulation A if they risked potential liability under Section 5 of the Securities Act for unknown disqualifying events. This exception could increase the potential for fraud by limiting issuers' incentive to determine whether bad actors are involved with their offerings. We also recognize that some issuers might incur costs associated with conducting and documenting their factual inquiry into possible disqualifications. The rule's flexibility about the nature and extent of the factual inquiry required could increase these costs because uncertainty could drive issuers to misunderstand requirements for compliance; however, the flexibility would allow an issuer to tailor its factual inquiry as appropriate to its particular circumstance, thereby potentially reducing costs associated with conducting the inquiry.

The proposed requirement that issuers disclose matters that would have triggered disqualification, had such matters occurred after the effective date of proposed Regulation A, also would impose costs and benefits. The proposed disclosure requirement would likely reduce issuer costs, relative to the cost of disqualification. This approach would not preclude the participation of past bad actors, whose disqualifying events occurred prior to the effective date of the proposed rules, which could expose

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639 *See* proposed Rule 262(b)(4).

investors to the risks that arise when bad actors are associated with an offering. Nevertheless, investors would benefit by having access to such information that could inform their investment decisions. Disclosure of triggering events may also make it more difficult for issuers to attract investors, and issuers may experience some or all of the impact of disqualification as a result. Some issuers may, accordingly, choose to exclude involvement from prior bad actors to avoid such disclosures.

We believe the inclusion of Commission cease-and-desist orders in the list of disqualifying events would not impose a significant, incremental cost on issuers and other covered persons because many might already be subject to Commission cease-and-desist orders or may already be disqualified on the basis of orders issued by state regulators, federal banking regulators and the National Credit Union Administration.[640] The inclusion of Commission cease-and-desist orders in the list of disqualifying events might change how settlement negotiations are conducted between respondents and the Commission, and the Commission could grant an appropriate waiver from disqualification.

Under the proposed rules, orders issued by the CFTC would trigger disqualification to the same extent as orders of the regulators enumerated in Section 302(d)(2)(B)(i) of the JOBS Act (*e.g.*, state securities, insurance and banking regulators, federal banking agencies and the National Credit Union Administration). We believe that including orders of the CFTC would result in the similar treatment, for disqualification purposes, of comparable sanctions. In this regard, we note that the conduct that would typically give rise to CFTC sanctions is similar to the type of conduct that would result in

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[640] *See* SEC Rel. No. 33-9414 (July 10, 2013) [78 FR 44729] ("Bad Actor" adopting release).

disqualification if it were the subject of sanctions by another financial services industry regulator. This provision should enable the disqualification rules to more effectively screen out bad actors.

7. Relationship with State Securities Law

As explained above, Regulation A offerings are subject to registration or qualification under state "blue sky laws," unless the offering is made to "qualified purchasers" (as the Commission may define that term) or is offered or sold on a national securities exchange. Compliance with blue sky law requirements can impose significant costs, predominantly as a result of having to coordinate independent reviews across multiple regulatory regimes when issuers are offering securities to investors in multiple states.[641]

The GAO study of Regulation A offerings found that blue sky law compliance was one of four central factors in the infrequent reliance on Regulation A.[642] Commenters have also raised the importance of state securities law preemption to the utilization of Regulation A.[643] As discussed above, we are concerned that the costs associated with state securities law compliance may deter issuers from using Regulation A, even if the increased cap on offering size and other proposals intended to make Regulation A more workable are implemented. This would limit the possible impact of an amended Regulation A as a tool for capital formation. We believe that

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641 *See* discussion in Section IV.A.1.a. above regarding the determinates of trends in Regulation A issuances.

642 *See* GAO-12-839, "Factors that May Affect Trends in Regulation A Offerings", (July 3, 2012).

643 *See* Fallbrook Letter ("It cannot be understated as to how critical state securities law preemption is to ensuring the Regulation A+ Rules are user-friendly and attractive for utilization by growing companies.").

Regulation A, as we propose to amend it for Tier 2 offerings, would provide substantial protections to purchasers. Under the proposed amendments, a Regulation A offering statement would continue to provide substantive narrative and financial disclosures about the issuer, including an MD&A discussion. We expect that Regulation A offering statements would continue to receive the same level of Commission staff review as registration statements. Additional investor protections would be afforded by Regulation A's limitations on eligible issuers and "bad actor" disqualification provisions, which we are proposing to expand. In addition, the requirements for Tier 2 offerings would provide further protection by requiring the audited financial statements in the offering circular, an obligation for issuers to provide ongoing reporting to purchasers, and a limitation on the percentage of annual income or net worth that an investor could invest in a single offering. Ongoing reporting would assure a continuing flow of information to investors and could support the development of secondary markets for Regulation A securities, offering the prospect of reduced investor risk through liquidity.

Based on these requirements, we are proposing to define the term "qualified purchasers" for purposes of Regulation A to include all offerees in a Regulation A offering and all purchasers in a Tier 2 Regulation A offering. Therefore, as proposed, Tier 1 offerings would be subject to state registration and qualification requirements to the same extent as offerings under current Regulation A, whereas such requirements would be preempted for Tier 2 offerings.

Because state registration requirements were cited as a central factor in the infrequent reliance on Regulation A,[644] we believe that by eliminating these costs of state

[644] *See* GAO-12-839, "Factors that May Affect Trends in Regulation A Offerings", (July 3, 2012).

law compliance for Tier 2 offerings issuers may be more likely to rely on amended Regulation A relative to the current rules under Regulation A, which do not preempt state securities laws.[645] We believe that this definition could facilitate capital formation, as suggested in several comment letters.[646] It is also possible that the preemption of state securities laws for Tier 2 offerings could attract issuers away from offerings conducted under Rule 506, which also provides preemption of state laws, but restricts resales. Given that in 2012 the majority of Rule 506 offerings by eligible issuers were less than $50 million, some shift from Rule 506 to Regulation A is possible; however, we are unable to quantify its magnitude. The infrequent and issuer-specific use of existing Regulation A makes it difficult to identify general findings about the effect of preemption on Regulation A, as proposed to be amended, and to quantify the potential effects of defining qualified purchasers to include all offerees in a Regulation A offering and all purchasers in Tier 2 offerings made under the proposed amendments.

We recognize that the proposal could impose some costs. For example, because the types of issuers and investors that would participate in Regulation A offerings could vary by state, state-specific securities requirements may potentially be tailored to the specific investors and issuers involved in these transactions. It is possible that state securities regulators could provide a meaningful level of investor protection for certain offerings because of greater familiarity with local issuers and investors.

As a policy alternative, we could permit one or a subset of states to qualify certain Regulation A offerings either in place of, or in addition to, federal qualification. This

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645 *See* discussion in Section IV.A.1.a. above.

646 *See, e.g,*. Campbell Letter, Kaplan Voekler Letter, WR Hambrecht + Co. Letter, and Tresslar Letter,

alternative could allow state securities regulators to provide a comparable level of oversight, while still limiting the costs associated with requiring issuers to undergo multiple review processes. Depending on how this alternative is implemented, it may not result in comparable review. For example, if state review is conducted by a single state, issuers could seek review from the state with the least stringent standards and could therefore increase the level of fraud in Regulation A offerings. A potentially greater risk of fraud could negatively affect both investors and issuers, which may find it more expensive to raise capital using Regulation A, as proposed to be amended, if investors demand higher returns because of any perceived increase in the risk associated with this type of offering. The Commission also recognizes that there are a number of alternative definitions of qualified purchaser that we could propose. One alternative that we could have selected is to define as a "qualified purchaser" any purchaser in any Regulation A offering. Compared to the definition in the proposed rulemaking, such a broad definition would allow Tier 1 Regulation A offerings to qualify for the state law preemption, which in turn would decrease the cost of such offerings and potentially enhance capital formation. However, the resulting loss of state review for Tier 1 offerings, combined with the absence of the additional investor protections included in Tier 2, could increase the likelihood of fraud in these offerings.

Other alternatives can be broadly categorized as relying on attributes of the investor, the issuer, and/or the offering. We discuss these alternatives in greater detail below.

We could have selected a policy alternative that defines as a "qualified purchaser" any purchaser who meets a specified income or net worth standard that is set either lower

or higher than the current "accredited investor" definition in Rule 501 of Regulation D. Compared to the definition in the proposed rulemaking, such an alternative could limit the number of offerings that would qualify for state preemption because some investors that purchased securities in Tier 2 offerings would not satisfy these alternative definitions. However, such alternatives might allow the preemption of blue sky law for Tier 1 offerings, which are not subject to the same reporting and other obligations proposed for Tier 2. Limiting eligible investors could result in higher offering costs for potential Regulation A issuers but could also lower the likelihood of fraud in Regulation A offerings compared to the proposed rules.

Another policy alternative that we could have adopted is to define a "qualified purchaser" as any purchaser who purchases securities in a Regulation A offering through a registered broker-dealer. Such an alternative could have limited the number of offerings that would qualify for state preemption because some investors might not use broker-dealers when participating in Tier 2 offerings. Such a limitation could result in higher offering costs for issuers. Additionally, such an alternative could have increased the cost to investors participating in Tier 2 offerings because they would have to pay broker-dealer fees. On the other hand, the presence of registered broker-dealers, who presumably perform due diligence on potential investments, could result in lower likelihood of fraud in this market compared to the proposed rules, and could support blue sky preemption for Tier 1 offerings as well as Tier 2 offerings.

In addition, we could have defined qualified purchasers as investors in a Regulation A offering in which the issuer meets specified conditions. For example, the definition could require that the issuer meet some financial criteria, or that the issuer meet

some governance requirements. The potential advantage of defining qualified purchaser according to attributes of the issuer is that indicators of fraud or risky investments are often characteristics of the issuer (e.g. shell companies, financially distressed companies, etc.). Therefore, a definition based on issuer attributes might effectively identify the investments most in need of additional regulatory oversight. However, it may be difficult to identify criteria that effectively distinguish between fraudulent or excessively risky investments and safer investments, given the wide variety of potential issuers. For example, a high degree of leverage would be indicative of financial distress in some companies, but could be optimal in others.

Lastly, we could have used attributes of the offering, other than or in addition to the proposed requirements for Tier 2, to define qualified purchasers. For example, qualified purchasers could be defined in relation to offerings in which issuers and agents of the issuer assume increased liability for material misstatements and omissions, offerings over a certain size, or offerings with a firm commitment underwriting. While some of these factors are correlated with the riskiness of the offering, using a definition based on these factors could prompt issuers to sub-optimally modify features of the offering in order to avoid state regulation.

We considered the policy alternative suggested by one commenter to preempt blue sky laws with respect to secondary sales of Regulation A securities in addition to preempting blue sky laws governing primary offerings.[647] If blue sky laws pertaining to resales affect the ability to conduct or the cost of transactions involving Regulation A securities, preemption of sales in addition to offers could help facilitate liquid secondary

[647] *See* Paul Hastings Letter.

markets, and could therefore enhance capital formation. We are currently unaware of any evidence suggesting that blue sky laws inhibit trading in OTC markets; therefore, we are not proposing to preempt blue sky laws with respect to secondary sales of Regulation A securities at this time.

8. Effect of Regulation A on OTC Markets and Dealer Intermediation

For securities issued in Regulation A offerings that end up trading on the OTC market, the proposed new Tier 2 disclosure requirements would provide timely and relevant issuer information to broker-dealers that initiate quotations and make markets in these securities and to investors in these securities. This information would be much more detailed than what is currently required for non-reporting issuers under Rule 15c2-11 and reported on Form 211. Similarly, for issuers with existing securities trading on the OTC market, the disclosure proposed to be required under Tier 2 would supplement the issuer information otherwise used by broker-dealers when relying on the existing piggyback exception of Rule 15c2-11.[648] For Tier 2 issuers, the proposed new periodic reporting requirements, including audited financials, would allow broker-dealers to obtain more current information about these issuers more frequently and at lower cost. Thus, broker-dealers quoting securities for such issuers under Rule 15c2-11 would have a more robust basis for believing that the issuer information is accurate. The availability of more current information about Tier 2 issuers would likely improve the pricing efficiency and reduce the likelihood of fraud in the OTC market for their securities. We expect this

[648] Rule 15c2-11(a)(5) currently provides that issuer information must be made available upon request to any person expressing an interest in a transaction in that issuer's security with the broker-dealer. This requirement may have little practical effect because only the first broker-dealer to publish quotations must have the information, and an investor might find it difficult to identify that broker-dealer. In fact, that broker-dealer may no longer be publishing quotations.

effect to be much stronger for issuers that do not currently provide voluntary disclosure to the OTC market. The overall effect of the required disclosure would also depend on what fraction of Regulation A securities eventually trade on the OTC market and on how many current OTC participants decide to make offerings under Regulation A.

A particular set of OTC-listed companies – those that cease reporting and, if necessary, delist from national securities exchanges – might find the proposed rules attractive for raising capital. As mentioned above, the proposed Tier 2 disclosure requirements are less stringent than those applicable to reporting companies. Companies that delist from national exchanges might be able to use Regulation A offerings to raise capital as well as maintain liquid securities in the OTC market. The potential effect of the proposed rules on companies that delist from national securities exchanges is difficult to predict. Companies that would like to maintain liquidity for their securities trading in the OTC market and face a less burdensome disclosure regime than entailed by Exchange Act registration might find Regulation A useful. On the other hand, companies that delist from national securities exchanges because they want to minimize disclosure and cease reporting might find the proposed disclosure requirements under Regulation A too burdensome, and might prefer other offering methods to raise capital (e.g., Regulation D).

The potential future use of Regulation A could also depend on the willingness of financial intermediaries such as placement agents or underwriters to participate in offerings. For example, in registered offerings, underwriters are frequently used to identify potential investors and are primarily responsible for facilitating a successful distribution of the offered securities. Some commenters claim that underwriters are

generally unwilling to participate in small offerings because the commissions are not sufficient to warrant their involvement.[649] If the services of financial intermediaries continue to be limited for small offerings under Regulation A as proposed to be amended, it could be difficult for Regulation A issuers to place all offered securities. As noted in the GAO report,[650] increasing the allowed maximum Regulation A offering amount may make placement agents more inclined to participate in offerings because they would be able to collect more compensation from larger offerings. Furthermore, underwriter costs for offerings under Regulation A as proposed to be amended may be lower than for registered public offerings because underwriters would not take on liability under Section 11 of the Securities Act (although they could be liable as sellers under Section 12(a)(2)). Finally, if the requirements for qualification of Regulation A offerings are substantially lighter than the requirements for registered offerings, an underwriting market could develop to provide expedient Regulation A underwriting services.

C. Request for Comment

Throughout this release, we have discussed the anticipated costs and benefits of the proposed rules and their potential impact on efficiency, competition and capital formation. We request and encourage any interested person to submit comments regarding the proposed rules, our analysis of the potential effects of the rules and other matters that may have an effect on the proposed rules. We request comment from the point of view of issuers, investors and other market participants. With regard to any comments, we note that such comments are of particular assistance to us if accompanied

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649 *See, e.g.,* Karr Tuttle Letter.

650 *See* GAO-12-839, "Factors that May Affect Trends in Regulation A Offerings", (July 3, 2012).

by supporting data and analysis of the issues addressed in those comments. We also are interested in comments on the qualitative benefits and costs we have identified and any benefits and costs we may have overlooked. We urge commenters to be as specific as possible.

Request for Comment

128. What types of companies (*e.g.*, in terms of size, industry, age, etc.) would most likely rely on the amended Regulation A exemption? Would Exchange Act reporting companies, which are ineligible to rely on proposed Regulation A, consider raising additional capital through Regulation A by first terminating or suspending their reporting requirements?

129. Are investors in private companies likely to use the amended Regulation A exemption to exit their investments? Would eliminating current Rule 251(b), which prohibits resales by affiliated parties unless the issuer has had operating income in at least one of the last two years, affect fraud in this market?

130. How likely is the amended Regulation A exemption to attract companies that are considering a traditional IPO? What types of companies (*e.g.*, in terms of size, industry, age, etc.) would prefer a Regulation A offering to a traditional IPO? How would the cost of a traditional IPO compare to the cost of a Regulation A offering? Could a Regulation A offering serve as a stepping stone for a future traditional IPO or a national securities exchange listing?

131. How likely is the amended Regulation A exemption to attract companies that are considering offerings relying on Rule 506(b) or Rule 506(c) of Regulation D? What would be the costs and benefits from relying on the amended Regulation A exemption versus Rule 506(b) or Rule 506(c) of Regulation D? Please provide estimates, where possible.

132. What is the economic effect of the proposed investment limitation in Tier 2 Regulation A offerings? What types of issuers and investors are most likely to be affected by this restriction? Will this restriction enhance investor protection? What would be the economic effect of imposing a similar restriction on Tier 1 Regulation A offerings?

133. Would the amended Regulation A exemption attract intermediaries (e.g., broker-dealers or underwriters) to the market for Regulation A offerings? How would the presence of intermediaries change the cost structure for Regulation A issuers? Would the amended Regulation A exemption make it economically feasible for intermediaries to serve as market makers and provide research and analyst coverage? Would the presence of intermediaries likely increase the chances that a wider variety of investors will participate in Regulation A offerings?

134. Do the proposed disclosure requirements help ensure that investors have a reasonable understanding of the risks and costs of investing in Regulation A securities? If not, what additional requirements would further mitigate the associated risks? How would the costs and benefits of the requirements compare to the costs and benefits of the disclosure that currently exists for

securities offered under the current Regulation A requirements? How would the costs and benefits compare to other exempt offering methods? Please provide estimates, where possible.

135. How would the proposed preemption of state blue sky laws for offerings made to qualified purchasers, as we propose to define that term, affect the costs and benefits of Tier 1 and Tier 2 Regulation A offerings? Please provide estimates, where possible. Would the proposed blue sky law preemption affect fraud and investor protection and capital formation in this market?

136. The Commission is interested in receiving comments, views, estimates and data on all aspects of the proposal and the following:

- Expected size of the Regulation A market (*e.g.*, number of offerings, number of issuers, size of offerings, number of investors, etc., as well as information comparing these estimates to the current baseline);
- Overall economic impact of the proposed rules; and
- Any other aspect of the economic analysis.

137. What would be the economic impact of the policy alternatives discussed in the proposed rules?

V. PAPERWORK REDUCTION ACT

A. Background

Certain provisions of the proposed rules contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[651]

[651] 44 U.S.C. 3501 *et seq.*

We are submitting the proposal to the Office of Management and Budget ("OMB") for review in accordance with the PRA.[652] The titles for the collections of information are:

(1) "Regulation A (Form 1-A and Form 2-A)" (OMB Control Number 3235-0286);

(2) "Form 1-K" (a proposed new collection of information);

(3) "Form 1-SA" (a proposed new collection of information);

(4) "Form 1-U" (a proposed new collection of information);

(5) "Form 1-Z" (a proposed new collection of information);

(6) "Form ID" (OMB Control Number 3235-0328).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. We are applying for OMB control numbers for the proposed new collections of information in accordance with 44 U.S.C. 3507(j) and 5 CFR 1320.13, and OMB has not yet assigned a control number to each new collection. Responses to these new collections of information would be mandatory for issuers raising capital under Regulation A.

B. Estimate of Issuers

The number, type and size of the issuers that would participate in offerings of securities under Regulation A, as proposed to be amended, is uncertain, but data regarding current market practices may help identify the number and characteristics of potential issuers that may offer and sell securities in reliance on the proposed rules.[653] We estimate that there are currently approximately 22 Regulation A filings by issuers per

652 44 U.S.C. 3507(d) and 5 CFR 1320.11.

653 *See* Section I.C. above for a discussion of the data regarding current market practices.

year.[654] While it is not possible to predict the number of filings by issuers relating to offerings made in reliance on the proposed amendments to Regulation A, for purposes of this analysis, we estimate that the number would be 250 offerings per year. We base this estimate on (i) the current approximate number of issuers that, on average in recent years, filed a Form 1-A to qualify a Regulation A offering of securities under the existing rules, plus (ii) 95 percent of the estimated number of registered offering of securities of up to $50 million,[655] plus (iii) an additional four offerings that either would not otherwise occur or would have been conducted in reliance on another exemption from Securities Act registration, such as Regulation D.[656] We believe issuers that have either previously relied on Regulation A or have offered securities in amounts up to the revised offering ceiling of $50 million in a twelve-month period would be similar to the potential issuers that may participate in offerings of securities under Regulation A as proposed to be amended.

C. Estimate of Issuer Burdens

1. Regulation A (Form 1-A and Form 2-A)

Currently, Regulation A requires issuers to file a Form 1-A: Offering Statement and a Form 2-A: Report of Sales and Uses of Proceeds with the Commission. Regulation A has 1.00 administrative burden hour associated with it, while current

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654 From 2009 through 2012, there were 87 Form 1-As filed with the Commission, and 19 qualified offering statements during this same period. *See also* figures for current use of Regulation A in Section I.C. above.

655 *See* figures and graphs for registered offerings cited in Section IV. above (citing approximately 236 registered initial public offerings or follow-on offerings of up to $50 million in calendar year 2012).

656 *See* figures and graphs for registered and exempt offerings under Regulation D cited in Section IV.A.1.a(2). above (citing approximately 12,000 issuances of up to $50 million in reliance on Regulation D in calendar year 2012).

Form 1-A takes approximately 608.00 hours to prepare and Form 2-A takes approximately 12.00 hours to prepare.[657] We do not anticipate that the 1.00 administrative burden hour associated with Regulation A would change as a result of the proposal. As discussed more fully below, we believe the burden hours associated with Form 1-A would change, while Form 2-A and the associated burden hours would be eliminated as a result of today's proposal.[658]

Under the proposed rules, an issuer conducting a transaction in reliance on Regulation A would be able to conduct either a Tier 1 offering or a Tier 2 offering.[659] In either case, a Regulation A issuer would continue to be required to file with the Commission specified disclosures on a Form 1-A: Offering Statement.[660] An issuer also would file amendments to Form 1-A to reflect comments from Commission staff and to disclose material changes in the disclosure previously provided to the Commission or investors.[661] In light of the proposed electronic filing requirements for Regulation A offering materials discussed above,[662] issuers would no longer be required to file a manually signed copy of the Form 1-A with the Commission.[663] Issuers would, however, be required to manually sign a copy of the offering statement before or at the time of non-public submission or filing that would have to be retained by the issuer for a period

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657 *See* Form 1-A at 1; Form 2-A at 1.

658 *See* discussion in Section II.E.1. above.

659 *See* discussion in Section II.B.3. above.

660 *See* 17 CFR 239.91 (Form 1-A) (OMB Control Number 3235-0286) and proposed Rule 252.

661 *See* proposed Rule 252(h).

662 *See* discussion in Section II.C.1. above.

663 *See* discussion in Section II.C.3.d. above.

of five years and produced to the Commission, upon request.[664] As issuers are currently required to manually sign the Form 1-A and file it with the Commission, we do not anticipate the proposed Form 1-A retention requirement would alter an issuer's compliance burden. As proposed, Form 1-A is similar to existing Form 1-A. In some instances, Form 1-A, as proposed, would contain fewer disclosure items than existing Form 1-A (*e.g.*, Part I (Notification) of Form 1-A would not require disclosure of "Affiliate Sales"; Part II (Offering Circular) of Form 1-A would require a description of the issuer's business for a period of three years, rather than five years). Part II of Form 1-A would no longer permit disclosure in reliance on the Model A disclosure format, but direct issuers to follow the provisions of Model B (renamed "Offering Circular") or Part I of Form S-1.[665] In other instances, Form 1-A would contain more disclosure items than existing Form 1-A (*e.g.*, Part I of Form 1-A would require additional disclosure of certain summary information regarding the issuer and the offering; Part II of Form 1-A would require a more detailed management discussion and analysis of the issuer's liquidity and capital resources and results of operations). Form 1-A would require disclosure similar to that required in a Form S-1 registration statement for registered offerings under the Securities Act, but it would require fewer disclosure items (*e.g.*, it would require less disclosure about the compensation of officers and directors, and less detailed management discussion and analysis of the issuer's

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664 *See* Instruction 2. to Signatures in Form 1-A.

665 *See* discussion at Section II.C.3.b. above.

liquidity and capital resources and results of operations) and, under certain circumstances, not require issuers to file audited financial statements.[666]

We expect that issuers relying on proposed Regulation A for Tier 1 offerings of up to $5 million in a twelve-month period would largely be at a similar stage of development to issuers relying on existing Regulation A and would therefore not experience an increased compliance burden with proposed Form 1-A. Given the increased annual offering threshold of $50 million, however, we expect that issuers conducting Tier 2 offerings pursuant to proposed Regulation A may be at a more advanced stage of development than issuers offering securities at a lower threshold. In such cases, the complexity of the required disclosure and, in turn, the burden of compliance with the requirements of proposed Form 1-A may be greater for some issuers than for issuers relying on existing Form 1-A.[667] We estimate that the total burden to prepare and file proposed Form 1-A, including any amendments to the form, would increase on average across all issuers in comparison to existing Form 1-A to approximately 750.00 hours.[668] We believe that the burden hour response of proposed Form 1-A would be greater than the current estimated 608.00 burden hours per response, but would not be as great as the current estimated 972.32 burden hours per response for Form S-1. We estimate that the issuer would internally carry 75 percent of the burden of

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666 *See* discussion in Section II.C.3.b. above.

667 As noted above, we estimate the burden per response for preparing existing Form 1-A to be 608.00 hours. *See* Form 1-A at 1.

668 By comparison, we estimate the burden per response for preparing Form S-1 to be 972.32 hours. *See* Form S-1, at 1.

preparation and that outside professionals[669] retained by the issuer at an average cost of $400 per hour would carry 25 percent.[670]

We estimate that compliance with the requirements of a Form 1-A provided in connection with transactions made in reliance on proposed Regulation A would require 187,500 burden hours (250 offering statements x 750.00 hours/offering statement) in aggregate each year, which corresponds to 140,625 aggregated hours carried by the issuer internally (250 offering statements x 750.00 hours/offering statement x 0.75) and aggregated costs of $18,750,000 (250 offering statements x 750.00 hours/offering statement x 0.25 x $400) for the services of outside professionals. These estimates include the time and cost of collecting the information, preparing and reviewing disclosure, filing documents and retaining records. In deriving our estimates, we recognize that the burdens likely would vary among individual issuers based on a number of factors, including the stage of development of the business, the amount of capital an issuer seeks to raise and the number of years since inception of the business. We believe that some issuers would experience costs in excess of the average and some issuers may experience less than the average costs.

2. Form 1-K: Annual Report

Under the proposed rules, any issuer that conducts a Tier 2 offering in reliance on proposed Regulation A would be required to file an annual report with the Commission

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669 For example, an issuer may address certain disclosure requirements internally, but retain an outside professional to assist in the preparation of the financial statements.

670 The costs of retaining outside professionals may vary depending on the nature of the professional services. For purposes of this PRA analysis, however, we estimate that such costs would be an average of $400/hour, which is consistent with the rate we typically estimate for outside legal services used in connection with public company reporting.

on Form 1-K: Annual Report.[671] A manually-signed copy of the Form 1-K would have to be executed by the issuer and related signatories before or at the time of electronic filing, retained by the issuer for a period of five years and, if requested, produced to Commission.[672] We do not anticipate that the proposed requirement to retain a manually-signed copy of the Form 1-K would affect an issuer's compliance burden. We believe the compliance burden on disclosure provided in Form 1-K would be less than the compliance burden associated with reporting required under Exchange Act Section 13 or 15(d). We also believe the burden would be more analogous to the compliance burden attendant to proposed Form 1-A. Unlike the disclosure required in Form 1-A, however, offering-specific disclosure in Form 1-K would not be required. Additionally, under certain circumstances, an issuer would also be required to disclose information similar to the information previously required of issuers on Form 2-A.[673] Unlike the disclosure previously required on Form 2-A, however, an issuer would not be required to provide disclosure about the use of proceeds. We estimate that the burden to prepare and file a Form 1-K would be less than that required to prepare and file a Form 1-A. We estimate that compliance with proposed Form 1-K would result in a burden of 600.00 hours per response.[674] We further estimate that 75 percent of the burden of preparation would be carried by the issuer internally and that 25 percent would be carried by outside

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671 *See* proposed Rule 257(b)(1).

672 *See* General Instruction C. to proposed Form 1-K and related discussion in Section II.E.1.a. above.

673 *See* discussion in Section II.E.1.a. above.

674 We estimate that the burden of preparing the information required by Form 1-K would be approximately 3/4 of the burden for the Form 1-A due to the lack of offering-specific disclosure and an issuer's ability to update previously-provided disclosure.

professionals[675] retained by the issuer at an average cost of $400 per hour.[676] While we do not know the exact number of issuers that will seek to qualify offerings in excess of $5 million in a twelve-month period in reliance on proposed Regulation A, we estimate 75 percent of all issuers filing a Form 1-A (or 188 issuers, 250 issuers x .75) will enter the proposed ongoing reporting regime and therefore be required to file proposed Form 1-K.

We estimate that compliance with the requirements of Form 1-K for issuers with an ongoing reporting obligation under proposed Regulation A would require 112,800 burden hours (188 issuers x 600.00 hours/issuer) in the aggregate each year, which corresponds to 84,600 hours carried by the issuer internally (188 issuers x 600.00 hours/issuer x 0.75) and costs of $11,280,000 (188 issuers x 600.00 hours/issuer x 0.25 x $400) for the services of outside professionals.

3. Form 1-SA: Semiannual Report

Under the proposed rules, any issuer that conducts a Tier 2 offering in reliance on proposed Regulation A would be required to file a semiannual report with the Commission on Form 1-SA: Semiannual Report.[677] A manually-signed copy of the Form 1-SA would have to be executed by the issuer and related signatories before or at the time of electronic filing, retained by the issuer for a period of five years and, if requested, produced to Commission.[678] We do not anticipate that the proposed requirement to retain a manually-signed copy of the Form 1-SA would affect an issuer's compliance burden. Issuers would be required to provide semiannual updates on

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675 *See* fn. 669 above.

676 *See* fn. 670 above.

677 *See* proposed Rule 257(b)(3).

proposed Form 1-SA, which, much like a Form 10-Q,[679] would consist primarily of financial statements and MD&A. Unlike Form 10-Q, Form 1-SA would not require disclosure regarding quantitative and qualitative market risk or controls and procedures.[680] We estimate, however, that on balance the reduction in burden attributable to eliminating these two items in Form 1-SA would be offset by the increased burden associated with requiring financial statement disclosure covering six months, rather than three months. We therefore believe the per response compliance burden of Form 1-SA would be similar to the compliance burden for issuers filing a Form 10-Q under the Exchange Act.[681] Therefore, for purposes of this PRA, we estimate that the burden to prepare and file a Form 1-SA would equal the burden to prepare and file Form 10-Q, which we have previously estimated as 187.43 hours per response.[682] Unlike proposed Form 1-K, Form 1-SA does not require the provision of audited financial statements. We therefore believe, in comparison to Form 1-K, issuers filing a Form 1-SA will be able to handle more of the required disclosures internally. Accordingly, we estimate that 85 percent of the burden of preparation would be carried by the issuer internally and that 15 percent would be carried by outside professionals retained by the issuer at an average cost of $400 per hour.[683]

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678 *See* General Instruction C. to proposed Form 1-SA and related discussion in Section II.E.1.b. above.

679 17 CFR 249.308a.

680 *See* discussion in Section II.E.1.b. above.

681 Issuers would, however, have to file Form 1-SA, a semiannual report, less frequently than Form 10-Q, a quarterly report.

682 *See* Form 10-Q, at 1.

683 *See* fn. 670 above.

We estimate that compliance with the requirements of Form 1-SA for issuers with an ongoing reporting obligation under proposed Regulation A would require 23,428.75 burden hours (188 issuers x 187.43 hours/issuer) in the aggregate each year, which corresponds to 19,914.44 hours carried by the issuer internally (188 issuers x 187.43 hours/issuer x 0.85) and costs of $1,405,725 (188 issuers x 187.43 hours/issuer x 0.15 x $400) for the services of outside professionals.

4. Form 1-U: Current Reporting

Under the proposed rules, any issuer that conducts a Tier 2 offering in reliance on proposed Regulation A would be required to promptly file current reports on proposed Form 1-U with the Commission.[684] A manually-signed copy of the Form 1-U would have to be executed by the issuer and related signatories before or at the time of electronic filing, retained by the issuer for a period of five years and, if requested, produced to Commission.[685] We do not anticipate that the proposed requirement to retain a manually-signed copy of the Form 1-U would affect an issuer's compliance burden. Issuers would be required to file such reports in the event they experience certain corporate events, much the same way as issuers subject to an ongoing reporting obligation under the Exchange Act file current reports on Form 8-K.[686] The requirement to file a Form 1-U, however, would be triggered by significantly fewer corporate events than those that trigger a reporting requirement on a Form 8-K, and, as proposed, the form

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684 *See* proposed Rule 257(b)(4).

685 *See* General Instruction C. to proposed Form 1-U and related discussion in Section II.E.1.c. above.

686 We estimate the burden per response for preparing a Form 8-K to be 5.71 hours. *See* Form 8-K, at 1.

itself would be slightly less burdensome for issuers to fill out.[687] Thus, the frequency of filing the required disclosure and the burden to prepare and file a Form 1-U would be considerably less than for Form 8-K. We estimate that the burden to prepare and file each current report would be 5.00 hours. While we do not know for certain how often an issuer would experience a corporate event that would trigger a current report filing on Form 1-U, we estimate that many issuers may not experience a corporate event that triggers reporting, while others may experience multiple events that trigger reporting. On average, we estimate that an issuer would be required to file one current report annually.[688] Therefore, we estimate that an issuer's compliance with proposed Form 1-U would result in an annual aggregate burden of 5.00 hours (1.00 current report annually x 5.00 hours per current report) per issuer.

As with Form 1-SA, we estimate that 85 percent of the burden of preparation would be carried by the issuer internally and that 15 percent would be carried by outside professionals retained by the issuer at an average cost of $400 per hour.[689] We estimate that compliance with the requirements of Form 1-U would require 940 burden hours (188 issuers x 1 current report annually x 5.00 hours per current report) in aggregate each year, which corresponds to 799 hours carried by the issuer internally (188 issuers x 5.00 hours/issuer/year x 0.85) and costs of $56,400 (188 issuers x 5.00 hours/issuer/year x 0.15 x $400) for the services of outside professionals.

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687 *See* discussion at Section II.E.1.c. above.

688 We have previously estimated that on average issuers file one current report on Form 8-K annually. Although we believe that the frequency of filing a Form 1-U would be considerably less than a Form 8-K, to be conservative, we are estimating that each issuer would be required to file one Form 1-U per year.

689 *See* fn. 670 above.

5. Form 1-Z: Exit Report

Under the proposed rules, all Regulation A issuers would be required to file a notice under cover of Form 1-Z: Exit Report. Issuers conducting Tier 1 offerings would be required to file Part I of Form 1-Z that would disclose information similar to the information previously required of issuers on Form 2-A.[690] Issuers conducting Tier 2 offerings would also be required to disclose the same information as issuers conducting Tier 1 offerings in Part I of Form 1-Z, unless previously reported by the issuer on Form 1-K. Issuers conducting Tier 2 offerings would also be required to fill out Part II of Form 1-Z in order to notify investors and the Commission that it will no longer file and provide annual reports pursuant to the requirements of Regulation A.[691] In Tier 2 offerings, an issuers' obligations to file ongoing reports could be terminated at any time after completion of reporting for the fiscal year in which the offering statement was qualified,[692] if the securities of each class to which the offering statement relates are held of record by fewer than 300 persons and offers and sales made in reliance on a qualified offering statement are not ongoing. A manually-signed copy of the Form 1-Z would have to be executed by the issuer and related signatories before or at the time of electronic filing, retained by the issuer for a period of five years and, if requested, produced to Commission.[693] We do not anticipate that the proposed requirement to retain a manually-signed copy of the Form 1-Z would affect an issuer's compliance burden. We estimate that 50 percent of issuers with an ongoing reporting obligation under proposed

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690 *See* discussion in Section II.E.1.a. above.

691 *See* proposed Rule 257(d).

692 *See* proposed Rule 252(h)(2).

693 *See* Instruction to proposed Form 1-Z and related discussion in Section II.E.4. above.

Regulation A (or 94 issuers, 188 issuers with an ongoing reporting obligation x .50 of issuers filing a Form 1-Z) would file a Form 1-Z in the second fiscal year after qualification of the offering statement. Although we believe that the vast majority of issuers subject to ongoing reporting under Regulation A would qualify for termination in the second fiscal year after qualification, we believe that only half or 50 percent of such issuers would actually choose to terminate their reporting obligations. An issuer may have many reasons, such as a desire to facilitate continued quotations in the over-the-counter ("OTC") markets pursuant to proposed revisions to Exchange Act Rule 15c2-11,[694] to continue reporting even though entitled to terminate reporting.

The Form 1-Z would be similar to the Form 15 that issuers file to provide notice of termination of the registration of a class of securities under Exchange Act Section 12(g) or to provide notice of the suspension of the duty to file reports required by Exchange Act Sections 13(a) or 15(d).[695] Therefore, we estimate that compliance with the proposed Form 1-Z would result in a similar burden as compliance with Form 15, a burden of 1.50 hours per response. We estimate that compliance with proposed Form 1-Z would result in a burden of 141 hours (94 issuers filing Form 1-Z x 1.50 hours/issuer) in the aggregate during the second fiscal year after qualification of the offering statement for issuers terminating their reporting obligations.

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694 *See* discussion in Section II.E.2. above.

695 We currently estimate the burden per response for preparing a Form 15 to be 1.50 hours. *See* Form 15 at 1.

6. Form ID Filings

Under the proposed rules, an issuer would be required to file specified disclosures with the Commission on EDGAR.[696] We anticipate that many issuers relying on proposed Regulation A for the first time would not have previously filed an electronic submission with the Commission and so would need to file a Form ID. Form ID is the application form for access codes to permit filing on EDGAR. The proposed rules would not change the form itself, but we anticipate that the number of Form ID filings would increase due to an increase in issuers relying on proposed Regulation A. For purposes of this PRA discussion, we estimate that 75 percent of the issuers who would seek to offer and sell securities in reliance on proposed Regulation A would not have previously filed an electronic submission with the Commission and would, therefore, be required to file a Form ID. As noted above, we estimate that approximately 250 issuers per year would seek to offer and sell securities in reliance on proposed Regulation A, which would correspond to approximately 188 additional Form ID filings. As a result, we estimate the additional annual burden would be approximately 28.20 hours (188 filings x 0.15 hours/filing).[697]

D. Collections of Information are Mandatory

The collections of information required under proposed Rules 251 through 263 would be mandatory for all issuers seeking to rely on the Regulation A exemption. Responses on Form 1-A, Form 1-K, Form 1-SA, Form 1-U and Form 1-Z would not be confidential, although issuers may request confidential treatment for certain materials

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696 *See* proposed Rules 252 and 257.

697 We currently estimate the burden associated with Form ID is 0.15 hours per response. *See* Form ID at 1.

submitted in conjunction with the filings.[698] It is anticipated that most of this material would be made public when the offering is qualified. A Form 1-A that is submitted by an issuer with a confidential treatment request and later abandoned before being publicly filed with the Commission and responses on Form ID would, however, remain non-public, absent a request for such information under the Freedom of Information Act.[699] The hours and costs associated with preparing and filing forms and retaining records constitute reporting and cost burdens imposed by the collection of information requirements.

E. Request for Comment

The Commission invites comment on all of the above estimates. Pursuant to 44 U.S.C. 3506(c)(2)(A), the Commission requests comment in order to: (1) evaluate whether the proposed collections of information are necessary for the proper performance of our functions, including whether the information would have practical utility; (2) evaluate the accuracy of our estimate of the burden of the proposed collections of information; (3) determine whether there are ways to enhance the quality, utility and clarity of the information to be collected; and (4) evaluate whether there are ways to minimize the burden of the proposed collections of information on those who respond, including through the use of automated collection techniques or other forms of information technology.

Persons submitting comments on the proposed collection of information requirements should direct their comments to the Office of Management and Budget,

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698 *See* Commission Rule 83, 17 CFR 200.83.

699 5 U.S.C. 552. The Commission's regulations that implement the Freedom of Information Act are at 17 CFR 200.80 *et seq*.

Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should also send a copy of their comments to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090, with reference to File No. S7-11-13. Requests for materials submitted to OMB by the Commission, with regard to these collections of information, should be in writing, with reference to File No. S7-11-13, and they should be submitted to the Securities and Exchange Commission, Office of FOIA Services, 100 F Street, NE, Washington, DC 20549-2736. As OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

VI. INITIAL REGULATORY FLEXIBILITY ACT ANALYSIS

This Initial Regulatory Flexibility Analysis has been prepared in accordance with 5 U.S.C. 603. It relates to the following:

- proposed amendments to Rules 251 through 263 of Regulation A, Form 1-A, Rule 4a-1 under the Trust Indenture Act, Rule 15c2-11 under the Exchange Act, and Item 101 of Regulation S-T;
- proposed new Forms 1-K, 1-SA, 1-U, and 1-Z; and
- the proposed rescission of Form 2-A.

A. Reasons for the Proposed Action

The proposed rule amendments, new forms, and rescission of Form 2-A are designed to implement the requirements of Section 3(b)(2) of the Securities Act and to make certain conforming changes based on our proposed amendments to Regulation A.

Section 3(b)(2) directs the Commission to adopt rules adding a class of securities exempt from the registration requirements of the Securities Act for offerings of up to $50 million of securities within a twelve-month period, subject to various additional terms and conditions set forth in Section 3(b)(2) or as provided for by the Commission as part of the rulemaking process.

B. Objectives

Our primary objective is to implement Section 401 of the JOBS Act, as mandated by Section 3(b)(2), by expanding and updating Regulation A in a manner that makes public offerings of up to $50 million less costly and more flexible while providing a framework for regulatory oversight to protect investors. In so doing, we have endeavored to craft a workable revision of Regulation A that would both promote small company capital formation and provide for meaningful investor protection. We believe that issuers, particularly small businesses, benefit from having a wide range of capital-raising strategies available to them, and that an expanded and updated Regulation A could serve as a valuable option that augments the exemptions more frequently relied upon, thereby facilitating capital formation for small businesses.

C. Legal Basis

The amendments are being proposed under the authority set forth in Sections 3(b), 19 and 28 of the Securities Act of 1933, as amended, and Section 401 of the JOBS Act.[700]

D. Small Entities Subject to the Proposed Rules

For purposes of the Regulatory Flexibility Act, under our rules, an issuer (other than an investment company) is a "small business" or "small organization" if it has total

[700] Pub. L. No. 112-106, -401, 126 Stat. 307 (April 5, 2012).

assets of $5 million or less as of the end of its most recent fiscal year and is engaged or proposing to engage in an offering of securities which does not exceed $5 million.[701]

While proposed Regulation A would be available for offerings of up to $50 million in securities in a twelve-month period, only offerings up to $5 million in securities in a twelve-month period would be offerings by small entities. It is difficult to predict the number of small businesses that would use proposed Regulation A due to the many variables created by our proposed amendments. Nevertheless, we believe that proposed Regulation A will increase the overall number of Regulation A offerings of $5 million or less due to the ability to non-publicly submit draft offering statements for review by the Commission's staff, the expanded use of solicitation of interest materials, the ability to electronically file and transmit offering statements and offering circulars, the potential for preemption of state regulatory review if the issuer elects to conduct a Tier 2 offering, and other significant changes summarized in Section II.A. above.

Regulation A is currently limited to offerings with an aggregate offering price of $5 million or less.[702] From 2009 through 2012, 87 issuers filed offering statements and 19 offering statements were qualified by the Commission, or an average of approximately 5 qualified offering statements per year. Of the 19 offering statements that were qualified, 12 included financial statements indicating that the issuer had total assets of $5

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701 17 CFR 230.157. We note that currently this rule refers to "the dollar limitation prescribed by Section 3(b) of the Securities Act." As noted earlier in this release, the JOBS Act amended Section 3(b) of the Securities Act. The former Section 3(b) is now Section 3(b)(1), and a new Section 3(b)(2) was added. To retain the meaning of 17 CFR 230.157, we are proposing a technical correction to replace the reference to "Section 3(b)" with a reference to "Section 3(b)(1)."

702 As explained in Section II.B.3. above, the aggregate offering price under existing and proposed Regulation A includes prior sales generated from Regulation A offerings that occurred in the twelve months preceding the current offering.

million or less (as of the most recent balance sheet included in such issuer's offering statement at the time of qualification), or an average of approximately 3 qualified offering statements per year in which the issuer indicated it had total assets of $5 million or less. Based on these data, and for the reasons discussed above, we believe that at least 3 small businesses will conduct offerings under proposed Regulation A per year.

E. Reporting, Recordkeeping, and Other Compliance Requirements

As discussed above in Section II.C., the proposed regulation includes reporting, recordkeeping and other compliance requirements. In particular, the proposed regulation would impose certain reporting requirements on issuers offering and selling securities in a transaction relying on the exemptions provided by Section 3(b) and Regulation A. The proposed rules would require that issuers relying on the exemption file with the Commission certain information specified in Form 1-A about the issuer and the offering, including the issuer's contact information; use of proceeds from the offering; price or method for calculating the price of the securities being offered; business and business plan; property; financial condition and results of operations; directors, officers, significant employees and certain beneficial owners; material agreements and contracts; and past securities sales.[703] Such issuers would also be required to provide information on the material factors that make an investment in the issuer speculative or risky; dilution; the plan of distribution for the offering; executive and director compensation; conflicts of interest and related party transactions; and financial statements. Similar to existing Regulation A, for Tier 1 offerings, Form 1-A would not require the financial

[703] *See* discussion in Section II.C.3. above.

statements to be audited unless the issuer has already had them audited for another purpose.[704]

As discussed above in Section II.E., issuers conducting Tier 2 offerings would also be required to file annual reports on proposed new Form 1-K, semiannual updates on proposed new Form 1-SA, current event reporting on proposed new Form 1-U, and to provide notice to the Commission of the termination of their ongoing reporting obligations on proposed new Form 1-Z. A Tier 1 offering would be limited to $5 million in a twelve-month period. Issuers in a Regulation A offering that would result in exceeding $5 million in a twelve-month period would be required to comply with the requirements for Tier 2 offerings, including being subject to ongoing reporting.

An issuer subject to the Tier 2 periodic and current event reporting described above would be required to provide information annually on Form 1-K, including the issuer's business and business plan; conflicts of interest and related party transactions; executive and director compensation; financial condition and results of operations; and audited financial statements. The semiannual update on Form 1-SA would consist primarily of unaudited, interim financial statements for the issuer's first two fiscal quarters and information regarding the issuer's financial condition and results of operations. The current event reporting on Form 1-U would require issuers to disclose certain major developments, including changes of control; changes in the principal executive officer and principal financial officer; fundamental changes in the nature of business; material transactions or corporate events; unregistered sales of five percent or

[704] The distinction between a Tier 1 offering and Tier 2 offering are discussed in Section II.B.3. above.

more of outstanding equity securities; changes in the issuer's certifying accountant; and non-reliance on previous financial statements.

Unlike the other ongoing reporting requirements, Form 1-Z would only be required for issuers in both Tier 1 and Tier 2 offerings to report summary information about a completed or terminated Regulation A offering. Issuers conducting Tier 2 offerings would, however, be subject to the additional provision in Form 1-Z that relates to the voluntary termination of an issuer's continuous reporting obligations under Tier 2 and thus its use by small entities would be limited. Also, the information that is required in Form 1-Z is minimal.

Although we estimated that approximately 188 issuers under proposed Regulation A would enter the proposed ongoing reporting regime every year, we believe that very few small businesses would do so. A small business under our rules would only be required to file ongoing reports under Regulation A if a Regulation A offering would result in exceeding the Tier 1 annual offering limitation of $5 million in a twelve-month period.

F. Duplicative, Overlapping or Conflicting Federal Rules

We believe that there are no federal rules that conflict with or duplicate the proposed rules.

G. Significant Alternatives

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish the stated objective of our proposals, while minimizing any significant adverse impact on small entities. In connection with the proposed amendments and rules, we considered the following alternatives: (1) the establishment of differing compliance or

reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation or simplification of compliance and reporting requirements under the rule for small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rules, or any parts of the rules, for small entities.

We considered whether it is necessary or appropriate to establish different compliance or reporting requirements, timetables, or to clarify, consolidate, or simplify compliance and reporting requirements under the proposed rules for small entities. With respect to using performance rather than design standards, we used performance standards to the extent appropriate under the statute. For example, issuers have the flexibility to customize the presentation of certain disclosures in their offering statements.[705] We also considered whether there should be an exemption from coverage of the rules, or any parts of the rule for small entities. As discussed above, we do propose different compliance reporting requirements for issuers of less than $5 million that conduct an offering under Tier 1. For example, we are not proposing to subject entities likely to be small entities to ongoing reporting requirements and the requirement to provide audited financial statements. We also considered providing additional reductions in the disclosures required by Form 1-A for issuers of less than $5 million, but we believe that different compliance requirements for Form 1-A users may lead to investor confusion or reduced investor confidence in Regulation A offerings, especially considering that the disclosure requirements are already less than what is required by Form S-1 for registered offerings. Further, we anticipate that the burden for filling out a

[705] *See* Section II.C. above.

Form 1-A should be less for companies at an earlier stage of development and with less extensive operations that are likely to be small entities.[706] For these reasons, we believe that small entities should be covered by the proposed rules to the extent specified above. We believe that the proposed rules should have limited impact on small entities and we are not proposing to establish different compliance requirements for small entities other than what we have proposed. We do, however, seek comment on alternatives that may reduce any potential adverse impact on small entities but accomplish similar objectives.

H. Request for Comment

We encourage comments with respect to any aspect of this initial regulatory flexibility analysis. In particular, we request comments regarding:

- The number of small entities that may be affected by the proposals;
- The existence or nature of the potential impact of the proposals on small entities discussed in the analysis; and
- How to quantify the impact of the proposed rules.

We request members of the public to submit comments and ask them to describe the nature of any impact on small entities they identify and provide empirical data supporting the extent of the impact. Such comments will be considered in the preparation of the final regulatory flexibility analysis, if the proposals are adopted, and will be placed in the same public file as comments on the proposed amendments themselves.

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[706] *See* discussion in Section V.C.1. above.

VII. SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996,[707] a rule is "major" if it has resulted, or is likely to result in:

- An annual effect on the economy of $100 million or more;
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment or innovation.

We request comment on whether our proposals would be a "major rule" for purposes of SBREFA. We solicit comment and empirical data on:

- The potential effect on the U.S. economy on an annual basis;
- Any potential increase in costs or prices for consumers or individual industries; and
- Any potential effect on competition, investment or innovation.

We request those submitting comments to provide empirical data and other factual support for their views if possible.

VIII. STATUTORY BASIS AND TEXT OF PROPOSED AMENDMENTS

The amendments and forms contained in this document are being proposed under the authority set forth in Sections 3(b), 19 and 28 of the Securities Act of 1933, as amended, and Section 401 of the JOBS Act.[708]

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[707] Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[708] Pub. L. No. 112-106, -401, 126 Stat. 307 (April 5, 2012).

TEXT OF PROPOSED AMENDMENTS

List of Subjects

17 CFR Part 230, 232, 239, 240 and 260

Reporting and recordkeeping requirements, Securities.

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is proposed to be amended as follows:

PART 230 – GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

1. The authority citation for part 230 is revised to read in part as follows:

Authority: 15 U.S.C. 77b, 77b note, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z–3, 77sss, 78c, 78d, 78j, 78*l*, 78m, 78n, 78o, 78o–7 note, 78t, 78w, 78*ll*(d), 78mm, 80a–8, 80a–24, 80a–28, 80a–29, 80a–30, and 80a–37, and Pub. L. No. 112-106, § 201(a), § 401, 126 Stat. 313 (2012), unless otherwise noted.

* * * * *

2. § 230.157(a) is revised to read as follows:

§ 230.157 Small entities under the Securities Act for purposes of the Regulatory Flexibility Act.

* * * * *

(a) When used with reference to an issuer, other than an investment company, for purposes of the Securities Act of 1933, means an issuer whose total assets on the last day of its most recent fiscal year were $5 million or less and that is engaged or proposing to engage in small business financing. An issuer is considered to be engaged or proposing to engage in small business financing under this section if it is conducting or proposes to

conduct an offering of securities which does not exceed the dollar limitation prescribed by section 3(b)(1) of the Securities Act.

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3. Revise the undesignated center heading and §§ 230.251 through 230.263 to read as follows:

Regulation A

Sec.	
230.251	Scope of exemption.
230.252	Offering statement.
230.253	Offering circular.
230.254	Preliminary offering circular.
230.255	Solicitation of interest communications.
230.256	Definition of "qualified purchaser."
230.257	Periodic and current reporting; exit report.
230.258	Suspension of the exemption.
230.259	Withdrawal or abandonment of offering statements.
230.260	Insignificant deviations from a term, condition or requirement of Regulation A.
230.261	Definitions.
230.262	Disqualification provisions.
230.263	Consent to service of process.

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4. §§ 230.251 through 230.263 are revised to read as follows:

§ 230.251 Scope of exemption.

(a) *Tier 1 and Tier 2.* A public offer or sale of eligible securities, as defined in Rule 261 (§ 230.261), that meets the following terms and conditions shall be exempt under section 3(b) from the registration requirements of the Securities Act of 1933 (the "Securities Act") (15 U.S.C. 77a *et seq.*):

(1) Offerings pursuant to Regulation A in which the sum of all cash and other consideration to be received for the securities being offered ("aggregate offering price")

plus the aggregate offering price for all securities sold pursuant to other Regulation A offering statements within the twelve months before the start of and during the current offering of securities does not exceed $5,000,000, including not more than $1,500,000 offered by all selling securityholders ("Tier 1 offerings"); and

(2) Offerings pursuant to Regulation A in which such sum does not exceed $50,000,000, including not more than $15,000,000 offered by all selling securityholders ("Tier 2 offerings").

NOTE: Where a mixture of cash and non-cash consideration is to be received, the aggregate offering price must be based on the price at which the securities are offered for cash. Any portion of the aggregate offering price attributable to cash received in a foreign currency must be translated into United States currency at a currency exchange rate in effect on or at a reasonable time before the date of the sale of the securities. If securities are not offered for cash, the aggregate offering price must be based on the value of the consideration as established by bona fide sales of that consideration made within a reasonable time, or, in the absence of sales, on the fair value as determined by an accepted standard. Valuations of non-cash consideration must be reasonable at the time made. If convertible securities or warrants are being offered, the underlying securities must also be qualified and the aggregate offering price must include the conversion, exercise, or exchange price of such securities.

(b) *Issuer*. The issuer of the securities:

(1) Is an entity organized under the laws of the United States or Canada, or any State, Province, Territory or possession thereof, or the District of Columbia, with its

principal place of business in the United States or Canada;

(2) Is not subject to section 13 or 15(d) of the Securities Exchange Act of 1934 (the "Exchange Act") (15 U.S.C. 78a *et seq.*) immediately before the offering;

(3) Is not a development stage company that either has no specific business plan or purpose, or has indicated that its business plan is to merge with an unidentified company or companies;

(4) Is not an investment company registered or required to be registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*) or a business development company as defined in section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(48));

(5) Is not issuing fractional undivided interests in oil or gas rights, or a similar interest in other mineral rights;

(6) Is not, and has not been, subject to any order of the Commission entered pursuant to Section 12(j) of the Exchange Act (15 U.S.C. 78*l*(j)) within five years before the filing of the offering statement;

(7) Has filed with the Commission all the reports it was required to file, if any, pursuant to Rule 257 (§ 230.257) during the two years before the filing of the offering statement (or for such shorter period that the issuer was required to file such reports); and

(8) Is not disqualified under Rule 262 (§ 230.262).

(c) *Integration with other offerings.* Offers and sales made in reliance on this Regulation A will not be integrated with:

(1) Prior offers or sales of securities; or

(2) Subsequent offers or sales of securities that are:

(i) Registered under the Securities Act, except as provided in Rule 255(e) (§ 230.255(e));

(ii) Made pursuant to Rule 701 (§ 230.701);

(iii) Made pursuant to an employee benefit plan;

(iv) Made pursuant to Regulation S (§ 230.901-905);

(v) Made more than six months after the completion of the Regulation A offering; or

(vi) Made in reliance on Regulation Crowdfunding (§ 230.XX-XX).

NOTE: If these safe harbors do not apply, whether subsequent offers and sales of securities will be integrated with the Regulation A offering will depend on the particular facts and circumstances. See Securities Act Release No. 4552 (November 6, 1962) [27 FR 11316].

(d) *Offering conditions*—(1) *Offers.*

(i) Except as allowed by Rule 255 (§ 230.255), no offer of securities may be made unless a Form 1-A offering statement has been filed with the Commission.

(ii) After the Form 1-A offering statement has been filed, but before it is qualified:

(A) Oral offers may be made;

(B) Written offers pursuant to Rule 254 (§ 230.254) may be made; and

(C) Communications pursuant to Rule 255 (§ 230.255) may be made.

(iii) After the Form 1-A offering statement has been qualified, any written offers must be accompanied with or preceded by the most recent offering circular filed with the Commission for such offering.

(2) *Sales.*

(i) No sale of securities may be made until:

(A) The Form 1-A offering statement has been qualified;

(B) A Preliminary Offering Circular is delivered at least 48 hours before the sale to any person that before qualification of the offering statement had indicated an interest in purchasing securities in the offering, including those persons that responded to an issuer's solicitation of interest materials; and

(C) For Tier 2 offerings, no sale may be made to a purchaser if the aggregate purchase price paid by such purchaser for securities in the offering (including any conversion, exercise, or exchange price for securities that are convertible, exercisable or exchangeable for other securities) is more than ten percent (10%) of the greater of such purchaser's annual income and net worth, based on the representations of the purchaser (with annual income and net worth for natural person purchasers determined as provided in Rule 501 (§ 230.501), provided that the issuer does not know, at the time of sale, that any such representation is untrue.

(ii) In a transaction that represents a sale by the issuer or an underwriter, or a sale where there is not an exclusion or exemption from the requirement to deliver a Final Offering Circular pursuant to paragraph 251(d)(2)(iii) of this rule, each underwriter or dealer selling in such transaction must deliver to each purchaser from it, not later than two business days following the completion of such sale, a copy of the Final Offering Circular or, in lieu of such Final Offering Circular, a notice to the effect that the sale was made pursuant to a qualified offering statement that includes the uniform resource locator ("URL") where the Final Offering Circular, or the offering statement of which such Final

Offering Circular is part, may be obtained on EDGAR and contact information sufficient to notify a purchaser where a request for a Final Offering Circular can be sent and received in response. If the sale was by the issuer and was not effected by or through an underwriter or dealer, the issuer is responsible for sending the Final Offering Circular or notice.

(iii) Sales by a dealer (including an underwriter no longer acting in that capacity for the security involved in such transaction) that take place within 90 calendar days after the qualification of the Regulation A offering statement may be made only if the dealer delivers a copy of the current offering circular to the purchaser before or with the confirmation of sale, provided that where an offering statement relates to offerings to be made from time to time pursuant to paragraph (d)(3) of this rule, such 90 calendar day period shall commence on the day of the first bona fide offering of securities under such offering statement; and

(3) *Continuous or delayed offerings.* (i) Continuous or delayed offerings may be made under this Regulation A, so long as the offering statement pertains only to:

(A) Securities that are to be offered or sold solely by or on behalf of a person or persons other than the issuer, a subsidiary of the issuer, or a person of which the issuer is a subsidiary;

(B) Securities that are to be offered and sold pursuant to a dividend or interest reinvestment plan or an employee benefit plan of the issuer;

(C) Securities that are to be issued upon the exercise of outstanding options, warrants, or rights;

(D) Securities that are to be issued upon conversion of other outstanding

securities;

(E) Securities that are pledged as collateral; or

(F) Securities the offering of which will be commenced within two calendar days after the qualification date, will be made on a continuous basis, may continue for a period in excess of 30 days from the date of initial qualification, and will be offered in an amount that, at the time the offering statement is qualified, is reasonably expected to be offered and sold within two years from the initial qualification date. These securities may be offered and sold only if not more than three years have elapsed since the initial qualification date of the offering statement under which they are being offered and sold; provided, however, that if a new offering statement has been filed pursuant to this paragraph (d)(3)(i)(F), securities covered by the prior offering statement may continue to be offered and sold until the earlier of the qualification date of the new offering statement or 180 days after the third anniversary of the initial qualification date of the prior offering statement. Before the end of such three-year period, an issuer may file a new offering statement covering the securities. The new offering statement must include all the information that would be required at that time in an offering statement relating to all offerings that it covers. Before the qualification date of the new offering statement, the issuer may include as part of such new offering statement any unsold securities covered by the earlier offering statement by identifying on the cover page of the new offering circular or the latest amendment the amount of such unsold securities being included. The offering of securities on the earlier offering statement will be deemed terminated as of the date of qualification of the new offering statement. Securities may be sold pursuant this paragraph (d)(3)(i)(F) only if the issuer is current in

its annual and semiannual filings pursuant to Rule 257(b) (§230.257(b)), at the time of such sale.

(ii) At the market offerings, by or on behalf of the issuer or otherwise, are not permitted under this Regulation A. As used in this paragraph (d)(3)(ii), the term *at the market offering* means an offering of equity securities into an existing trading market for outstanding shares of the same class at other than a fixed price.

§ 230.252 Offering statement.

(a) *Documents to be included*. The offering statement consists of the contents required by Form 1-A (§ 239.90 of this chapter) and any other material information necessary to make the required statements, in light of the circumstances under which they are made, not misleading.

(b) *Paper, printing, language and pagination*. Except as otherwise specified in this rule, the requirements for offering statements are the same as those specified in Rule 403 (§ 230.403) for registration statements under the Act. No fee is payable to the Commission upon either the submission or filing of an offering statement on Form 1-A, or any amendment to an offering statement.

(c) *Confidential treatment*. A request for confidential treatment may be made under Rule 406 (§ 230.406) for information required to be filed, and Rule 83 (§ 200.83) for information not required to be filed.

(d) *Signatures*. The issuer, its principal executive officer, principal financial officer, principal accounting officer, and a majority of the members of its board of directors or other governing body, must sign the offering statement. If a signature is by a person on behalf of any other person, evidence of authority to sign must be filed, except where an

executive officer signs for the issuer.

(e) *How to file*. The offering statement must be filed with the Commission in electronic format by means of the Commission's Electronic Data Gathering, Analysis and Retrieval System ("EDGAR") in accordance with the EDGAR rules set forth in Regulation S-T (17 CFR Part 232). The offering statement must be signed in the manner prescribed by Form 1-A.

(f) *Non-public submission*. An issuer whose securities have not been previously sold pursuant to a qualified offering statement under this Regulation A or an effective registration statement under the Securities Act may submit under Rule 83 (§ 200.83) a draft offering statement to the Commission for non-public review by the staff of the Commission before public filing, provided that the offering statement shall not be qualified less than 21 calendar days after the public filing of (1) the initial non-public submission, (2) all non-public amendments with the Commission, and (3) all non-public correspondence submitted by or on behalf of the issuer to the Commission staff regarding such submissions (subject to any separately approved confidential treatment request under paragraph (c) of this rule). Draft offering statements must be submitted to the Commission in electronic format by means of EDGAR in accordance with the EDGAR rules set forth in Regulation S-T (17 CFR Part 232).

(g) *Qualification*. An offering statement and any amendment thereto can be qualified only by order of the Commission.

(h) *Amendments*. (1) (i) Amendments to an offering statement must be signed and filed in the same manner as the initial filing. The amendment must be filed with the Commission in the manner set forth in paragraph (e) of this rule. Amendments to an

offering statement must be filed under cover of Form 1-A and must be numbered consecutively in the order in which filed.

(ii) Every amendment that includes audited financial statements must include the consent of the certifying accountant to the use of such accountant's certificate in connection with the amended financial statements in the offering statement or offering circular and to being named as having audited such financial statements.

(iii) Amendments solely relating to Part III of Form 1-A must comply with the requirements of paragraph (h)(1)(i) of this rule, except that such amendments may be limited to the Part I of Form 1-A, an explanatory note, and all of the information required by Part III of Form 1-A.

(2) Post-qualification amendments must be filed in the following circumstances for ongoing offerings:

(i) At least every 12 months after the qualification date to include the financial statements that would be required by Form 1-A as of such date; or

(ii) To reflect any facts or events arising after the qualification date of the offering statement (or the most recent post-qualification amendment thereof) which, individually or in the aggregate, represent a fundamental change in the information set forth in the offering statement.

§ 230.253 Offering circular.

(a) *Contents*. An offering circular must include the information required by Form 1-A for offering circulars.

(b) Notwithstanding paragraph (a) of this section, the offering circular may omit information with respect to the public offering price, underwriting syndicate (including

any material relationships between the issuer or selling securityholders and the unnamed underwriters, brokers or dealers), underwriting discounts or commissions, discounts or commissions to dealers, amount of proceeds, conversion rates, call prices and other items dependent upon the offering price, delivery dates, and terms of the securities dependent upon the offering date; provided, that the following conditions are met:

(1) The securities to be qualified are offered for cash.

(2) The outside front cover page of the offering circular includes a bona fide estimate of the range of the maximum offering price and the maximum number of shares or other units of securities to be offered or a bona fide estimate of the principal amount of debt securities offered, subject to the following conditions:

(i) The range must not exceed $2 for offerings where the upper end of the range is $10 or less and 20% if the upper end of the price range is over $10; and

(ii) The upper end of the range must be used in determining the aggregate offering price under Rule 251(a) (§ 230.251(a)).

(3) The offering statement does not relate to securities to be offered by competitive bidding.

(4) The volume of securities (the number of equity securities or aggregate principal amount of debt securities) to be offered may not be omitted in reliance on this paragraph (b).

NOTE: A decrease in the volume of securities offered or a change in the bona fide estimate of the offering price range from that indicated in the offering circular filed as part of a qualified offering statement may be disclosed in the offering circular filed with the Commission pursuant to Rule 253(g) (§ 230.253(g)), so

long as the decrease in the volume of securities offered or change in the price range would not materially change the disclosure contained in the offering statement at qualification. Notwithstanding the foregoing, any decrease in the volume of securities offered and any deviation from the low or high end of the price range may be reflected in the offering circular supplement filed with the Commission pursuant to Rule 253(g)(1) (§ 230.253(g)(1)) if, in the aggregate, the decrease in volume and/or change in price represent no more than a 20% change from the maximum aggregate offering price calculable using the information in the qualified offering statement. In no circumstances may this paragraph be used to offer securities where the maximum aggregate offering price would result in the offering exceeding the limit set forth in Rule 251(a) (§ 230.251(a)) for offerings under Regulation A or if the change would result in a Tier 1 offering becoming a Tier 2 offering. An offering circular supplement may not be used to increase the volume of securities being offered. Additional securities may only be offered pursuant to a new offering statement or post-qualification amendment qualified by the Commission.

(c) The information omitted from the offering circular in reliance upon paragraph (b) of this rule must be contained in an offering circular filed with the Commission pursuant to Rule 252(e) (§ 230.252(e)) and paragraph (g) of this rule; except that if such offering circular is not so filed by the later of 15 business days after the qualification date of the offering statement or 15 business days after the qualification of a post-qualification amendment thereto that contains an offering circular, the information omitted in reliance upon paragraph (b) of this rule must be contained in a qualified post-qualification

amendment to the offering statement.

(d) *Presentation of information.*

(1) Information in the offering circular must be presented in a clear, concise and understandable manner and in a type size that is easily readable. Repetition of information should be avoided; cross-referencing of information within the document is permitted.

(2) Where an offering circular is distributed through an electronic medium, issuers may satisfy legibility requirements applicable to printed documents by presenting all required information in a format readily communicated to investors.

(e) *Date.* An offering circular must be dated approximately as of the date it was filed with the Commission.

(f) *Cover page legend.* The cover page of every offering circular must display the following statement highlighted by prominent type or in another manner:

> The United States Securities and Exchange Commission does not pass upon the merits of or give its approval to any securities offered or the terms of the offering, nor does it pass upon the accuracy or completeness of any offering circular or other solicitation materials. These securities are offered pursuant to an exemption from registration with the Commission; however, the Commission has not made an independent determination that the securities offered are exempt from registration.

(g) *Offering circular supplements.*

(1) An offering circular that discloses information previously omitted from the offering circular in reliance upon Rule 253(b) (§ 230.253(b)) must be filed with the

Commission no later than two business days following the earlier of the date of determination of the offering price or the date such offering circular is first used after qualification in connection with a public offering or sale.

(2) An offering circular that reflects information other than that covered in paragraph (g)(1) of this rule that constitutes a substantive change from or addition to the information set forth in the last offering circular filed with the Commission must be filed with the Commission no later than five business days after the date it is first used after qualification in connection with a public offering or sales. If an offering circular filed pursuant to this paragraph (g)(2) consists of an offering circular supplement attached to an offering circular that (i) previously had been filed or (ii) was not required to be filed pursuant to paragraph (g) of this rule because it did not contain substantive changes from an offering circular that previously was filed, only the offering circular supplement need be filed under paragraph (g) of this rule, provided that the cover page of the offering circular supplement includes a cross reference to the date(s) of the related offering circular and any offering circular supplements thereto that together constitute the offering circular with respect to the securities currently being offered or sold.

(3) An offering circular that discloses information, facts or events covered in both paragraphs (g)(1) and (2) must be filed with the Commission no later than two business days following the earlier of the date of the determination of the offering price or the date it is first used after qualification in connection with a public offering or sales.

(4) An offering circular required to be filed pursuant to paragraph (g) of this rule that is not filed within the time frames specified in paragraph (g) must be filed pursuant to this paragraph (4) as soon as practicable after the discovery of such failure to file.

(5) Each offering circular must be filed with the Commission in electronic format by means of EDGAR in accordance with the EDGAR rules set forth in Regulation S-T (17 CFR Part 232).

(6) Each offering circular filed under this rule must contain in the upper right corner of the cover page the paragraph and subparagraph of this rule under which the filing is made, and the file number of the offering statement to which the offering circular relates.

§ 230.254 Preliminary offering circulars.

Before qualification of the required offering statement, but after its filing, a written offer of securities may be made if it meets the following requirements:

(a) The outside front cover page of the material bears the caption *Preliminary Offering Circular*, the date of issuance, and the following legend, which must be highlighted by prominent type or in another manner:

> An offering statement pursuant to Regulation A relating to these securities has been filed with the Securities and Exchange Commission. Information contained in this Preliminary Offering Circular is subject to completion or amendment. These securities may not be sold nor may offers to buy be accepted before the offering statement filed with the Commission is qualified. This Preliminary Offering Circular shall not constitute an offer to sell or the solicitation of an offer to buy nor may there be any sales of these securities in any state in which such offer, solicitation or sale would be unlawful before registration or qualification under the laws of any such state. We may elect to satisfy our obligation to deliver a Final Offering Circular by sending you a notice within two business days after

the completion of our sale to you that contains the URL where the Final Offering Circular or the offering statement in which such Final Offering Circular was filed may be obtained.

(b) The Preliminary Offering Circular contains substantially the information required in an offering circular by Form 1-A (§ 239.90 of this chapter), except that information that may be omitted under Rule 253(b) (§ 230.253(b)) may be omitted if the conditions set forth in Rule 253(b) are met.

(c) The Preliminary Offering Circular is filed as a part of the offering statement.

§ 230.255 Solicitation of interest communications.

(a) At any time before the qualification of an offering statement, including before the non-public submission or public filing of such offering statement, an issuer or any person authorized to act on behalf of an issuer may communicate orally or in writing to determine whether there is any interest in a contemplated securities offering. Such communications are deemed to be an offer of a security for sale for purposes of the antifraud provisions of the federal securities laws. No solicitation or acceptance of money or other consideration, nor of any commitment, binding or otherwise, from any person is permitted until qualification of the offering statement.

(b) The communications must:

(1) State that no money or other consideration is being solicited, and if sent in response, will not be accepted;

(2) State that no offer to buy the securities can be accepted and no part of the purchase price can be received until the offering statement is qualified, and any such offer may be withdrawn or revoked, without obligation or commitment of any kind, at

any time before notice of its acceptance given after the qualification date;

(3) State that a person's indication of interest involves no obligation or commitment of any kind; and

(4) After the public filing of the offering statement:

(i) State from whom a copy of the most recent version of the Preliminary Offering Circular may be obtained, including a phone number and address of such person;

(ii) Provide the URL where such Preliminary Offering Circular or to the offering statement in which such Preliminary Offering Circular was filed may be obtained; or

(iii) Include a complete copy of the Preliminary Offering Circular.

(c) Any written communication under this rule may include a means by which a person may indicate to the issuer that such person is interested in a potential offering. This issuer may require the name, address, telephone number, and/or e-mail address in any response form included pursuant to this paragraph (c).

(d) If solicitation of interest materials are used after the public filing of the offering statement and such solicitation of interest materials contain information that is inaccurate or inadequate in any material respect, revised solicitation of interest materials must be redistributed in a manner substantially similar to the manner in which such materials were originally distributed. Notwithstanding the foregoing in this paragraph (d), if the only information that is inaccurate or inadequate is contained in a Preliminary Offering Circular provided with the solicitation of interest materials pursuant to paragraphs (b)(4)(i) or (b)(4)(ii) of this rule, no such redistribution is required in the following

circumstances:

(1) in the case of paragraph (b)(4)(i) of this rule, the revised Preliminary Offering Circular will be provided to any persons making new inquiries and will be recirculated to any persons making any previous inquiries; or

(2) in the case of paragraph (b)(4)(ii) of this rule, the URL continues to link directly to the most recent Preliminary Offering Circular or to the offering statement in which such revised Preliminary Offering Circular was filed.

(e) Where an issuer decides to register an offering under the Securities Act after soliciting interest in a contemplated, but abandoned, Regulation A offering, the Regulation A exemption for offers would not be subject to integration with the registered offering, unless the issuer engaged in solicitations of interest pursuant to this rule to persons other than qualified institutional buyers and institutional accredited investors permitted by Section 5(d) of the Securities Act. In such circumstances, the issuer (and any underwriter, broker, dealer, or agent used by the issuer in connection with the proposed offering) must wait at least 30 calendar days between the last such solicitation of interest in the Regulation A offering and the filing of the registration statement with the Commission.

§ 230.256 Definition of "qualified purchaser."

For purposes of Section 18(b)(3) of the Securities Act [15 USC 77r(b)(3)], a "qualified purchaser" of a security offered or sold pursuant to Regulation A means any offeree of such security and, in a Tier 2 offering, any purchaser of such security.

§ 230.257 Periodic and current reporting; exit report.

(a) *Tier 1: Exit report.* Each issuer that has filed an offering statement for a Tier

1 offering that has been qualified pursuant to this Regulation A must file an exit report on Form 1-Z (§ 239.94) not later than 30 calendar days after the termination or completion of the offering.

(b) *Tier 2: Periodic and current reporting.* Each issuer that has filed an offering statement for a Tier 2 offering that has been qualified pursuant to this Regulation A must file with the Commission the following periodic and current reports in electronic format by means of EDGAR in accordance with the EDGAR rules set forth in Regulation S-T (17 CFR Part 232):

(1) *Annual reports*. An annual report on Form 1-K (§ 239.91) for the fiscal year in which the offering statement became qualified and for any fiscal year thereafter, unless the issuer's obligation to file such annual report is suspended under paragraph (d) of this rule. Annual reports must be filed within the period specified in Form 1-K.

(2) *Special financial report*. (i) A special financial report if the offering statement did not contain the following:

(A) audited financial statements for the issuer's last full fiscal year (or for the life of the issuer if less than a full fiscal year) preceding the fiscal year in which the issuer's offering statement became qualified; or

(B) financial statements covering the first half of the issuer's current fiscal year if the offering statement was qualified during the second half of that fiscal year.

(ii) The special financial report described in paragraph (a)(2)(i)(A) of this rule must be filed under cover of Form 1-K within 120 calendar days after the qualification date of the offering statement and must include audited financial statements for such last full fiscal year or other period, as the case may be. The special financial report described

in paragraph (a)(2)(i)(B) of this rule must be filed under cover of Form 1-SA within 90 calendar days after the qualification date of the offering statement and must include the semiannual financial statements for the first half of the issuer's fiscal year, which may be unaudited.

(iii) A special financial report must be signed in accordance with the requirements of the form on which it is filed.

(3) *Semiannual report*. A semiannual report on Form 1-SA (§ 239.92) within the period specified in Form 1-SA. Semiannual reports must cover the first half of each fiscal year of the issuer, commencing with the first half of the fiscal year following the most recent fiscal year for which full financial statements were included in the offering statement, or, if the offering statement included financial statements for the first half of the fiscal year following the most recent full fiscal year, for the first half of the following fiscal year.

(4) *Current reports*. Current reports on Form 1-U (§ 239.93) with respect to the matters and within the period specified in that form, unless substantially the same information has been previously reported to the Commission by the issuer under cover of Form 1-K or 1-SA.

(5) *Reporting by successor issuers.* Where in connection with a succession by merger, consolidation, exchange of securities, acquisition of assets or otherwise, securities of any issuer that is not required to file reports pursuant to paragraph (b) of this rule are issued to the holders of any class of securities of another issuer that is required to file such reports, the duty to file reports pursuant to paragraph (b) of this rule shall be deemed to have been assumed by the issuer of the class of securities so issued. The

successor issuer must, after the consummation of the succession, file reports in accordance with paragraph (b) of this rule, unless that issuer is exempt from filing such reports or the duty to file such reports is suspended under paragraph (d).

(c) *Amendments*. All amendments to the reports described in paragraphs (a) and (b) of this rule must be filed under cover of the form amended, marked with the letter "A" to designate the document as an amendment, *e.g.*, "1-K/A," and in compliance with pertinent requirements applicable to such reports. Amendments filed pursuant to this paragraph (c) must set forth the complete text of each item as amended, but need not include any items that were not amended. Amendments must be numbered sequentially and be filed separately for each report amended. Amendments must be signed on behalf of the issuer by a duly authorized representative of the issuer. An amendment to any report required to include certifications as specified in the applicable form must include new certifications by the appropriate persons.

(d) *Termination or suspension of duty to file reports*. (1) The duty to file reports under this rule shall be automatically suspended if and so long as the issuer is subject to the duty to file reports required by section 13 or 15(d) of the Exchange Act (15 U.S.C. 78m or 15 U.S.C. 78o).

(2) The duty to file reports under paragraph (b) of this rule with respect to a class of securities held of record (as defined in Rule 12g5-1 (§ 240.12g5-1)) by less than 300 persons shall be suspended for such class of securities immediately upon filing with the Commission an exit report on Form 1-Z (§ 239.94) if the issuer of such class has filed all reports due pursuant to this rule before the date of such Form 1-Z filing for the shorter of (i) the period since the issuer became subject to such reporting obligation, or (ii) its most

recent three fiscal years and the portion of the current year preceding the date of filing Form 1-Z. For the purposes of this subsection, the term ‘‘class’’ shall be construed to include all securities of an issuer that are of substantially similar character and the holders of which enjoy substantially similar rights and privileges. If the Form 1-Z is subsequently withdrawn or denied, the issuer must, within 60 days, file with the Commission all reports which would have been required if such exit report had not been filed. If the suspension resulted from the issuer’s merger into, or consolidation with, another issuer or issuers, the notice must be filed by the successor issuer.

(3) The ability to suspend reporting, as described in paragraph (d)(2) of this rule, is not available for any class of securities if (i) during that fiscal year an offering statement was qualified or (ii) at the time of filing of Form 1-Z, offers or sales of securities of that class are being made pursuant to Regulation A.

(e) *Termination of suspension of duty to file reports*. If the duty to file reports is suspended pursuant to paragraph (d)(1) of this rule and such suspension ends because the issuer is no longer subject to the duty to file reports under the Exchange Act, the issuer’s obligation to file reports under paragraph (b) of this rule shall:

(1) automatically terminate if the issuer is eligible to suspend its duty to file reports under paragraph (d)(2)-(3); or

(2) recommence with the report covering any financial period after that included in any registration statement or Exchange Act report.

§ 230.258 Suspension of the exemption.

(a) The Commission may at any time enter an order temporarily suspending a Regulation A exemption if it has reason to believe that:

(1) No exemption is available or any of the terms, conditions or requirements of Regulation A have not been complied with;

(2) The offering statement, any sales or solicitation of interest material, or any report filed pursuant to Rule 257 (§ 230.257) contains any untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading;

(3) The offering is being made or would be made in violation of section 17 of the Securities Act;

(4) An event has occurred after the filing of the offering statement that would have rendered the exemption hereunder unavailable if it had occurred before such filing;

(5) Any person specified in Rule 262(a) (§ 230.262(a)) has been indicted for any crime or offense of the character specified in Rule 262(a)(1) (§ 230.262(a)(1)), or any proceeding has been initiated for the purpose of enjoining any such person from engaging in or continuing any conduct or practice of the character specified in Rule 262(a)(2) (§ 230.262(a)(2)), or any proceeding has been initiated for the purposes of Rule 262(a)(3)-(8) (§ 230.262(a)(3)-(8)); or

(6) The issuer or any promoter, officer, director or underwriter has failed to cooperate, or has obstructed or refused to permit the making of an investigation by the Commission in connection with any offering made or proposed to be made in reliance on Regulation A.

(b) Upon the entry of an order under paragraph (a) of this rule, the Commission will promptly give notice to the issuer, any underwriter and any selling securityholder:

(1) That such order has been entered, together with a brief statement of the

reasons for the entry of the order; and

(2) That the Commission, upon receipt of a written request within 30 calendar days after the entry of the order, will within 20 calendar days after receiving the request, order a hearing at a place to be designated by the Commission.

(c) If no hearing is requested and none is ordered by the Commission, an order entered under paragraph (a) of this rule shall become permanent on the 30th calendar day after its entry and shall remain in effect unless or until it is modified or vacated by the Commission. Where a hearing is requested or is ordered by the Commission, the Commission will, after notice of and opportunity for such hearing, either vacate the order or enter an order permanently suspending the exemption.

(d) The Commission may, at any time after notice of and opportunity for hearing, enter an order permanently suspending the exemption for any reason upon which it could have entered a temporary suspension order under paragraph (a) of this rule. Any such order shall remain in effect until vacated by the Commission.

(e) All notices required by this rule must be given by personal service, registered or certified mail to the addresses given by the issuer, any underwriter and any selling securityholder in the offering statement.

§ 230.259 Withdrawal or abandonment of offering statements.

(a) If none of the securities that are the subject of an offering statement have been sold and such offering statement is not the subject of a proceeding under Rule 258 (§ 230.258), the offering statement may be withdrawn with the Commission's consent. The application for withdrawal must state the reason the offering statement is to be withdrawn, must be signed by an authorized representative of the issuer and must be filed

with the Commission in electronic format by means of EDGAR in accordance with the EDGAR rules set forth in Regulation S-T (17 CFR Part 232). Any withdrawn document will remain in the Commission's files, as well as the related request for withdrawal.

(b) When an offering statement has been on file with the Commission for nine months without amendment and has not become qualified, the Commission may, in its discretion, declare the offering statement abandoned. If the offering statement has been amended, the nine-month period shall be computed from the date of the latest amendment.

§ 230.260 Insignificant deviations from a term, condition or requirement of Regulation A.

(a) A failure to comply with a term, condition or requirement of Regulation A will not result in the loss of the exemption from the requirements of section 5 of the Securities Act for any offer or sale to a particular individual or entity, if the person relying on the exemption establishes that:

(1) The failure to comply did not pertain to a term, condition or requirement directly intended to protect that particular individual or entity;

(2) The failure to comply was insignificant with respect to the offering as a whole, provided that any failure to comply with paragraphs (a), (b), (d)(1) and (3) of Rule 251 (§ 230.251) shall be deemed to be significant to the offering as a whole; and

(3) A good faith and reasonable attempt was made to comply with all applicable terms, conditions and requirements of Regulation A.

(b) A transaction made in reliance upon Regulation A must comply with all applicable terms, conditions and requirements of the regulation. Where an exemption is

established only through reliance upon paragraph (a) of this rule, the failure to comply shall nonetheless be actionable by the Commission under section 20 of the Securities Act.

(c) This provision provides no relief or protection from a proceeding under Rule 258 (§ 230.258).

§ 230.261 Definitions.

As used in this Regulation A, all terms have the same meanings as in Rule 405 (§ 230.405), except that all references to *registrant* in those definitions shall refer to the issuer of the securities to be offered and sold under Regulation A. In addition, these terms have the following meanings:

(a) *Business day.* Any day except Saturdays, Sundays or United States federal holidays.

(b) *Eligible securities*. Equity securities, debt securities, and debt securities convertible or exchangeable to equity interests, including any guarantees of such securities, but not including asset-backed securities as such term is defined in Item 1101(c) of Regulation AB.

(c) *Final offering circular.* The more recent of (1) the current offering circular contained in a qualified offering statement and (2) the offering circular filed pursuant to Rule 253(g) (§ 230.253(g)), or if the issuer is relying on Rule 253(b), the Final Offering Circular is the offering circular filed pursuant to Rule 253(g)(1) or (3) (§ 230.253(g)(1) or (3)).

(d) *Preliminary offering circular.* The offering circular described in Rule 254 (§ 230.254).

§ 230.262 Disqualification provisions.

(a) No exemption under this Regulation A shall be available for a sale of securities if the issuer; any predecessor of the issuer; any affiliated issuer; any director, executive officer, other officer participating in the offering, general partner or managing member of the issuer; any beneficial owner of 20% or more of the issuer's outstanding voting equity securities, calculated on the basis of voting power; any promoter connected with the issuer in any capacity at the time of filing, any offer after qualification, or such sale; any person that has been or will be paid (directly or indirectly) remuneration for solicitation of purchasers in connection with such sale of securities; any general partner or managing member of any such solicitor; or any director, executive officer or other officer participating in the offering of any such solicitor or general partner or managing member of such solicitor:

(1) Has been convicted, within ten years before the filing of the offering statement (or five years, in the case of issuers, their predecessors and affiliated issuers), of any felony or misdemeanor:

(i) In connection with the purchase or sale of any security;

(ii) Involving the making of any false filing with the Commission; or

(iii) Arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, investment adviser or paid solicitor of purchasers of securities;

(2) Is subject to any order, judgment or decree of any court of competent jurisdiction, entered within five years before the filing of the offering statement, that, at the time of such filing, restrains or enjoins such person from engaging or continuing to engage in any conduct or practice:

(i) In connection with the purchase or sale of any security;

(ii) Involving the making of any false filing with the Commission; or

(iii) Arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, investment adviser or paid solicitor of purchasers of securities;

(3) Is subject to a final order of a state securities commission (or an agency or officer of a state performing like functions); a state authority that supervises or examines banks, savings associations, or credit unions; a state insurance commission (or an agency or officer of a state performing like functions); an appropriate federal banking agency; the U.S. Commodity Futures Trading Commission; or the National Credit Union Administration that:

(i) At the time of the filing of the offering statement, bars the person from:

(A) Association with an entity regulated by such commission, authority, agency, or officer;

(B) Engaging in the business of securities, insurance or banking; or

(C) Engaging in savings association or credit union activities; or

(ii) Constitutes a final order based on a violation of any law or regulation that prohibits fraudulent, manipulative, or deceptive conduct entered within ten years before such sale;

(4) Is subject to an order of the Commission entered pursuant to section 15(b) or 15B(c) of the Securities Exchange Act of 1934 (15 U.S.C. 78 *o* (b) or 78 *o* -4(c)) or section 203(e) or (f) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-3(e) or (f)) that, at the time of the filing of the offering statement:

(i) Suspends or revokes such person's registration as a broker, dealer, municipal securities dealer or investment adviser;

(ii) Places limitations on the activities, functions or operations of such person; or

(iii) Bars such person from being associated with any entity or from participating in the offering of any penny stock;

(5) Is subject to any order of the Commission entered within five years before the filing of the offering statement that, at the time of such filing, orders the person to cease and desist from committing or causing a violation or future violation of:

(i) Any scienter-based anti-fraud provision of the federal securities laws, including without limitation section 17(a)(1) of the Securities Act of 1933 (15 U.S.C. 77q(a)(1)), section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b)) and 17 CFR 240.10b-5, section 15(c)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78 *o* (c)(1)) and section 206(1) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-6(1)), or any other rule or regulation thereunder; or

(ii) Section 5 of the Securities Act of 1933 (15 U.S.C. 77e).

(6) Is suspended or expelled from membership in, or suspended or barred from association with a member of, a registered national securities exchange or a registered national or affiliated securities association for any act or omission to act constituting conduct inconsistent with just and equitable principles of trade;

(7) Has filed (as a registrant or issuer), or was or was named as an underwriter in, any registration statement or Regulation A offering statement filed with the Commission that, within five years before the filing of the offering statement, was the subject of a

refusal order, stop order, or order suspending the Regulation A exemption, or is, at the time of such filing, the subject of an investigation or proceeding to determine whether a stop order or suspension order should be issued; or

(8) Is subject to a United States Postal Service false representation order entered within five years before the filing of the offering statement, or is, at the time of such filing, subject to a temporary restraining order or preliminary injunction with respect to conduct alleged by the United States Postal Service to constitute a scheme or device for obtaining money or property through the mail by means of false representations.

(b) Paragraph (a) of this rule shall not apply:

(1) With respect to any order under § 230.262(a)(3) or (a)(5) that occurred or was issued before **[effective date of rule]**;

(2) Upon a showing of good cause and without prejudice to any other action by the Commission, if the Commission determines that it is not necessary under the circumstances that an exemption be denied;

(3) If, before the filing of the offering statement, the court or regulatory authority that entered the relevant order, judgment or decree advises in writing (whether contained in the relevant judgment, order or decree or separately to the Commission or its staff) that disqualification under paragraph (a) of this rule should not arise as a consequence of such order, judgment or decree; or

(4) If the issuer establishes that it did not know and, in the exercise of reasonable care, could not have known that a disqualification existed under paragraph (a) of this rule.

Instruction to paragraph (b)(4). An issuer will not be able to establish that it has exercised reasonable care unless it has made, in light of the circumstances, factual inquiry

into whether any disqualifications exist. The nature and scope of the factual inquiry will vary based on the facts and circumstances concerning, among other things, the issuer and the other offering participants.

(c) For purposes of paragraph (a) of this rule, events relating to any affiliated issuer that occurred before the affiliation arose will be not considered disqualifying if the affiliated entity is not:

(1) In control of the issuer; or

(2) Under common control with the issuer by a third party that was in control of the affiliated entity at the time of such events.

(d) *Disclosure of prior "bad actor" events.* The issuer must include in the offering circular a description of any matters that would have triggered disqualification under paragraph (a) of this rule but occurred before **[effective date]**. The failure to provide such information shall not prevent an issuer from relying on Regulation A if the issuer establishes that it did not know and, in the exercise of reasonable care, could not have known of the existence of the undisclosed matter or matters.

NOTE: An issuer will not be able to establish that it has exercised reasonable care unless it has made, in light of the circumstances, factual inquiry into whether any disqualifications exist. The nature and scope of the factual inquiry will vary based on the facts and circumstances concerning, among other things, the issuer and the other offering participants.

§ 230.263 Consent to service of process.

(a) If the issuer is not organized under the laws of any of the states of or the United States of America, it shall at the time of filing the offering statement required by

Rule 252 (§ 230.252), furnish to the Commission a written irrevocable consent and power of attorney on Form F-X (§ 239.42 of this chapter).

(b) Any change to the name or address of the agent for service of the issuer shall be communicated promptly to the Commission through amendment of the requisite form and referencing the file number of the relevant offering statement.

* * * * *

5. § 230.505(b)(2)(iii)(A) and (B) are revised, in part, to read as follows:

§ 230.505 Exemption for limited offers and sales of securities not exceeding $5,000,000.

* * * * *

(b) * * *

(2) * * *

(iii) * * *

(A) The term "filing of the offering statement" as used in § 230.262 shall mean the first sale of securities under this section;

(B) The term "underwriter" as used in § 230.262(a) shall mean a person that has been or will be paid directly or indirectly remuneration for solicitation of purchasers in connection with sales of securities under this section; and

* * * * *

PART 232 – REGULATION S-T—GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

6. The authority citation for part 232 is revised to read in part as follows:

Authority: 15 U.S.C. 77c, 77f, 77g, 77h, 77j, 77s(a), 77z-3, 77sss(a), 78c(b), 78*l*, 78m, 78n, 78o(d), 78w(a), 78*ll*, 80a-6(c), 80a-8, 80a-29, 80a-30, 80a-37, 7201 et seq.; 18 U.S.C. 1350; and Pub. L. No. 112-106, § 401, 126 Stat. 313 (2012), unless otherwise noted.

* * * * *

7. § 232.101 is amended by:

a. Revising paragraph (a)(1)(vii) and (c)(6);

b. Adding paragraph (a)(1)(xvii); and

c. Reserving paragraph (b)(8).

The revisions, additions and reservations read as follows:

§ 232.101 Mandated electronic submissions and exceptions.

* * * * *

(a) * * *

(1) * * *

(vii) Form F-X (§ 239.42 of this chapter) when filed in connection with a Form CB (§§ 239.800 and 249.480 of this chapter) or a Form 1-A (§ 239.90);

* * * * *

(xvii) Filings made pursuant to Regulation A (§§ 230.251-230.263 of this chapter).

* * * * *

(b) * * *

(8) [Reserved]

* * * * *

(c) * * *

(6) Filings on Form 144 (§ 239.144 of this chapter) where the issuer of the securities is not subject to the reporting requirements of section 13 or 15(d) of the Exchange Act (15 U.S.C. 78m or 78o(d), respectively).

* * * * *

PART 239 – FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

8. The authority citation for Part 239 is revised to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77f, 77g, 77h, 77j, 77s, 77z–2, 77z–3, 77sss, 78c, 78 l, 78m,78n, 78 o (d), 78o–7 note, 78u–5, 78w(a), 78 ll, 78mm, 80a–2(a), 80a–3, 80a–8, 80a–9, 80a–10, 80a–13, 80a–24, 80a–26, 80a–29, 80a–30, and 80a–37, and Pub. L. No. 112-106, § 401, 126 Stat. 313 (2012), unless otherwise noted.

* * * * *

9. Amend Form 1-A (referenced in § 239.90) by revising it to read as follows:

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 1-A
REGULATION A OFFERING STATEMENT UNDER THE SECURITIES ACT OF 1933

GENERAL INSTRUCTIONS

I. Eligibility Requirements for Use of Form 1-A.

This Form is to be used for securities offerings made pursuant to Regulation A (17 CFR 230.251 *et seq*.). Careful attention should be directed to the terms, conditions and requirements of Regulation A, especially Rule 251, because the exemption is not available to all issuers or to every type of securities transaction. Further, the aggregate offering price of securities in any 12 month period is strictly limited to $5 million for Tier 1 offerings and $50 million for Tier 2 offerings, including no more than $1.5 million offered by all selling securityholders for Tier 1 offerings and $15 million for Tier 2 offerings. Please refer to Rule 251 of Regulation A for more details.

II. Preparation, Submission and Filing of the Offering Statement.

An offering statement must be prepared by all persons seeking exemption under the provisions of Regulation A. Parts I, II and III must be addressed by all issuers. Part II, which relates to the content of the required offering circular, provides two alternative formats, of which the issuer must choose one. General information regarding the preparation, format, content, and submission or filing of the offering statement is contained in Rule 252. Information regarding non-public submission of the offering statement is contained in Rule 252(f). Requirements relating to the offering circular are contained in Rules 253 and 254. The offering statement must be submitted or filed with the Securities and Exchange Commission in electronic format by means of the Commission's Electronic Data Gathering, Analysis and Retrieval System (EDGAR) in accordance with the EDGAR rules set forth in Regulation S-T (17 CFR Part 232) for such submission or filing.

III. Incorporation by Reference.

An issuer may incorporate by reference to other documents previously submitted or filed on EDGAR pursuant to Regulation A, subject to the following additional conditions:

(a) The use of incorporation by reference in Part II of this Form is limited to the following items:

(1) Items 2-14 of Part II if following the Offering Circular format; or

(2) Items 3-11 of Form S-1 if following the Part I of Form S-1 format.

(b) Descriptions of where the information incorporated by reference can be found must be specific and must clearly identify the relevant document and portion thereof where such information can be found. For exhibits, this description must be noted in the exhibits index for each relevant exhibit. All such descriptions must be accompanied by a separate hyperlink to the incorporated document on EDGAR, which hyperlink need not remain active after the filing of the offering statement. Inactive hyperlinks must be updated in any amendment to the offering statement otherwise required. Reference may not be made to any document that incorporates another document by reference if the pertinent portion of the document containing the information to be incorporated by reference includes an incorporation by reference to another document. Incorporation by reference to documents not available on EDGAR is not permitted. Matter shall not be incorporated by reference in any case where such incorporation would render the statement or report incomplete, unclear, or confusing.

(c) If any substantive modification has occurred in the text of any document incorporated by reference since such document was filed, the issuer must file with the reference a statement containing the text and date of such modification.

IV. Supplemental Information.

The following information must be furnished to the Commission as supplemental information, if applicable:

(a) A statement as to whether or not the amount of compensation to be allowed or paid to the underwriter has been cleared with the Financial Industry Regulatory Authority (FINRA);

(b) Any engineering, management, market, or similar report referenced in the offering circular; and

(c) Such other information as requested by the staff in support of statements, representations and other assertions contained in the offering statement or any correspondence to the staff.

Correspondence appropriately responding to any staff comments made on the offering statement must also be furnished. When applicable, such correspondence must clearly indicate where changes responsive to the staff's comments may be found in the offering statement.

PART I—NOTIFICATION

The following information must be provided in the XML-based portion of Form 1-A available through the EDGAR portal and must be completed or updated before uploading each offering statement or amendment thereto. The format of Part I shown below may differ from the electronic version available on EDGAR. The electronic version of Part I will allow issuers to attach Part II and Part III for filing by means of EDGAR. All items must be addressed, unless otherwise indicated.

* * * * * *

☐ No changes to the information required by Part I have occurred since the last filing of this offering statement.

ITEM 1. Issuer Information

Exact name of issuer as specified in the issuer's charter: _____

State or other jurisdiction of incorporation: _____

Year of incorporation:_____

CIK:_____

Primary Standard Industrial Classification Code:_____

I.R.S. Employer Identification Number:_____

Total number of full time employees:_____

Total number of part time employees:_____

Contact Information

Address of Principal Executive Offices: _____
_____

Telephone: (__)_____

Provide the following information for the person the Securities and Exchange Commission's staff should call in connection with any pre-qualification review of the offering statement:

Name:_____
Address:_____
Telephone: (__)_____

Optional: Provide up to two e-mail addresses to which the Securities and Exchange Commission's staff may send any comment letters relating to the offering statement. After qualification of the offering statement, such e-mail addresses are not required to remain active. Regardless of whether you provide this information here, you may be asked to provide such e-mail addresses by the staff member reviewing your filing:_____
_____

Financial Statements

Use the financial statements for the most recent fiscal period contained in this offering statement to provide the following information about the issuer:

Balance Sheet Information

Total Assets: _____
Cash and Cash Equivalents: _____
Accounts Receivable: _____
Investment Assets: _____
Property, Plant and Equipment: _____
Total Liabilities: _____
Accounts Payable: _____
Short Term Liabilities: _____
Long Term Liabilities: _____

Income Statement Information

Total Revenues: _____

Total Expenses: _____

Research and Development Expenses: _____

Interest Expense: _____

Investment Income: _____

Name of Auditor (if any):_____

Outstanding Securities

	Units Outstanding	CUSIP (if any)	Units Publicly Traded
Common Equity			
Preferred Equity			
Debt Securities			

ITEM 2. Issuer Eligibility

☐ Check this box to certify that all of the following statements are true for the issuer:

- Organized under the laws of the United States or Canada, or any State, Province, Territory or possession thereof, or the District of Columbia.
- Principal place of business is in the United States or Canada.
- Not subject to section 13 or 15(d) of the Securities Exchange Act of 1934.
- Not a development stage company that either (a) has no specific business plan or purpose, or (b) has indicated that its business plan is to merge with an unidentified company or companies.
- Not an investment company registered or required to be registered under the Investment Company Act of 1940.
- Not issuing fractional undivided interests in oil or gas rights, or a similar interest in other mineral rights.
- Not issuing asset-backed securities as defined in Item 1101(c) of Regulation AB.

- Not, and has not been, subject to any order of the Commission entered pursuant to Section 12(j) of the Exchange Act (15 U.S.C. 78*l*(j)) within five years before the filing of this offering statement.

- Has filed with the Commission all the reports it was required to file, if any, pursuant to Rule 257 during the two years immediately before the filing of the offering statement (or for such shorter period that the issuer was required to file such reports).

ITEM 3. Application of Rule 262

☐ Check this box to certify that, as of the time of this filing, none of the persons described in Rule 262 of Regulation A are disqualified under that rule.

☐ Check this box if "bad actor" disclosure under Rule 262(d) is provided in Part II of the offering statement.

ITEM 4. Summary Information Regarding the Offering and Other Current or Proposed Offerings

Check the appropriate box to indicate whether you are conducting a Tier 1 or Tier 2 offering:

☐ Tier 1 ☐ Tier 2

Types of Securities Offered in this Offering Statement (select all that apply):

☐ Equity (common or preferred stock)

☐ Debt

☐ Option, warrant or other right to acquire another security

☐ Security to be acquired upon exercise of option, warrant or other right to acquire security

☐ Tenant-in-common securities

☐ Other (describe) _____

Does the issuer intend to offer the securities on a delayed or continuous basis pursuant to Rule 251(d)(3)?

Yes ☐ No ☐

Does the issuer intend this offering to last more than one year?
Yes ☐ No ☐

Does the issuer intend to price this offering after qualification pursuant to Rule 253(b)?

Yes ☐ No ☐

Will the issuer be conducting a best efforts offering?
Yes ☐ No ☐

Has the issuer used solicitation of interest communications in connection with the proposed offering?

Yes ☐ No ☐

Does the proposed offering involve the resale of securities by affiliates of the issuer?
Yes ☐ No ☐

Number of securities offered:_____

Number of securities of that class already outstanding:_____

The information called for by this item below may be omitted if undetermined at the time of filing or submission, except that if a price range has been included in the offering statement, the midpoint of that range must be used to respond. Please refer to Rule 251(a) for the definition of "aggregate offering price" as used in this item.

Price per security: $_____

The aggregate offering price for the securities being offered on behalf of the issuer:
$_____ ☐ N/A

The aggregate offering price for the securities being offered on behalf of selling securityholders:
$_____ ☐ N/A

The aggregate offering price for all securities of the issuer sold pursuant to a qualified offering statement within the 12 months before the qualification of this offering statement:
$_____ ☐ N/A

The estimated aggregate offering price of any securities that may be sold pursuant to any other qualified offering statement concurrently with securities being sold under this offering statement:
$_____ ☐ N/A

Total: $_____ (the sum of the aggregate offering prices in the four preceding paragraphs).

Anticipated fees in connection with this offering and names of service providers:

Name of Service Provider	Fees

Underwriters:	_____	$ _____
Sales Commissions:	_____	$ _____
Finders' Fees:	_____	$ _____
Auditor:	_____	$ _____
Legal:	_____	$ _____
Promoters:	_____	$ _____
Blue Sky Compliance:	_____	$ _____

CRD Number of any broker or dealer listed:_____
Estimated net proceeds to the issuer: $_____

Clarification of responses (if necessary): _____

ITEM 5. Jurisdictions in Which Securities are to be Offered

Check the appropriate box for each jurisdiction in which the issuer intends to offer the securities:

☐ All States

☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐
AL	AK	AZ	AR	CA	CO	CT	DE	DC	FL	GA	HI	ID
☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐
IL	IN	IA	KS	KY	LA	ME	MD	MA	MI	MN	MS	MO
☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐
MT	NE	NV	NH	NJ	NM	NY	NC	ND	OH	OK	OR	PA
☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐
RI	SC	SD	TN	TX	UT	VT	VA	WA	WV	WI	WY	PR

Check the appropriate box for each jurisdiction in which the securities are to be offered by underwriters, dealers or sales persons:

☐ None

☐ Same as the jurisdictions in which the issuer intends to offer the securities.

☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐
AL	AK	AZ	AR	CA	CO	CT	DE	DC	FL	GA	HI	ID
☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐
IL	IN	IA	KS	KY	LA	ME	MD	MA	MI	MN	MS	MO
☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐
MT	NE	NV	NH	NJ	NM	NY	NC	ND	OH	OK	OR	PA
☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐
RI	SC	SD	TN	TX	UT	VT	VA	WA	WV	WI	WY	PR

ITEM 6. Unregistered Securities Issued or Sold Within One Year

☐ None

As to any unregistered securities issued by the issuer or any of its predecessors or affiliated issuers within one year before the filing of this Form 1-A, state:

(a) Name of such issuer;

(b) Title and amount of securities issued; and

(c) Aggregate consideration for which they were issued and basis for computing the amount thereof.

_____

_____

_____

As to any unregistered securities of the issuer or any of its predecessors or affiliated issuers that were sold within one year before the filing of this Form 1-A by or for the account of any person who at the time was a director, officer, promoter or principal securityholder of the issuer of such securities, or was an underwriter of any securities of such issuer, furnish the information specified in subsections (a) through (c) of the preceding paragraph: _____

_____

Indicate the section of the Securities Act or Commission rule or regulation relied upon for exemption from the registration requirements of such Act and state briefly the facts relied upon for such exemption: _____

_____

PART II — INFORMATION REQUIRED IN OFFERING CIRCULAR

(a) The narrative disclosure contents of offering circulars are specified as follows:

(1) The information required by the Offering Circular format described below; or

(2) The offering circular must describe any matters that would have triggered disqualification under Rule 262(a) but for the provisions set forth in Rule 262(b)(1);

(3) The legend required by Rule 253(f) of Regulation A must be included on the offering circular cover page (for issuers following the S-1 disclosure model this legend must be included instead of the legend required by Item 501(b)(7) of Regulation S-K);

(4) For preliminary offering circulars, the legend required by Rule 254(a) must be included on the offering circular cover page (for issuers following the S-1

disclosure model, this legend must be included instead of the legend required by Item 501(b)(10) of Regulation S-K); and

(5) For Tier 2 offerings, the offering circular cover page must include the following legend highlighted by prominent type or in another manner:

> No sale may be made to you in this offering if the aggregate purchase price you pay is more than 10% of the greater of your annual income and net worth. Before making any representation that your investment does not exceed this threshold, we encourage you to refer to Rule 251(d)(2)(i)(C) of Regulation A, which provides additional details. For general information on investing, we encourage you to refer to www.investor.gov.

(c) The Commission encourages the use of management's projections of future economic performance that have a reasonable basis and are presented in an appropriate format. See Rule 175, 17 CFR 230.175.

(d) Offering circulars need not follow the order of the items or the order of other requirements of the disclosure form except to the extent otherwise specifically provided. Such information may not, however, be set forth in such a fashion as to obscure any of the required information or any information necessary to keep the required information from being incomplete or misleading. Information requested to be presented in a specified tabular format must be given in substantially the tabular format specified. For incorporation by reference, please refer to General Instruction III of this Form.

OFFERING CIRCULAR

Item 1. Cover Page of Offering Circular

The cover page of the offering circular must be limited to one page and must include the information specified in this item.

(a) Name of the issuer.

Instruction to Item 1(a):

> *If your name is the same as, or confusingly similar to, that of a company that is well known, include information to eliminate any possible confusion with the other company. If your name indicates a line of business in which you are not engaged or you are engaged only to a limited extent, include information to eliminate any misleading inference as to your business. In some circumstances, disclosure may not be sufficient and you may be required to change your name. You will not be required to change your name if you are an established company, the character of your business has changed, and the investing public is generally aware of the change and the character of your current business.*

(b) Full mailing address of the issuer's principal executive offices and the issuer's telephone number (including the area code) and, if applicable, website address.

(c) Date of the offering circular.

(d) Title and amount of securities offered. Separately state the amount of securities offered by selling securityholders, if any. Include a cross-reference to the section where the disclosure required by Item 14 of this Form 1-A has been provided;

(e) The information called for by the applicable table below as to all the securities being offered, in substantially the tabular format indicated. If necessary, you may estimate any underwriting discounts and commissions and the proceeds to the issuer or other persons.

	Price to public	Underwriting discount and commissions	Proceeds to issuer	Proceeds to other persons
Per share/unit:	_____	_____	_____	_____
Total:	_____	_____	_____	_____

If the securities are to be offered on a best efforts basis, the cover page must set forth the termination date, if any, of the offering, any minimum required sale and any arrangements to place the funds received in an escrow, trust, or similar arrangement. The following table must be used instead of the preceding table.

	Price to public	Underwriting discount and commissions	Proceeds to issuer	Proceeds to other persons
Per share/unit:	_____	_____	_____	_____
Total Minimum:	_____	_____	_____	_____
Total Maximum:	_____	_____	_____	_____

Instructions to Item 1(e):

> *1. The term "commissions" includes all cash, securities, contracts, or anything else of value, paid, to be set aside, disposed of, or understandings with or for the benefit of any other persons in which any underwriter is interested, made in connection with the sale of such security.*

2. Only commissions paid by the issuer in cash are to be indicated in the table. Commissions paid by other persons or any form of non-cash compensation must be briefly identified in a footnote to the table with a cross-reference to a more complete description elsewhere in the offering circular.

3. Before the commencement of sales pursuant to Regulation A, the issuer must inform the Commission whether or not the amount of compensation to be allowed or paid to the underwriters, as described in the offering statement, has been cleared with FINRA.

4. If the securities are not to be offered for cash, state the basis upon which the offering is to be made.

5. Any finder's fees or similar payments must be disclosed on the cover page with a reference to a more complete discussion in the offering circular. Such disclosure must identify the finder, the nature of the services rendered and the nature of any relationship between the finder and the issuer, its officers, directors, promoters, principal stockholders and underwriters (including any affiliates of such persons).

6. The amount of the expenses of the offering borne by the issuer, including underwriting expenses to be borne by the issuer, must be disclosed in a footnote to the table.

(f) The name of the underwriter or underwriters.

(g) Any legend or information required by the law of any state in which the securities are to be offered.

(h) A cross-reference to the risk factors section, including the page number where it appears in the offering circular. Highlight this cross-reference by prominent type or in another manner.

(i) Approximate date of commencement of proposed sale to the public.

(j) If the issuer intends to rely on Rule 253(b) and a preliminary offering circular is circulated, provide (1) a bona fide estimate of the range of the maximum offering price and the maximum number of securities offered or (2) a bona fide estimate of the principal amount of the debt securities offered. The range must not exceed $2 for offerings where the upper end of the range is $10 or less and 20% if the upper end of the price range is over $10.

Instruction to Item 1(j):

The upper limit of the price range must be used in determining the aggregate offering price for purposes of Rule 251(a).

Item 2. Table of Contents

On the page immediately following the cover page of the offering circular, provide a reasonably detailed table of contents. It must show the page number of the various sections or subdivisions of the offering circular. Include a specific listing of the risk factors section required by Item 3 of this Form 1-A.

Item 3. Summary and Risk Factors

(a) An issuer may provide a summary of the information in the offering circular where the length or complexity of the offering circular makes a summary useful. The summary should be brief and must not contain all of the detailed information in the offering circular.

(b) Immediately following the Table of Contents required by Item 2 or the Summary, there must be set forth under an appropriate caption, a carefully organized series of short, concise paragraphs, summarizing the most significant factors that make the offering speculative or substantially risky. Issuers should avoid generalized statements and include only factors that are specific to the issuer.

Item 4. Dilution

Where there is a material disparity between the public offering price and the effective cash cost to officers, directors, promoters and affiliated persons for shares acquired by them in a transaction during the past year, or that they have a right to acquire, there must be included a comparison of the public contribution under the proposed public offering and the average effective cash contribution of such persons.

Item 5. Plan of Distribution and Selling Securityholders

(a) If the securities are to be offered through underwriters, give the names of the principal underwriters, and state the respective amounts underwritten. Identify each such underwriter having a material relationship to the issuer and state the nature of the relationship. State briefly the nature of the underwriters' obligation to take the securities.

Instructions to Item 5(a):

1. All that is required as to the nature of the underwriters' obligation is whether the underwriters are or will be committed to take and to pay for all of the securities if any are taken, or whether it is merely an agency or the type of best efforts arrangement under which the underwriters are required to take and to pay for only such securities as they may sell to the public. Conditions precedent to the

underwriters' taking the securities, including market-outs, need not be described except in the case of an agency or best efforts arrangement.

2. It is not necessary to disclose each member of a selling group. Disclosure may be limited to those underwriters who are in privity of contract with the issuer with respect to the offering.

(b) State briefly the discounts and commissions to be allowed or paid to dealers, including all cash, securities, contracts or other consideration to be received by any dealer in connection with the sale of the securities.

(c) Outline briefly the plan of distribution of any securities being issued that are to be offered through the selling efforts of brokers or dealers or otherwise than through underwriters.

(d) If any of the securities are to be offered for the account of securityholders, identify each selling securityholder, state the amount owned by the securityholder, the amount offered for his or her account and the amount to be owned after the offering. Provide such disclosure in a tabular format. At the bottom of the table, provide the total number of securities being offered for the account of all securityholders and describe what percent of the outstanding securities of such class the offering represents.

Instruction to Item 5(d):

The term "securityholder" in this paragraph refers to beneficial holders, not nominee holders or other such holders of record. If the selling securityholder is an entity, disclosure of the persons who have sole or shared voting or investment power must be included.

(e) Describe any arrangements for the return of funds to subscribers if all of the securities to be offered are not sold. If there are no such arrangements, so state.

(f) If there will be a material delay in the payment of the proceeds of the offering by the underwriter to the issuer, the salient provisions in this regard and the effects on the issuer must be stated.

(g) Describe any arrangement to (1) limit or restrict the sale of other securities of the same class as those to be offered for the period of distribution, (2) stabilize the market for any of the securities to be offered, or (3) withhold commissions, or otherwise to hold each underwriter or dealer responsible for the distribution of its participation.

(h) Identify any underwriter that intends to confirm sales to any accounts over which it exercises discretionary authority and include an estimate of the amount of securities so intended to be confirmed:

Instruction to Item 5:

Attention is directed to the provisions of Rules 10b-9 [17 CFR 240.10b-9] and 15c2-4 [17 CFR 240.15c2-4] under the Securities Exchange Act of 1934. These rules outline, among other things, antifraud provisions concerning the return of funds to subscribers and the transmission of proceeds of an offering to a seller.

Item 6. Use of Proceeds to Issuer

State the principal purposes for which the net proceeds to the issuer from the securities to be offered are intended to be used and the approximate amount intended to be used for each such purpose. If the issuer will not receive any of proceeds from the offering, so state.

Instructions to Item 6:

1. If any substantial portion of the proceeds has not been allocated for particular purposes, a statement to that effect must be made together with a statement of the amount of proceeds not so allocated.

2. State whether or not the proceeds will be used to compensate or otherwise make payments to officers or directors of the issuer or any of its subsidiaries.

3. For best efforts offerings, describe any anticipated material changes in the use of proceeds if all of the securities being qualified on the offering statement are not sold.

4. If an issuer must provide the disclosure described in Item 9(c) the use of proceeds and plan of operations should be consistent.

5. If any material amounts of other funds are to be used in conjunction with the proceeds, state the amounts and sources of such other funds.

6. If any material part of the proceeds is to be used to discharge indebtedness, describe the material terms of such indebtedness. If the indebtedness to be discharged was incurred within one year, describe the use of the proceeds arising from such indebtedness.

7. If any material amount of the proceeds is to be used to acquire assets, otherwise than in the ordinary course of business, briefly describe and state the cost of the assets. If the assets are to be acquired from affiliates of the issuer or their associates, give the names of the persons from whom they are to be acquired and set forth the basis used in determining the purchase price to the issuer.

8. The issuer may reserve the right to change the use of proceeds, so long as the reservation is prominently disclosed in the section where the use of proceeds is discussed. It is not necessary to describe the possible alternative uses of proceeds

unless the issuer believes that a change in circumstances leading to an alternative use of proceeds is likely to occur.

Item 7. Description of Business

(a) Narrative description of business.

(1) Describe the business done and intended to be done by the issuer and its subsidiaries and the general development of the business during the past three years or such shorter period as the issuer may have been in business. Such description must include, but not be limited to, a discussion of the following factors if such factors are material to an understanding of the issuer's business:

(i) The principal products and services of the issuer and the principal market for and method of distribution of such products and services.

(ii) The status of a product or service if the issuer has made public information about a new product or service that would require the investment of a material amount of the assets of the issuer or is otherwise material.

(iii) The estimated amount spent during each of the last two fiscal years on company- sponsored research and development activities determined in accordance with generally accepted accounting principles. In addition, state the estimated dollar amount spent during each of such years on material customer-sponsored research activities relating to the development of new products, services or techniques or the improvement of existing products, services or techniques.

(iv) The total number of persons employed by the issuer, indicating the number employed full time.

(v) Any bankruptcy, receivership or similar proceeding.

(vi) Any legal proceedings material to the business or financial condition of the issuer.

(vii) Any material reclassification, merger, consolidation, or purchase or sale of a significant amount of assets not in the ordinary course of business.

(2) The issuer must also describe those distinctive or special characteristics of the issuer's operation or industry that may have a material impact upon the issuer's future financial performance. Examples of factors that might be discussed include dependence on one or a few major customers or suppliers (including suppliers of raw materials or financing), existing or probable governmental regulation

(including environmental regulation), material terms of and/or expiration of material labor contracts or patents, trademarks, licenses, franchises, concessions or royalty agreements, unusual competitive conditions in the industry, cyclicality of the industry and anticipated raw material or energy shortages to the extent management may not be able to secure a continuing source of supply.

(3) Any engineering, management or similar reports that have been prepared or provided for external use by the issuer or by a principal underwriter in connection with the proposed offering must be furnished to the Commission at the time of filing the offering statement or as soon as practicable thereafter. There must also be furnished at the same time a statement as to the actual or proposed use and distribution of such report or memorandum. Such statement must identify each class of persons who have received or will receive the report or memorandum, and state the number of copies distributed to each such class. If no such report or memorandum has been prepared, the Commission must be so informed in writing at the time the report or memorandum would otherwise have been submitted.

(b) Segment Data. If the issuer is required to include segment information in its financial statements, an appropriate cross-reference must be included in the description of business.

(c) Industry Guides. The disclosure guidelines in all Securities Act Industry Guides must be followed. To the extent that the industry guides are codified into Regulation S-K, the Regulation S-K industry disclosure items must be followed.

(d) For offerings of limited partnership or limited liability company interests, an issuer must comply with the Commission's interpretive views on substantive disclosure requirements set forth in Securities Act Release No. 6900 (June 17, 1991).

Item 8. Description of Property

State briefly the location and general character of any principal plants or other material physical properties of the issuer and its subsidiaries. If any such property is not held in fee or is held subject to any major encumbrance, so state and briefly describe how held. Include information regarding the suitability, adequacy, productive capacity and extent of utilization of the properties and facilities used in the issuer's business.

Instruction to Item 8:

Detailed descriptions of the physical characteristics of individual properties or legal descriptions by metes and bounds are not required and should not be given.

Item 9. Management's Discussion and Analysis of Financial Condition and Results of Operations

Discuss the issuer's financial condition, changes in financial condition and results of operations for each year and interim period for which financial statements are required, including the causes of material changes from year to year or period to period in financial statement line items, to the extent necessary for an understanding of the issuer's business as a whole. Information provided also must relate to all separate segments of the issuer. Provide the information specified below as well as such other information that is necessary for an investor's understanding of the issuer's financial condition, changes in financial condition and results of operations.

(a) Operating results. Provide information regarding significant factors, including unusual or infrequent events or new developments, materially affecting the issuer's income from operations, indicating the extent to which income was so affected. Describe any other significant component of revenue or expenses necessary to understand the issuer's results of operations. To the extent that the financial statements disclose material changes in net sales or revenues, provide a narrative discussion of the extent to which such changes are attributable to changes in prices or to changes in the volume or amount of products or services being sold or to the introduction of new products or services.

(b) Liquidity and capital resources. Provide information regarding the following:

> (1) the issuer's liquidity (both short and long term), including a description and evaluation of the internal and external sources of liquidity and a brief discussion of any material unused sources of liquidity. Include a statement by the issuer that, in its opinion, the working capital is sufficient for the issuer's present requirements, or, if not, how it proposes to provide the additional working capital needed.
>
> (2) the level of borrowings at the end of the period under review, the seasonality of borrowing requirements and the maturity profile of borrowings and committed borrowing facilities, with a description of any restrictions on their use.
>
> (3) the type of financial instruments used, the maturity profile of debt, currency and interest rate structure, the extent to which borrowings are at fixed rates, and the use of financial instruments for hedging purposes.
>
> (4) the issuer's material commitments for capital expenditures as of the end of the latest financial year and any subsequent interim period and an indication of the general purpose of such commitments and the anticipated sources of funds needed to fulfill such commitments.

(c) Plan of Operations. Issuers (including predecessors) that have not received revenue from operations during each of the three fiscal years immediately before the filing of the offering statement must describe, if formulated, their plan of operation for the twelve months following the commencement of the proposed offering. If such information is not available, the reasons for its unavailability must be stated. Disclosure relating to any plan must include, among other things, a statement indicating whether, in the issuer's

opinion, the proceeds from the offering will satisfy its cash requirements or whether it anticipates it will be necessary to raise additional funds in the next six months to implement the plan of operations.

(d) Trend information. The issuer must identify the most significant recent trends in production, sales and inventory, the state of the order book and costs and selling prices since the latest financial year. The issuer also must discuss, for at least the current financial year, any known trends, uncertainties, demands, commitments or events that are reasonably likely to have a material effect on the issuer's net sales or revenues, income from continuing operations, profitability, liquidity or capital resources, or that would cause reported financial information not necessarily to be indicative of future operating results or financial condition.

Item 10. Directors, Executive Officers and Significant Employees

(a) For each of the directors, persons nominated or chosen to become directors, executive officers, persons chosen to become executive officers, and significant employees, provide the information specified below in substantially the following tabular format:

Name	Position	Age	Term of Office(1)	Approximate hours per week(2)
Executive Officers:				
Directors:				
Significant Employees:				

(1) Provide the month and year of the start date and, if applicable, the end date. To the extent you are unable to provide specific dates, provide such other description in the table or in an appropriate footnote clarifying the term of office. If the person is a nominee or chosen to become a director or executive officer, it must be indicated in this column or by footnote.

(2) For executive officers and significant employees that are working part-time, indicate approximately the average number of hours per week or month such person works or is anticipated to work. This column may be left blank for directors. The entire column may be omitted if all those listed in the table work full time for the issuer.

In a footnote to the table, briefly describe any arrangement or understanding between the persons described above and any other persons (naming such persons) pursuant to which the person was or is to be selected to his or her office or position.

Instructions to Item 10(a):

1. No nominee or person chosen to become a director or person chosen to be an executive officer who has not consented to act as such may be named in response to this item.

2. The term "executive officer" means the president, secretary, treasurer, any vice-president in charge of a principal business function (such as sales, administration, or finance) and any other person who performs similar policy making functions for the issuer.

3. The term "significant employee" means persons such as production managers, sales managers, or research scientists, who are not executive officers, but who make or are expected to make significant contributions to the business of the issuer.

(b) Family relationships. State the nature of any family relationship between any director, executive officer, person nominated or chosen by the issuer to become a director or executive officer or any significant employee.

Instruction to Item 10(b):

The term "family relationship" means any relationship by blood, marriage, or adoption, not more remote than first cousin.

(c) Business experience. Give a brief account of the business experience during the past five years of each director, executive officer, person nominated or chosen to become a director or executive officer, and each significant employee, including his or her principal occupations and employment during that period and the name and principal business of any corporation or other organization in which such occupations and employment were carried on. When an executive officer or significant employee has been employed by the issuer for less than five years, a brief explanation must be included as to the nature of the responsibilities undertaken by the individual in prior positions to provide adequate disclosure of this prior business experience. What is required is information relating to the level of the employee's professional competence, which may include, depending upon the circumstances, such specific information as the size of the operation supervised.

(d) Involvement in certain legal proceedings. Describe any of the following events which occurred during the past five years and which are material to an evaluation of the ability or integrity of any director, person nominated to become a director or executive officer of the issuer:

(1) A petition under the federal bankruptcy laws or any state insolvency law was filed by or against, or a receiver, fiscal agent or similar officer was appointed by a court for the business or property of such person, or any partnership in which he was general partner at or within two years before the time of such filing, or any

corporation or business association of which he was an executive officer at or within two years before the time of such filing; or

(2) Such person was convicted in a criminal proceeding (excluding traffic violations and other minor offenses).

Item 11. Compensation of Directors and Officers

(a) Provide, in substantially the tabular format indicated, the annual compensation of each of the three highest paid persons who were officers or directors during the issuer's last completed fiscal year.

Name	Capacities in which compensation was received (e.g., Chief Executive Officer, director, etc.)	Cash compensation ($)	Other compensation ($)	Total compensation ($)

(b) Provide the aggregate annual compensation of the issuer's directors as a group for the issuer's last completed fiscal year.

(c) Briefly describe all proposed compensation to be made in the future pursuant to any ongoing plan or arrangement to the individuals specified in paragraphs (a) and (b) of this item. The description must include a summary of how each plan operates, any performance formula or measure in effect (or the criteria used to determine payment amounts), the time periods over which the measurements of benefits will be determined, payment schedules, and any recent material amendments to the plan. Information need not be furnished with respect to any group life, health, hospitalization, or medical reimbursement plans that do not discriminate in scope, terms or operation in favor of officers or directors of the issuer and that are available generally to all salaried employees.

Instructions to Item 11:

1. In case of compensation paid or to be paid otherwise than in cash, if it is impracticable to determine the cash value thereof, state in a note to the table the nature and amount thereof.

2. This item is to be answered on an accrual basis if practicable; if not so answered, state the basis used.

Item 12. Security Ownership of Management and Certain Securityholders

(a) Include the information specified in paragraph (b) of this item as of the most recent practicable date (stating the date used), in substantially the tabular format indicated, with respect to voting securities beneficially owned by:

(1) all officers and directors as a group, individually naming each director or officer who beneficially owns more than 10% of any class of the issuer's voting securities;

(2) any other shareholder who beneficially owns more than 10% of any class of the issuer's voting securities as such beneficial ownership would be calculated if the issuer were subject to Rule 13d-3(d)(1) of the Securities Exchange Act of 1934.

(b) Beneficial Ownership Table:

Title of Class	Name and address of beneficial owner(1)	Amount and nature of beneficial ownership	Amount and nature of beneficial ownership acquirable(2)	Percent of Class(3)

(1) The address given in this column may be a business, mailing, or residential address. The address may be included in an appropriate footnote to the table rather than in this column.

(2) This column must include the amount of equity securities each beneficial owner has the right to acquire using the manner specified in Rule 13d-3(d)(1) of the Securities Exchange Act of 1934. An appropriate footnote must be included if the column heading does not sufficiently describe the circumstances upon which such securities could be acquired.

(3) This column must use the amounts contained in the two preceding columns to calculate the percent of class owned by such beneficial owner.

Item 13. Interest of Management and Others in Certain Transactions

(a) Describe briefly any transactions or any currently proposed transactions during the issuer's last two completed fiscal years and the current fiscal year, to which the issuer or any of its subsidiaries was or is to be a participant and the amount involved exceeds the lesser of $120,000 or one percent of the average of the issuer's total assets at year end for the last two completed fiscal years, and in which any of the following persons had or is to have a direct or indirect material interest, naming the person and stating his or her

relationship to the issuer, the nature of the person's interest in the transaction and, where practicable, the amount of such interest:

(1) Any director or officer of the issuer;

(2) Any nominee for election as a director;

(3) Any securityholder named in answer to Item 12(a)(2);

(4) If the issuer was incorporated or organized within the past three years, any promoter of the issuer; or

(5) Any immediate family member of the above persons. An "immediate family member" of a person means such person's child, stepchild, parent, stepparent, spouse, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, or any person (other than a tenant or employee) sharing such person's household.

Instructions to Item 13(a):

1. For purposes of calculating the amount of the transaction described above, all periodic installments in the case of any lease or other agreement providing for periodic payments must be aggregated to the extent they occurred within the time period described in this item.

2. No information need be given in answer to this item as to any transaction where:

(a) The rates of charges involved in the transaction are determined by competitive bids, or the transaction involves the rendering of services as a common or contract carrier fixed in conformity with law or governmental authority;

(b) The transaction involves services as a bank depositary of funds, transfer agent, registrar, trustee under a trust indenture, or similar services;

(c) The interest of the specified person arises solely from the ownership of securities of the issuer and the specified person receives no extra or special benefit not shared on a pro-rata basis by all of the holders of securities of the class.

3. This item calls for disclosure of indirect as well as direct material interests in transactions. A person who has a position or relationship with a firm, corporation, or other entity which engages in a transaction with the issuer or its subsidiaries may have an indirect interest in such transaction by reason of the

position or relationship. However, a person is deemed not to have a material indirect interest in a transaction within the meaning of this item where:

> *(a) the interest arises only (i) from the person's position as a director of another corporation or organization (other than a partnership) that is a party to the transaction, or (ii) from the direct or indirect ownership by the person and all other persons specified in paragraphs (1) through (5) of this item, in the aggregate, of less than a 10 percent equity interest in another person (other than a partnership) that is a party to the transaction, or (iii) from both such position and ownership;*
>
> *(b) the interest arises only from the person's position as a limited partner in a partnership in which the person and all other persons specified in paragraphs (1) through (5) of this item had an interest of less than 10 percent; or*
>
> *(c) the interest of the person arises solely from the holding of an equity interest (unless the equity interest confers management rights similar to a general partner interest) or a creditor interest in another person that is a party to the transaction with the issuer or any of its subsidiaries and the transaction is not material to the other person.*

4. Include the name of each person whose interest in any transaction is described and the nature of the relationships by reason of which such interest is required to be described. The amount of the interest of any specified person must be computed without regard to the amount of the profit or loss involved in the transaction. Where it is not practicable to state the approximate amount of the interest, the approximate amount involved in the transaction must be disclosed.

5. Information must be included as to any material underwriting discounts and commissions upon the sale of securities by the issuer where any of the specified persons was or is to be a principal underwriter or is a controlling person, or member, of a firm which was or is to be a principal underwriter. Information need not be given concerning ordinary management fees paid by underwriters to a managing underwriter pursuant to an agreement among underwriters, the parties to which do not include the issuer or its subsidiaries.

6. As to any transaction involving the purchase or sale of assets by or to any issuer or any subsidiary, otherwise than in the ordinary course of business, state the cost of the assets to the purchaser and, if acquired by the seller within two years before the transaction, the cost to the seller.

7. Information must be furnished in answer to this item with respect to transactions not excluded above which involve compensation from the issuer or its subsidiaries, directly or indirectly, to any of the specified persons for services in any capacity unless the interest of such persons arises solely from the

ownership individually and in the aggregate of less than 10 percent of any class of equity securities of another corporation furnishing the services to the issuer or its subsidiaries.

(b) If any expert named in the offering statement as having prepared or certified any part of the offering statement was employed for such purpose on a contingent basis or, at the time of such preparation or certification or at any time thereafter, had a material interest in the issuer or any of its parents or subsidiaries or was connected with the issuer or any of its subsidiaries as a promoter, underwriter, voting trustee, director, officer or employee, describe the nature of such contingent basis, interest or connection.

Item 14. Securities Being Offered

(a) If capital stock is being offered, state the title of the class and furnish the following information regarding all classes of capital stock outstanding:

(1) Outline briefly: (i) dividend rights; (ii) voting rights; (iii) liquidation rights; (iv) preemptive rights; (v) conversion rights; (vi) redemption provisions; (vii) sinking fund provisions; (viii) liability to further calls or to assessment by the issuer; (ix) any classification of the Board of Directors, and the impact of classification where cumulative voting is permitted or required; (x) restrictions on alienability of the securities being offered; (xi) any provision discriminating against any existing or prospective holder of such securities as a result of such securityholder owning a substantial amount of securities; and (xii) any rights of holders that may be modified otherwise than by a vote of a majority or more of the shares outstanding, voting as a class.

(2) Briefly describe potential liabilities imposed on shareholders under state statutes or foreign law, for example, to employees of the issuer, unless such disclosure would be immaterial because the financial resources of the issuer are such as to make it unlikely that the liability will ever be imposed.

(3) If preferred stock is to be offered or is outstanding, describe briefly any restriction on the repurchase or redemption of shares by the issuer while there is any arrearage in the payment of dividends or sinking fund installments. If there is no such restriction, so state.

(b) If debt securities are being offered, outline briefly the following:

(1) Provisions with respect to interest, conversion, maturity, redemption, amortization, sinking fund or retirement.

(2) Provisions with respect to the kind and priority of any lien securing the issue, together with a brief identification of the principal properties subject to such lien.

(3) Material affirmative and negative covenants.

Instruction to Item 14(b):

In the case of secured debt there must be stated: (i) the approximate amount of unbonded property available for use against the issuance of bonds, as of the most recent practicable date, and (ii) whether the securities being issued are to be issued against such property, against the deposit of cash, or otherwise.

(c) If securities described are to be offered pursuant to warrants, rights, or convertible securities, state briefly:

(1) the amount of securities issuable upon the exercise or conversion of such warrants, convertible securities or rights;

(2) the period during which and the price at which the warrants, convertible securities or rights are exercisable;

(3) the amounts of warrants, convertible securities or rights outstanding; and

(4) any other material terms of such securities.

(d) In the case of any other kind of securities, appropriate information of a comparable character.

Part F/S

(a) General Rules

(1) The appropriate financial statements set forth below of the issuer, or the issuer and its predecessors or any businesses to which the issuer is a successor must be filed as part of the offering statement and included in the offering circular that is distributed to investors.

(2) Unless the issuer is a Canadian company, financial statements must be prepared in accordance with generally accepted accounting principles in the United States (US GAAP). If the issuer is a Canadian company, such financial statements must be prepared in accordance with either US GAAP or International Financial Reporting Standards as issued by the International Accounting Standards Board. If the financial statements comply with International Financial Reporting Standards as issued by the International Accounting Standards Board, such compliance must be unreservedly and explicitly stated in the notes to the financial statements and the auditor's report must include an opinion on whether the financial statements comply with International Financial Reporting Standards as issued by the International Accounting Standards Board.

(3) The following requirements apply to all financial statements filed on this Form 1-A:

(i) The most recent balance sheet must be as of a date within nine months before filing the offering statement. For filings made more than three months after the end of the issuer's most recent fiscal year, the balance sheet must be dated as of the end of the most recent fiscal year. For filings made more than nine months after the end of the issuer's most recent fiscal year, the balance sheet must be dated no earlier than as of six months after the end of the most recent fiscal year.

(ii) The date of the most recent balance sheet included pursuant to this Part F/S must be used to determine which fiscal years must be covered by the statements of income and cash flows and any other financial statement disclosure dependent on such date.

(iii) Financial statements for the two most recently completed fiscal years are required for the issuer. Financial statements for no more than the two most recently completed fiscal years are required for any businesses acquired or to be acquired.

(iv) Interim financial statements, which may be unaudited (in which case that fact must be stated), must cover at least the first six months of the issuer's fiscal year and the corresponding period of the preceding fiscal year.

(v) If the day that the financial statements included in the offering statement become stale falls on a Saturday, Sunday, or holiday, such offering statement may be filed on the first business day following the last day of the specified period.

(vi) *Financial Statements of Guarantors and Issuers of Guaranteed Securities*. Financial statements of a subsidiary of an issuer that issues securities guaranteed by the issuer or guarantees securities issued by the issuer must be presented as required by Rule 3-10 of Regulation S-X, except that the periods presented are those required by this paragraph (a)(3) of this Part F/S and that no audit is required for Tier 1 offerings unless paragraph (b)(7) applies.

(vii) *Financial Statements of Affiliates Whose Securities Collateralize an Issuance*. Financial statements for an issuer's affiliates whose securities constitute a substantial portion of the collateral for any class of securities being offered must be presented as required by Rule 3-16 of Regulation S-X, except that the periods presented are those required by this paragraph (a)(3) of this Part F/S and that no audit is required for Tier 1 offerings unless paragraph (b)(7) applies.

(viii) *Oil and Gas Producing Activities.* Issuers engaged in oil and gas producing activities must follow the financial accounting and reporting standards specified in Rule 4-10 of Regulation S-X.

(ix) Additional financial statement requirements depend on whether the offering is a Tier 1 or Tier 2 offering and those requirements are set forth in paragraphs (b) and (c) below.

(4) Issuers should refer to Rule 257(b)(2) to determine whether a special financial report will be required after qualification of the offering statement.

(b) Financial Statements for Tier 1 Offerings

(1) In addition to the general rules in paragraph (a), the rules in (2) through (8) of this paragraph should be followed in the preparation of the issuer's financial statements. Regulation S-X does not apply to the financial statements, except as otherwise specifically provided below.

(2) *Balance Sheet*. There must be filed consolidated balance sheets for the issuer and its subsidiaries as of the end of each of the two most recent fiscal years. If the issuer has been in existence for less than one fiscal year, the issuer must file a balance sheet as of a date within nine months of the date of the filing of the offering statement.

(3) *Statements of income, cash flows, and other stockholders equity*. File consolidated statements of income, cash flows, and other stockholders equity for each of the two fiscal years preceding the date of the most recent balance sheet being filed, and for any interim period between the end of the most recent of such fiscal years and the date of the most recent balance sheet being filed, and the corresponding period of the preceding fiscal year, or for the period of the issuer's existence if less than the period above.

(4) Income statements must be accompanied by a statement that in the opinion of management all adjustments necessary for a fair statement of results for the interim period have been included. If all such adjustments are of a normal recurring nature, a statement to that effect must be made.

(5) *Financial Statements of Businesses Acquired or to be Acquired.* File the financial statements described in Rule 8-04 of Regulation S-X. The requirements of such rules apply as if the issuer were conducting a registered offering, except as otherwise provided in paragraph (a)(3) of this Part F/S and except that no audit is required unless paragraph (b)(7) applies.

(6) *Pro Forma Financial Information*.

(i) Pro forma information must be furnished if any of the following conditions exist:

(A) During the most recent fiscal year or subsequent interim period for which a balance sheet of the issuer is required, a significant business combination has occurred; or

(B) After the date of the issuer's most recent balance sheet, consummation of a significant business combination has occurred or is probable.

(ii) Pro forma statements must ordinarily be in columnar form showing condensed historical statements, pro forma adjustments, and the pro forma results and must include the following:

(A) If the transaction was consummated during the most recent fiscal year or in the subsequent interim period, pro forma statements of income reflecting the combined operations of the entities for the latest fiscal year and interim period, if any, or

(B) If consummation of the transaction has occurred or is probable after the date of the most recent balance sheet, a pro forma balance sheet giving effect to the combination as of the date of the most recent balance sheet required and pro forma statements of income reflecting the combined operations of the entities for the latest fiscal year and interim period, if any.

(7) The financial statements prepared pursuant to this paragraph (b) need not be audited. However, if an audit of these financial statements is obtained for other purposes and that audit was performed in accordance with either U.S. generally accepted auditing standards or the Standards of the Public Company Accounting Oversight Board by an auditor that is independent pursuant to Rule 2-01 of Regulation S-X, those audited financial statements must be filed, and an audit opinion complying with Article 2 of Regulation S-X must be filed along with such financial statements. The auditor may, but need not, be registered with the Public Company Accounting Oversight Board.

(8) As an alternative, an issuer may—but need not—elect to comply with the provisions of paragraph (c).

(c) Financial Statement Requirements for Tier 2 Offerings

(1) In addition to the general rules in paragraph (a), the rules in (2) through (4) of this paragraph should be followed in the preparation of the issuer's financial statements.

(2) Audited financial statements are required for Tier 2 offerings.

(3) An issuer must comply with Article 8 of Regulation S-X as if it was conducting a registered offering on Form S-1, except as otherwise provided in paragraph (a)(3) of this Part F/S.

(4) The audit must be conducted in accordance with standards of the Public Company Accounting Oversight Board (United States). Accounting firms conducting audits for the financial statements included in the offering circular may, but need not, be registered with the Public Company Accounting Oversight Board.

PART III—EXHIBITS

Item 16. Index to Exhibits

(a) An exhibits index must be presented at the beginning of Part III.

(b) Each exhibit must be listed in the exhibit index according to the number assigned to it under Item 17 below.

(c) For incorporation by reference, please refer to General Instruction III of this Form.

Item 17. Description of Exhibits

As appropriate, the following documents must be filed as exhibits to the offering statement.

1. *Underwriting agreement*—Each underwriting contract or agreement with a principal underwriter or letter pursuant to which the securities are to be distributed; where the terms have yet to be finalized, proposed formats may be provided.

2. *Charter and bylaws*—The charter and bylaws of the issuer or instruments corresponding thereto as currently in effect and any amendments thereto.

3. *Instruments defining the rights of securityholders*—

(a) All instruments defining the rights of any holder of the issuer's securities, including but not limited to (i) holders of equity or debt securities being issued; (ii) holders of long-term debt of the issuer, and of all subsidiaries for which consolidated or unconsolidated financial statements are required to be filed.

(b) The following instruments need not be filed if the issuer agrees to file them with the Commission upon request: (i) instruments defining the rights of holders of long-term debt of the issuer and all of its subsidiaries for which consolidated financial statements are required to be filed if such debt is not being issued

pursuant to this Regulation A offering and the total amount of such authorized issuance does not exceed 5% of the total assets of the issuer and its subsidiaries on a consolidated basis; (ii) any instrument with respect to a class of securities that is to be retired or redeemed before the issuance or upon delivery of the securities being issued pursuant to this Regulation A offering and appropriate steps have been taken to assure such retirement or redemption; and (iii) copies of instruments evidencing scrip certificates or fractions of shares.

4. *Subscription agreement*—The form of any subscription agreement to be used in connection with the purchase of securities in this offering.

5. *Voting trust agreement*—Any voting trust agreements and amendments.

6. *Material contracts*

(a) Every contract not made in the ordinary course of business that is material to the issuer and is to be performed in whole or in part at or after the filing of the offering statement or was entered into not more than two years before such filing. Only contracts need be filed as to which the issuer or subsidiary of the issuer is a party or has succeeded to a party by assumption or assignment or in which the issuer or such subsidiary has a beneficial interest.

(b) If the contract is such as ordinarily accompanies the kind of business conducted by the issuer and its subsidiaries, it is made in the ordinary course of business and need not be filed unless it falls within one or more of the following categories, in which case it must be filed except where immaterial in amount or significance: (i) any contract to which directors, officers, promoters, voting trustees, securityholders named in the offering statement, or underwriters are parties, except where the contract merely involves the purchase or sale of current assets having a determinable market price, at such market price; (ii) any contract upon which the issuer's business is substantially dependent, as in the case of continuing contracts to sell the major part of the issuer's products or services or to purchase the major part of the issuer's requirements of goods, services or raw materials or any franchise or license or other agreement to use a patent, formula, trade secret, process or trade name upon which the issuer's business depends to a material extent; (iii) any contract calling for the acquisition or sale of any property, plant or equipment for a consideration exceeding 15% of such fixed assets of the issuer on a consolidated basis; or (iv) any material lease under which a part of the property described in the offering statement is held by the issuer.

(c) Any management contract or any compensatory plan, contract or arrangement including, but not limited to, plans relating to options, warrants or rights, pension, retirement or deferred compensation or bonus, incentive or profit sharing (or if not set forth in any formal document, a written description) is deemed material and must be filed except for the following: (i) ordinary purchase and sales agency agreements; (ii) agreements with managers of stores in a chain organization or

similar organization; (iii) contracts providing for labor or salesperson's bonuses or payments to a class of securityholders, as such; (iv) any compensatory plan, contract or arrangement that pursuant to its terms is available to employees generally and that in operation provides for the same method of allocation of benefits between management and non-management participants.

7. *Plan of acquisition, reorganization, arrangement, liquidation, or succession*—Any material plan of acquisition, disposition, reorganization, readjustment, succession, liquidation or arrangement and any amendments thereto described in the offering statement. Schedules (or similar attachments) to these exhibits must not be filed unless such schedules contain information that is material to an investment decision and that is not otherwise disclosed in the agreement or the offering statement. The plan filed must contain a list briefly identifying the contents of all omitted schedules, together with an agreement to furnish supplementally a copy of any omitted schedule to the Commission upon request.

8. *Escrow agreements*—Any escrow agreement or similar arrangement which has been executed in connection with the Regulation A offering.

9. *Letter re change in certifying accountant*—A letter from the issuer's former independent accountant regarding its concurrence or disagreement with the statements made by the issuer in the current report concerning the resignation or dismissal as the issuer's principal accountant.

10. *Power of attorney*—If any name is signed to the offering statement pursuant to a power of attorney, signed copies of the power of attorney must be filed. Where the power of attorney is contained elsewhere in the offering statement or documents filed therewith, a reference must be made in the index to the part of the offering statement or document containing such power of attorney. In addition, if the name of any officer signing on behalf of the issuer is signed pursuant to a power of attorney, certified copies of a resolution of the issuer's board of directors authorizing such signature must also be filed. A power of attorney that is filed with the Commission must relate to a specific filing or an amendment thereto. A power of attorney that confers general authority may not be filed with the Commission.

11. *Consents*—

(a) Experts: The written consent of (i) any accountant, counsel, engineer, geologist, appraiser or any persons whose profession gives authority to a statement made by them and who is named in the offering statement as having prepared or certified any part of the document or is named as having prepared or certified a report or evaluation whether or not for use in connection with the offering statement; (ii) the expert that authored any portion of a report quoted or summarized as such in the offering statement, expressly stating their consent to the use of such quotation or summary; (iii) any persons who are referenced as having reviewed or passed upon any information in the offering statement, and

that such information is being included on the basis of their authority or in reliance upon their status as experts.

(b) All written consents must be dated and signed.

12. *Opinion re legality*—An opinion of counsel as to the legality of the securities covered by the Offering Statement, indicating whether they will when sold, be legally issued, fully paid and non-assessable, and if debt securities, whether they will be binding obligations of the issuer.

13. *"Test the waters" materials*—Any written communication or broadcast script used under the authorization of Rule 255. Such materials need not be filed if they are substantively the same as materials previously filed with the offering statement.

14. *Appointment of agent for service of process*—A Canadian issuer must file Form F-X.

15. *Additional exhibits*—

(a) Any non-public, draft offering statement previously submitted pursuant to Rule 252(f) and any related, non-public correspondence submitted by or on behalf of the issuer.

(b) Any additional exhibits which the issuer may wish to file, which must be so marked as to indicate clearly the subject matters to which they refer.

SIGNATURES

Pursuant to the requirements of Regulation A, the issuer certifies that it has reasonable grounds to believe that it meets all of the requirements for filing on Form 1-A and has duly caused this offering statement to be signed on its behalf by the undersigned, thereunto duly authorized, in the City of _____, State of _____, on___ _____ *(date)*.

(Exact name of issuer as specified in its charter) _____

By (Signature and Title) _____

This offering statement has been signed by the following persons in the capacities and on the dates indicated.

(Signature)_____

(Title)_____

(Date)_____

Instructions to Signatures:

1. The offering statement must be signed by the issuer, its principal executive officer, principal financial officer, principal accounting officer, and a majority of the members of its board of directors or other governing body. If a signature is by a person on behalf of any other person, evidence of authority to sign must be filed with the offering statement, except where an executive officer signs on behalf of the issuer.

2. The offering statement must be signed using a typed signature. Each signatory to the filing must also manually sign a signature page or other document authenticating, acknowledging or otherwise adopting his or her signature that appears in the filing. Such document must be executed before or at the time the filing is made and must be retained by the issuer for a period of five years. Upon request, the issuer must furnish to the Commission or its staff a copy of any or all documents retained pursuant to this section.

3. The name and title of each person signing the offering statement must be typed or printed beneath the signature.

Note: The text of Form 1-A will not appear in the Code of Federal Regulations.

* * * * *

10. Revise § 239.91 to read as follows:

§ 239.91 Form 1-K

This form shall be used for filing annual reports under Regulation A (§§ 230.251-230.263 of this chapter).

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 1-K

GENERAL INSTRUCTIONS

A. Rules as to Use of Form 1-K.

(1) This Form shall be used for annual reports pursuant to Rule 257(b)(1) of Regulation A (§§ 230.251-230.263).

(2) Annual reports on this Form shall be filed within 120 days after the end of the fiscal year covered by the report.

(3) This Form also shall be used for special financial reports filed pursuant to Rule 257(b)(2)(i)(A) of Regulation A. Such special financial reports shall be filed and signed in the manner set forth in this Form, but otherwise need only provide Part I and the financial statements required by Rule 257(b)(2)(i)(A). Special financial reports filed using this Form shall be filed within 120 calendar days after the qualification date of the offering statement.

B. Preparation of Report.

(1) Regulation A contains certain general requirements that are applicable to reports on any form, including amendments to reports. These general requirements should be carefully read and observed in the preparation and filing of reports on this Form.

(2) This Form is not to be used as a blank form to be filled in, but only as a guide in the preparation of the report.

(3) Except where information is required to be given for the fiscal year or as of a specified date, it shall be given as of the latest date reasonably practicable.

(4) References in this Form to the items in Form 1-A are to the items set forth in Part II and Part III of Form 1-A, not Part I.

(5) In addition to the information expressly required to be included in this Form, there shall be added such further material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not misleading.

C. Signature and Filing of Report.

(1) The report must be filed with the Commission in electronic format by means of the Commission's Electronic Data Gathering, Analysis and Retrieval System ("EDGAR") in accordance with the EDGAR rules set forth in Regulation S-T (17 CFR Part 232).

(2) The report must be signed by the issuer, its principal executive officer, principal financial officer, principal accounting officer, and at least a majority of the members of its board of directors or other governing body. If a signature is by a person on behalf of any other person, evidence of authority to sign must be filed with the report, except where an executive officer signs on behalf of the issuer.

(3) The report must be signed using a typed signature. Each signatory to the filing must also manually sign a signature page or other document authenticating, acknowledging or otherwise adopting his or her signature that appears in the filing. Such document must be executed before or at the time the filing is made and must be retained by the issuer for a period of five years. Upon request, the issuer must furnish to the Commission or its staff a copy of any or all documents retained pursuant to this paragraph.

D. Incorporation by Reference.

(1) An issuer may incorporate by reference to other documents previously submitted or filed on EDGAR pursuant to Regulation A. Descriptions of where the information incorporated by reference can be found must be specific and must clearly identify the relevant document and portion thereof where such information can be found. For exhibits, this description must be noted in the exhibits index for each relevant exhibit. All such descriptions must be accompanied by a separate hyperlink to the incorporated document on EDGAR. A hyperlink need not remain active after the filing of the report, except that amendments to the report must update any hyperlinks referred to in the amendment that are inactive. If any substantive modification has occurred in the text of any document incorporated by reference since such document was filed, the issuer must file with the reference a statement containing the text and date of such modification.

(2) Reference may not be made to any document which incorporates another document by reference if the pertinent portion of the document containing the information to be incorporated by reference includes an incorporation by reference to another document. Incorporation by reference to documents not available on EDGAR is not permitted. Matter shall not be incorporated by reference in any case where such incorporation would render the statement or report incomplete, unclear, or confusing.

PART I
NOTIFICATION

The following information must be provided in the XML-based portion of Form 1-K available through the EDGAR portal and must be completed or updated before uploading each offering statement or amendment thereto. The format of Part I shown below may differ from the electronic version available on EDGAR. The electronic version of Part I will allow issuers to attach Part II for filing by means of EDGAR. All items must be addressed, unless otherwise indicated.

* * * * * *

This Form 1-K is to provide an ☐ Annual Report ***OR*** ☐ Special Financial Report for the fiscal year ended _____

Exact name of issuer as specified in the issuer's charter: _____

State or other jurisdiction of incorporation: _____

I.R.S. Employer Identification Number:_____

Address of Principal Executive Offices: _____
_____

Telephone: (__)_____

Title of each class of securities issued pursuant to Regulation A: _____
_____

Summary Information Regarding Prior Offerings and Proceeds

The following information must be provided for any Regulation A offering that has terminated or completed prior to the filing of this Form 1-K, unless such information has been previously reported in a manner permissible under Rule 257. If such information has been previously reported, check this box ☐ and leave the rest of Part I blank.

Date of qualification of the offering statement:_____

Date of commencement of the offering:_____

Number of securities qualified to be sold in the offering:_____

Number of securities sold in the offering:_____

Price per security: $_____

The aggregate offering price for securities sold on behalf of the issuer:
$_____ ☐ N/A

The aggregate offering price for the securities sold on behalf of selling securityholders:
$_____ ☐ N/A

Fees in connection with this offering and names of service providers:

	Name of Service Provider	Fees
Underwriters:	_____	$ _____
Sales Commissions:	_____	$ _____
Finders' Fees:	_____	$ _____
Auditor:	_____	$ _____
Legal:	_____	$ _____
Promoters:	_____	$ _____
Blue Sky Compliance:	_____	$ _____

CRD Number of any broker or dealer listed:_____

Net proceeds to the issuer: $_____

Clarification of responses (if necessary): _____

PART II

INFORMATION TO BE INCLUDED IN REPORT

Item 1. Business

Set forth the information required by Item 7 of Form 1-A.

Item 2. Management's Discussion and Analysis of Financial Condition and Results of Operations

Set forth the information required by Item 9 of Form 1-A for the previous two completed fiscal years.

Item 3. Directors and Officers

Set forth the information required by Items 10 and 11 of Form 1-A.

Item 4. Security Ownership of Management and Certain Securityholders

Set forth the information required by Item 12 of Form 1-A.

Item 5. Interest of Management and Others in Certain Transactions

Set forth the information required by Item 13 of Form 1-A.

Item 6. Other Information

Set forth any information required to be disclosed in a report on Form 1-U during the second half of the fiscal year covered by this Form 1-K, but not reported, whether or not otherwise required by this Form 1-K. If disclosure of such information is made under this item, it need not be repeated in a report on Form 1-U that would otherwise be required to be filed with respect to such information or in a subsequent report on Form 1-U.

Item 7. Financial Statements

(a) At the beginning of the section where you provide the financial statements required by this Form, provide a list of the financial statements included.

(b) Include annual financial statements of the issuer that would meet the requirements of Part F/S of Form 1-A if included in an offering statement being qualified on the due date of the report.

Item 8. Exhibits

(a) An exhibits index must be presented immediately preceding the first signature page of the report.

(b) File, as exhibits to this Form, the exhibits required by Form 1-A, except for the exhibits required by paragraphs 1, 12, and 13 of Item 17.

SIGNATURES

Pursuant to the requirements of Regulation A, the issuer has duly caused this report to be signed on its behalf by the undersigned, thereunto duly authorized.

(Exact name of issuer as specified in its charter)_____
_____

By (Signature and Title)_____

Date_____

Pursuant to the requirements of Regulation A, this report has been signed below by the following persons on behalf of the issuer and in the capacities and on the dates indicated.

By (Signature and Title)_____

Date_____

By (Signature and Title)_____

Date_____

Note: The text of Form 1-K will not appear in the Code of Federal Regulations.

* * * * *

12. Revise § 239.92 to read as follows:

§ 230.92 Form 1-SA

This form shall be used for filing semiannual reports under Regulation A

(§§ 230.251-230.263 of this chapter).

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 1-SA

[ ] SEMIANNUAL REPORT PURSUANT TO REGULATION A
or
[ ] SPECIAL FINANCIAL REPORT PURSUANT TO REGULATION A

For the fiscal semiannual period ended _____

_____
(Exact name of issuer as specified in its charter)

_____	_____
State or other jurisdiction of incorporation or organization	(I.R.S. Employer Identification No.)

_____
(Full mailing address of principal executive offices)

_____
(Issuer's telephone number, including area code)

GENERAL INSTRUCTIONS

A. Rules as to Use of Form 1-SA.

(1) This Form shall be used for semiannual reports pursuant to Rule 257(b)(3) of Regulation A (§§ 230.251-230.263).

(2) Semiannual reports on this Form shall be filed within 90 days after the end of the semiannual period covered by the report.

(3) This Form also shall be used for special financial reports filed pursuant to Rule 257(b)(2)(i)(B) of Regulation A. Such special financial reports shall be filed and signed in the manner set forth in this Form, but otherwise need only provide the cover page and financial statements required by Rule 257(b)(2)(i)(B). Special financial reports filed using this Form shall be filed within 90 calendar days after the qualification date of the offering statement.

B. Preparation of Report.

(1) Regulation A contains certain general requirements that are applicable to reports on any form, including amendments to reports. These general requirements should be carefully read and observed in the preparation and filing of reports on this Form.

(2) This Form is not to be used as a blank form to be filled in, but only as a guide in the preparation of the report.

(3) In addition to the information expressly required to be included in this Form, there shall be added such further material information, if any, as may be necessary to make the

required statements, in light of the circumstances under which they are made, not misleading.

C. Signature and Filing of Report.

(1) The report must be filed with the Commission in electronic format by means of the Commission's Electronic Data Gathering, Analysis and Retrieval System ("EDGAR") in accordance with the EDGAR rules set forth in Regulation S-T (17 CFR Part 232).

(2) The report must be signed by the issuer, its principal executive officer, principal financial officer and principal accounting officer. If a signature is by a person on behalf of any other person, evidence of authority to sign must be filed with the report, except where an executive officer signs on behalf of the issuer.

(3) The report must be signed using a typed signature. Each signatory to the filing must also manually sign a signature page or other document authenticating, acknowledging or otherwise adopting his or her signature that appears in the filing. Such document must be executed before or at the time the filing is made and must be retained by the issuer for a period of five years. Upon request, the issuer must furnish to the Commission or its staff a copy of any or all documents retained pursuant to this paragraph.

D. Incorporation by Reference.

(1) An issuer may incorporate by reference to other documents previously submitted or filed on EDGAR pursuant to Regulation A. Descriptions of where the information incorporated by reference can be found must be specific and must clearly identify the relevant document and portion thereof where such information can be found. For exhibits, this description must be noted in the exhibits index for each relevant exhibit. All such descriptions must be accompanied by a separate hyperlink to the incorporated document on EDGAR. A hyperlink need not remain active after the filing of the report, except that amendments to the report must update any hyperlinks referred to in the amendment that are inactive. If any substantive modification has occurred in the text of any document incorporated by reference since such document was filed, the issuer must file with the reference a statement containing the text and date of such modification.

(2) Reference may not be made to any document which incorporates another document by reference if the pertinent portion of the document containing the information to be incorporated by reference includes an incorporation by reference to another document. Incorporation by reference to documents not available on EDGAR is not permitted. Matter shall not be incorporated by reference in any case where such incorporation would render the statement or report incomplete, unclear, or confusing.

INFORMATION TO BE INCLUDED IN REPORT

Item 1. Management's Discussion and Analysis of Financial Condition and Results of Operations

Set forth the information required by Item 9 of Form 1-A.

Item 2. Other Information

Set forth any information required to be disclosed in a report on Form 1-U during the semiannual period covered by this Form 1-SA, but not reported, whether or not otherwise required by this Form 1-SA. If disclosure of such information is made under this item, it need not be repeated in a report on Form 1-U that would otherwise be required to be filed with respect to such information or in a subsequent report on Form 1-U.

Item 3. Financial Statements

The appropriate financial statements set forth below of the issuer, or the issuer and its predecessors or any businesses to which the issuer is a successor must be filed as part of the Form 1-SA.

Unless the issuer is a Canadian company, financial statements must be prepared on a consolidated basis in accordance with generally accepted accounting principles in the United States (US GAAP). If the issuer is a Canadian company, such financial statements must be prepared in accordance with either US GAAP or International Financial Reporting Standards as issued by the International Accounting Standards Board. If the financial statements comply with International Financial Reporting Standards as issued by the International Accounting Standards Board, such compliance must be unreservedly and explicitly stated in the notes to the financial statements.

The financial statements included pursuant to this item may be unaudited and are not required to be reviewed. The financial statements must include the following:

(a) An interim balance sheet as of the end of the six month period covered by this report and a balance sheet as of the end of the preceding fiscal year. An interim balance sheet as of the end of the corresponding six month interim period of the preceding fiscal year need not be provided unless necessary for an understanding of the impact of seasonal fluctuations on the issuer's financial condition.

(b) Interim statements of income must be provided for the six month interim period covered by this report and for the corresponding period of the preceding fiscal year. Income statements must be accompanied by a statement that in the opinion of management all adjustments necessary for a fair statement of results for the interim period have been included. If all such adjustments are of a normal recurring nature, a statement to that effect must be made.

(c) Interim statements of cash flows must be provided for the six month interim period covered by this report and for the corresponding period of the preceding fiscal year.

(d) Interim statements of changes in financial position shall be provided for the period between the end of the preceding fiscal year and the end of the interim period covered by this report, and for the corresponding period of the preceding fiscal year.

(e) *Financial Statements of Guarantors and Issuers of Guaranteed Securities.* Financial statements of a subsidiary of an issuer that issues securities guaranteed by the issuer or guarantees securities issued by the issuer must be presented as required by Rule 3-10 of Regulation S-X, except that the periods presented are those required by this item and the financial statements need not be audited.

(f) *Financial Statements of Affiliates Whose Securities Collateralize an Issuance.* Financial statements for an issuer's affiliates whose securities constitute a substantial portion of the collateral for any class of securities being offered must be presented as required by Rule 3-16 of Regulation S-X, except that the periods presented are those required by this item and the financial statements need not be audited.

(g) *Oil and Gas Producing Activities.* Issuers engaged in oil and gas producing activities must follow the financial accounting and reporting standards specified in Rule 4-10 of Regulation S-X.

Item 4. Exhibits

(a) An exhibits index must be presented immediately preceding the first signature page of the report.

(b) File, as exhibits to this Form, the exhibits required by Form 1-A, except for the exhibits required by paragraphs 1, 12, and 13 of Item 17.

SIGNATURES

Pursuant to the requirements of Regulation A, the issuer has duly caused this report to be signed on its behalf by the undersigned, thereunto duly authorized.

(Exact name of issuer as specified in its charter)_____

By (Signature and Title)_____

Date_____

Pursuant to the requirements of Regulation A, this report has been signed below by the following persons on behalf of the issuer and in the capacities and on the dates indicated.

By (Signature and Title)_____

Date_____

By (Signature and Title)_____

Date_____

Note: The text of Form 1-SA will not appear in the Code of Federal Regulations.

* * * * *

13. Revise § 239.93 to read as follows:

§ 230.93 Form 1-U

This form shall be used for filing current reports under Regulation A (§§ 230.251-230.263 of this chapter).

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 1-U

CURRENT REPORT PURSUANT TO REGULATION A

Date of Report (Date of earliest event reported)_____

_____
(Exact name of issuer as specified in its charter)

_____	_____
State or other jurisdiction of incorporation or organization	(I.R.S. Employer Identification No.)

_____
(Full mailing address of principal executive offices)

_____
(Issuer's telephone number, including area code)

Title of each class of securities issued pursuant to Regulation A: _____
_____

GENERAL INSTRUCTIONS

A. Rules as to Use of Form 1-U.

(1) This Form shall be used for current reports pursuant to Rule 257(b)(4) of Regulation A (§§ 230.251-230.263).

(2) A report on this Form is required to be filed, as applicable, upon the occurrence of any one or more of the events specified in Items 1 – 9 of this Form. Unless otherwise specified, a report is to be filed within four business days after occurrence of the event. If the event occurs on a Saturday, Sunday, or holiday on which the Commission is not open for business, then the four business day period shall begin to run on, and include, the first business day thereafter.

(3) If the issuer previously has provided substantially the same information as required by this Form in a report required by Rule 257(b) of Regulation A, the issuer need not make an additional report of the information on this Form. To the extent that an item calls for disclosure of developments concerning a previously reported event or transaction, any information required in the new report or amendment about the previously reported event or transaction may be provided by incorporation by reference to the previously filed report, if a hyperlink to such report as filed with the Commission is included.

(4) Copies of agreements, amendments or other documents or instruments required to be filed pursuant to Form 1-U are not required to be filed or furnished as exhibits to the Form 1-U unless specifically required to be filed or furnished by the applicable item. This instruction does not affect the requirement to otherwise file such agreements, amendments or other documents or instruments, including as exhibits to offering statements and periodic reports pursuant to the requirements of Regulation A.

B. Preparation of Report.

(1) Regulation A contains certain general requirements which are applicable to reports on any form, including amendments to reports. These general requirements should be carefully read and observed in the preparation and filing of reports on this Form.

(2) This Form is not to be used as a blank form to be filled in, but only as a guide in the preparation of the report. Nevertheless, the report shall contain the number and caption of the applicable item, but the text of such item may be omitted. All items that are not required to be answered in a particular report may be omitted and no reference thereto need be made in the report. All instructions should also be omitted.

(3) In addition to the information expressly required to be included in this Form, there shall be added such further material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not misleading.

C. Signature and Filing of Report.

(1) The report must be filed with the Commission in electronic format by means of the Commission's Electronic Data Gathering, Analysis and Retrieval System ("EDGAR") in accordance with the EDGAR rules set forth in Regulation S-T (17 CFR Part 232).

(2) The report must be signed by an officer duly authorized to sign on behalf of the issuer. The report must be signed using a typed signature. The signatory to the filing must also manually sign a signature page or other document authenticating, acknowledging or otherwise adopting his or her signature that appears in the filing. Such document must be executed before or at the time the filing is made and must be retained by the issuer for a period of five years. Upon request, the issuer must furnish to the Commission or its staff a copy of any or all documents retained pursuant to this paragraph.

D. Incorporation by Reference.

(1) An issuer may incorporate by reference to other documents previously submitted or filed on EDGAR pursuant to Regulation A. Descriptions of where the information incorporated by reference can be found must be specific and must clearly identify the relevant document and portion thereof where such information can be found. For exhibits, this description must be noted in the exhibits index for each relevant exhibit. All such descriptions must be accompanied by a separate hyperlink to the incorporated document on EDGAR. A hyperlink need not remain active after the filing of the report, except that amendments to the report must update any hyperlinks referred to in the amendment that are inactive. If any substantive modification has occurred in the text of any document incorporated by reference since such document was filed, the issuer must file with the reference a statement containing the text and date of such modification.

(2) Reference may not be made to any document which incorporates another document by reference if the pertinent portion of the document containing the information to be incorporated by reference includes an incorporation by reference to another document. Incorporation by reference to documents not available on EDGAR is not permitted. Matter shall not be incorporated by reference in any case where such incorporation would render the statement or report incomplete, unclear, or confusing.

INFORMATION TO BE INCLUDED IN THE REPORT

Item 1. Fundamental Changes

(a) If the issuer has entered into or terminated a material definitive agreement that has resulted in or would reasonably be expected to result in a fundamental change to the nature of its business or plan of operations, disclose the following information to the extent applicable:

> (1) the date on which the agreement was entered into, amended, or terminated, the identity of the parties to the agreement or amendment, and a brief description of any material relationship between the issuer or its affiliates and any of the parties

(other than the relationship created by the material definitive agreement or amendment);

(2) a brief description of the material terms and conditions of the agreement;

(3) a brief description of the material circumstances surrounding the termination; and

(4) any material early termination penalties incurred by the issuer due to a termination.

(b) For purposes of this item, a material definitive agreement means an agreement that provides for obligations that are material to and enforceable against the issuer, or rights that are material to the issuer and enforceable by the issuer against one or more other parties to the agreement, in each case whether or not subject to conditions.

(c) File any material definitive agreement disclosed pursuant to this item as an exhibit to the report on this Form.

Instructions to Item 1:

1. A material definitive agreement that is not made in the ordinary course of business is not necessarily required to be disclosed under this item if it does not result in, and would not reasonably be expected to result in, a fundamental change to the nature of the issuer's business or plan of operations.

2. Without limiting the generality of the foregoing, a material definitive agreement is deemed to result in a fundamental change if it involves any of the following:

a. A transaction that would exceed the significance thresholds in Rule 8-04 of Regulation S-X (17 CFR 210.8-04) if such rule applied;

b. A merger, consolidation, acquisition or similar transaction that requires approval by the issuer's securityholders;

c. Any contract upon which the issuer's business is substantially dependent, as in the case of continuing contracts to sell the major part of the issuer's products or services or to purchase the major part of the issuer's requirements of goods, services or raw materials or any franchise or license or other agreement to use a patent, formula, trade secret, process or trade name upon which the issuer's business is substantially dependent; or

3. An issuer must provide disclosure under this item if the issuer succeeds as a party to the agreement or amendment to the agreement by assumption or

assignment (other than in connection with a merger or acquisition or similar transaction that is otherwise reported pursuant to this item).

4. No disclosure under this item is required regarding the termination of a material definitive agreement if:

a. The agreement terminated on its stated termination date, or as a result of all parties completing their obligations under such agreement.

b. Only negotiations or discussions regarding termination of a material definitive agreement are being conducted and the agreement has not been terminated.

c. The issuer believes in good faith that the material definitive agreement has not been terminated, unless the issuer has received a notice of termination pursuant to the terms of agreement.

Item 2. Bankruptcy or Receivership

(a) If a receiver, fiscal agent or similar officer has been appointed for an issuer or its parent, in a proceeding under the U.S. Bankruptcy Code or in any other proceeding under state, federal, or Canadian laws, in which a court or governmental authority has assumed jurisdiction over substantially all of the assets or business of the issuer or its parent, or if such jurisdiction has been assumed by leaving the existing directors and officers in possession but subject to the supervision and orders of a court or governmental authority, disclose the following information:

(1) the name or other identification of the proceeding;

(2) the identity of the court or governmental authority;

(3) the date that jurisdiction was assumed; and

(4) the identity of the receiver, fiscal agent or similar officer and the date of his or her appointment.

(b) If an order confirming a plan of reorganization, arrangement or liquidation has been entered by a court or governmental authority having supervision or jurisdiction over substantially all of the assets or business of the issuer or its parent, disclose the following:

(1) the identity of the court or governmental authority;

(2) the date that the order confirming the plan was entered by the court or governmental authority;

(3) a summary of the material features of the plan;

(4) the number of shares or other units of the issuer or its parent issued and outstanding, the number reserved for future issuance in respect of claims and interests filed and allowed under the plan, and the aggregate total of such numbers; and

(5) information as to the assets and liabilities of the issuer or its parent as of the date that the order confirming the plan was entered, or a date as close thereto as practicable.

Instruction to Item 2:

The information called for in paragraph (b)(5) of this item may be presented in the form in which it was furnished to the court or governmental authority.

Item 3. Material Modification to Rights of Securityholders

(a) If the constituent instruments defining the rights of the holders of any class of securities of the issuer that were issued pursuant to Regulation A have been materially modified, disclose the date of the modification, the title of the class of securities involved and briefly describe the general effect of such modification upon the rights of holders of such securities.

(b) If the rights or benefits evidenced by any class of securities issued pursuant to Regulation A have been materially limited or qualified by the issuance or modification of any other class of securities by the issuer, briefly disclose the date of the issuance or modification, the general effect of the issuance or modification of such other class of securities upon the rights or benefits of the holders of the securities issued pursuant to Regulation A.

Instruction to Item 3:

Working capital restrictions and other limitations upon the payment of dividends must be reported pursuant to this item.

Item 4. Changes in Issuer's Certifying Accountant

(a) If an independent accountant who was previously engaged as the principal accountant to audit the issuer's financial statements, or an independent accountant upon whom the principal accountant expressed reliance in its report regarding a significant subsidiary, resigns (or indicates that it declines to stand for re-appointment after completion of the current audit) or is dismissed, disclose the information that would be required under Item 304(a)(1) of Regulation S-K (17 CFR 229.304(a)(1)), including compliance with Item 304(a)(3) of Regulation S-K (17 CFR 229.304(a)(3)) if the issuer were a "registrant."

(b) If a new independent accountant has been engaged as either the principal accountant to audit the issuer's financial statements or as an independent accountant on whom the principal accountant is expected to express reliance in its report regarding a significant subsidiary, the issuer must disclose the information that would be required by Item 304(a)(2) of Regulation S-K (17 CFR 229.304(a)(2)) if the issuer were a "registrant."

Instructions to Item 4:

> *1. Information under this Item 4 is only required if the issuer's most recent qualified offering statement on Form 1-A or report on Form 1-K, whichever is most recent, contains audited financial statements.*
>
> *2. The resignation or dismissal of an independent accountant, or its refusal to stand for re-appointment, is a reportable event separate from the engagement of a new independent accountant. On some occasions, two reports on Form 1-U are required for a single change in accountants, the first on the resignation (or refusal to stand for re-appointment) or dismissal of the former accountant and the second when the new accountant is engaged. Information required in the second Form 1-U in such situations need not be provided to the extent that it has been reported previously in the first Form 1-U.*

Item 5. Non-reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review

(a) If the issuer's board of directors, a committee of the board of directors or the officer or officers of the issuer authorized to take such action if board action is not required, concludes that any previously issued financial statements, covering one or more years or interim periods for which the issuer is required to provide financial statements under Regulation A, including Form 1-A, should no longer be relied upon because of an error in such financial statements as addressed in FASB Accounting Standards Codification Topic 250, as may be modified, supplemented or succeeded, disclose the following information:

> (1) the date of the conclusion regarding the non-reliance and an identification of the financial statements and years or periods covered that should no longer be relied upon;
>
> (2) a brief description of the facts underlying the conclusion to the extent known to the issuer at the time of filing;
> and
>
> (3) a statement of whether the audit committee, or the board of directors in the absence of an audit committee, or authorized officer or officers, discussed with the issuer's independent accountant the matters disclosed in the filing pursuant to this paragraph (a).

(b) If the issuer is advised by, or receives notice from, its independent accountant that disclosure should be made or action should be taken to prevent future reliance on a previously issued audit report or completed interim review related to previously issued financial statements, disclose the following information:

(1) the date on which the issuer was so advised or notified;

(2) identification of the financial statements that should no longer be relied upon;

(3) a brief description of the information provided by the accountant; and

(4) a statement of whether the audit committee, or the board of directors in the absence of an audit committee, or authorized officer or officers, discussed with the independent accountant the matters disclosed in the filing pursuant to paragraph (b) of this item.

(c) If the issuer receives advisement or notice from its independent accountant requiring disclosure under paragraph (b) of this item, the issuer must:

(1) provide the independent accountant with a copy of the disclosures it is making in response to this item that the independent accountant shall receive no later than the day that the disclosures are filed with the Commission;

(2) request the independent accountant to furnish to the issuer as promptly as possible a letter addressed to the Commission stating whether the independent accountant agrees with the statements made by the issuer in response to this item and, if not, stating the respects in which it does not agree; and

(3) amend the issuer's previously filed Form 1-U by filing the independent accountant's letter as an exhibit to the filed Form 1-U no later than two business days after the issuer's receipt of the letter.

Item 6. Changes in Control of Issuer

(a) If, to the knowledge of the issuer's board of directors, a committee of the board of directors, governing body similar to a board of directors, or authorized officer or officers of the issuer, a change in control of the issuer has occurred, furnish the following information:

(1) the identity of the persons who acquired such control;

(2) the date and a description of the transactions which resulted in the change in control;

(3) the basis of the control, including the percentage of voting securities of the issuer now beneficially owned directly or indirectly by the persons who acquired control;

(4) the amount of the consideration used by such persons;

(5) the sources of funds used by the persons, unless all or any part of the consideration used is a loan made in the ordinary course of business by a bank as defined by Section 3(a)(6) of the Securities Exchange Act of 1934.

(6) the identity of the persons from whom control was assumed; and

(7) any arrangements or understandings among members of both the former and new control groups and their associates with respect to election of directors or other matters.

(b) Describe any arrangements, known to the issuer, including any pledge by any person of securities of the issuer or any of its parents, the operation of which may at a subsequent date result in a change in control of the issuer. It is not necessary to describe ordinary default provisions contained in the charter, trust indentures, or other governing instruments relating to securities of the issuer in response to this paragraph.

Item 7. Departure of Certain Officers

If the issuer's principal executive officer, principal financial officer, principal accounting officer, or any person performing similar functions, retires, resigns or is terminated from that position, disclose the fact that the event has occurred and the date of the event.

Instruction to Item 7:

The disclosure requirements of this item do not apply to an issuer that is a wholly-owned subsidiary of an issuer with a class of securities registered under Section 12 of the Exchange Act (15 U.S.C. 78l), or that is required to file reports under Section 15(d) of the Exchange Act (15 U.S.C. 78o(d)) or under Regulation A.

Item 8. Unregistered Sales of Equity Securities

(a) If the issuer sells equity securities in a transaction that is not registered under the Securities Act or qualified under Regulation A, furnish the information set forth in Item 6 of Part I of Form 1-A. For purposes of determining the required filing date for the Form 1-U under this item, the issuer has no obligation to disclose information under this item until the issuer enters into an agreement enforceable against the issuer, whether or not subject to conditions, under which the equity securities are to be sold. If there is no such agreement, the issuer must provide the disclosure within four business days after the occurrence of the closing or settlement of the transaction or arrangement under which the equity securities are to be sold.

(b) No report need be filed if the equity securities sold, in the aggregate since its last report filed under this item or its last periodic report, whichever is more recent, constitute less than 5% of the number of shares outstanding of the class of equity securities sold.

Instructions to Item 8:

> *1. For purposes of this item, "the number of shares outstanding" refers to the actual number of shares of equity securities of the class outstanding and does not include outstanding securities convertible into or exchangeable for such equity securities.*
>
> *2. It is not necessary to follow the format of Item 6 of Part I of Form 1-A when providing the information required by this item.*

Item 9. Other Events

The issuer may, at its option, disclose under this item any events, with respect to which information is not otherwise called for by this Form, that the issuer deems of importance to securityholders.

SIGNATURES

Pursuant to the requirements of Regulation A, the issuer has duly caused this report to be signed on its behalf by the undersigned, thereunto duly authorized.

(Exact name of issuer as specified in its charter)_____

By (Signature and Title)_____

Date_____

Note: The text of Form 1-U will not appear in the Code of Federal Regulations.

* * * * *

13. Revise § 239.94 to read as follows:

§ 230.94 Form 1-Z

This form shall be used to file an exit report under Regulation A (§§ 230.251-230.263 of this chapter).

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 1-Z

EXIT REPORT UNDER REGULATION A

GENERAL INSTRUCTIONS

(1) The following information must be provided in the XML-based Form 1-Z available through the EDGAR portal. The format shown below may differ from the electronic version available on EDGAR.

(2) An issuer filing this Form pursuant to Rule 257(a) must only complete the Preliminary Information and Part I.

(3) An issuer filing this Form to suspend its duty to file reports under Rule 257(d) must complete the Preliminary Information and Part II. Such issuer must also provide Part I if it has not previously provided the Part I information in a Form 1-K filing.

* * * * * *

PRELIMINARY INFORMATION

Exact name of issuer as specified in the issuer's charter: _____

Address of Principal Executive Offices: _____
_____

Telephone: (__)_____

Commission File Number(s):_____

PART I
Summary Information Regarding the Offering and Proceeds

Date of qualification of the offering statement:_____

Date of commencement of the offering:_____

Number of securities qualified to be sold in the offering:_____

Number of securities sold in the offering:_____

Price per security: $_____

The aggregate offering price for securities sold on behalf of the issuer:
$_____ ☐ N/A

The aggregate offering price for the securities sold on behalf of selling securityholders:
$_____ ☐ N/A

Fees in connection with this offering and names of service providers:

	Name of Service Provider	Fees
Underwriters:	_____	$ _____
Sales Commissions:	_____	$ _____
Finders' Fees:	_____	$ _____
Auditor:	_____	$ _____
Legal:	_____	$ _____
Promoters:	_____	$ _____
Blue Sky Compliance:	_____	$ _____

CRD Number of any broker or dealer listed:_____

Net proceeds to the issuer: $_____

Clarification of responses (if necessary): _____

PART II
Certification of Suspension of Duty to File Reports

Title of each class of securities covered by this Form_____

Commission File Number(s)_____

Approximate number of holders of record as of the certification date:_____

Pursuant to the requirements of Regulation A, _____ *(Name of issuer as specified in charter)* certifies that it meets all of the conditions for termination of Regulation A reporting specified in Rule 257(d) and that there are no classes of securities other than those that are the subject of this Form 1-Z regarding which the issuer has Regulation A reporting obligations. _____ *(Name of issuer as*

specified in charter) has caused this certification to be signed on its behalf by the undersigned duly authorized person.

By: _____ Date: _____
Title:_____

Instruction: This Part II of Form 1-Z is required by Rule 257(d) of Regulation A. An officer of the issuer or any other duly authorized person may sign, and must do so by typed signature. The name and title of the person signing the form must be typed or printed under the signature. The signatory to the filing must also manually sign a signature page or other document authenticating, acknowledging or otherwise adopting his or her signature that appears in the filing. Such document must be executed before or at the time the filing is made and must be retained by the issuer for a period of five years. Upon request, the issuer must furnish to the Commission or its staff a copy of any or all documents retained pursuant to this instruction.

Note: The text of Form 1-Z will not appear in the Code of Federal Regulations.

* * * * *

PART 240 – GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

14. The authority citation for Part 240 is amended by revising the sectional authority for § 240.15c2-11 to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c-3, 78c-5, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78*l*, 78m, 78n, 78n-1, 78o, 78o-4, 78o-10, 78p, 78q, 78q-1, 78s, 78u-5, 78w, 78x, 78*ll*, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, 7201 et. seq., and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; and Pub. L. 111-203, 939A, 124 Stat. 1376, (2010), unless otherwise noted.

* * * * *

Section 240.15c2-11 also issued under 15 U.S.C. 78j(b), 78 o (c), 78q(a), 78w(a), and Pub. L. No. 112-106, § 401, 126 Stat. 313 (2012).

* * * * *

15. § 240.15c2-11 is amended by revising paragraphs (a)(3) and (d)(2)(i) to read as follows:

§ 240.15c2-11 Initiation or resumption of quotations without specific information.

* * * * *

(a) * * *

(3) A copy of the issuer's most recent annual report filed pursuant to section 13 or 15(d) of the Act or pursuant to Regulation A ((§§ 230.251-230.263 of this chapter), or a copy of the annual statement referred to in section 12(g)(2)(G)(i) of the Act in the case of an issuer required to file reports pursuant to section 13 or 15(d) of the Act or an issuer of a security covered by section 12(g)(2)(B) or (G) of the Act, together with any semiannual, quarterly and current reports that have been filed under the provisions of the Act or Regulation A by the issuer after such annual report or annual statement; *provided, however*, that until such issuer has filed its first annual report pursuant to section 13 or 15(d) of the Act or pursuant to Regulation A, or annual statement referred to in section 12(g)(2)(G)(i) of the Act, the broker or dealer has in its records a copy of the prospectus specified by section 10(a) of the Securities Act of 1933 included in a registration statement filed by the issuer under the Securities Act of 1933, other than a registration statement on Form F-6, or a copy of the offering circular specified by Regulation A included in an offering statement filed by the issuer under Regulation A, that became effective or was qualified within the prior 16 months, or a copy of any registration

statement filed by the issuer under section 12 of the Act that became effective within the prior 16 months, together with any semiannual, quarterly and current reports filed thereafter under section 13 or 15(d) of the Act or Regulation A; and *provided further*, that the broker or dealer has a reasonable basis under the circumstances for believing that the issuer is current in filing annual, semiannual, quarterly, and current reports filed pursuant to section 13 or 15(d) of the Act or Regulation A, or, in the case of an insurance company exempted from section 12(g) of the Act by reason of section 12(g)(2)(G) thereof, the annual statement referred to in section 12(g)(2)(G)(i) of the Act; or

* * * * *

(d) * * *

(2) * * *

(i) A broker-dealer shall be in compliance with the requirement to obtain current reports filed by the issuer if the broker-dealer obtains all current reports filed with the Commission by the issuer as of a date up to five business days in advance of the earlier of the date of submission of the quotation to the quotation medium and the date of submission of the paragraph (a) information pursuant to the applicable rule of the Financial Industry Regulatory Authority, Inc. or its successor organization; and

* * * * *

PART 260 - GENERAL RULES AND REGULATIONS, TRUST INDENTURE ACT OF 1939

16. The authority citation for Part 260 is revised to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77eee, 77ggg, 77nnn, 77sss, 78 ll (d), 80b-3, 80b-4, 80b-11 and Pub. L. No. 112-106, § 401, 126 Stat. 313 (2012), unless otherwise noted.

* * * * *

17. § 260.4a-1 is revised to read as follows:

§ 260.4a-1 Exempted securities under section 304(a)(8).

The provisions of the Trust Indenture Act of 1939 shall not apply to any security that has been or will be issued otherwise than under an indenture. The same issuer may not claim this exemption within a period of twelve consecutive months for more than $50,000,000 aggregate principal amount of any securities.

By the Commission.

Elizabeth M. Murphy

Secretary

Dated: December 18, 2013