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August 19, 2016

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

Re: OTC Petition to Expand Regulation A to SEC Reporting Companies and permit “at the market” Offerings.
SEC File No. 4-699

Dear Mr. Fields:

I fully endorse the OTC Market’s June 6, 2016 Petition to the SEC requesting that the SEC amend Regulation A to expand the eligibility criteria to include all small issuers, including those that are subject to the Securities Exchange Act of 1934 (“Exchange Act”) reporting requirements and to allow “at-the-market offerings.”

The Petition is concise and to the point. When Congress passed the JOBS Act, it primarily left the particulars of Regulation A+ rulemaking to the SEC. The JOBS Act itself did not prohibit or limit the use of Regulation A+ for reporting companies, and accordingly, that decision is within the SEC rulemaking discretion.

The SEC reasoning for excluding reporting companies in the first place is weak at best. In particular, the SEC excluded reporting issuers because the prior Regulation A rules, which were admittedly rarely used and ineffective at assisting in small business capital formation, contained the exclusion. That is, when revamping Regulation A+ as mandated by the JOBS Act, the SEC simply didn’t change that provision.

As enacted, Regulation A is available to companies organized and operating in the United States and Canada. The following issuers are not be eligible for a Regulation A+ offering:

- Companies currently subject to the reporting requirements of the Exchange Act;
- Investment companies registered or required to be registered under the Investment Company Act of 1940, including BDC’s;
- Blank check companies, which are companies that have no specific business plan or purpose or whose business plan and purpose is to engage in a merger or acquisition with an unidentified target; however, shell companies are not prohibited, unless such shell company is also a blank check company. A shell company is a company that has no or nominal operations; and either no or nominal assets, assets consisting of cash and cash equivalents, or assets consisting of any amount of cash and cash equivalents and nominal other assets. Accordingly, a start-up business or minimally operating business may utilize Regulation A+;
- Issuers seeking to offer and sell asset-backed securities or fractional undivided interests in oil, gas or other mineral rights;
- Issuers that have been subject to any order of the SEC under Exchange Act Section 12(j) denying, suspending

or revoking registration, entered within the past five years;

- Issuers that became subject to Exchange Act reporting requirements, such as through a Tier 2 offering, and did not file required ongoing reports during the preceding two years; and
- Issuers that are disqualified under the “bad actor” rules and, in particular, Rule 262 of Regulation A+.

Although companies subject to the reporting requirement have been disqualified from day one, the SEC quickly issued guidance clarifying that Regulation A may be used by many existing “reporting entities” either because they voluntarily report (generally because they never filed a Form 8-A or Form 10 after an S-1 registration statement and the initial required reporting period has passed) or through a wholly owned subsidiary resulting in a complete or partial spin-off.

The SEC specifically provided that a company that was once subject to the Exchange Act reporting obligations but suspended such reporting obligations by filing a Form 15 is eligible to utilize Regulation A. The determination of eligibility is made at the time of the offering. Moreover, a company that voluntarily files reports under the Exchange Act is not “subject to the Exchange Act reporting requirements” and therefore is eligible to rely on Regulation A. In addition, a wholly owned subsidiary of an Exchange Act reporting company parent is eligible to complete a Regulation A+ offering as long as the parent reporting company is not a guarantor or co-issuer of the securities being issued.

Related to small business issuers, the current rules create an unfair distinction. A company trading on the OTC Markets that voluntarily reports to the SEC would be eligible, whereas a company that may be substantially similar but is required to file reports would be ineligible to utilize Regulation A+.

In addition to the obvious benefit to small and emerging company capital formation of allowing small reporting companies to utilize Regulation A+, there is also an added potential benefit to the capital markets as a whole. OTC Markets opines that the flow of freely tradable securities into the marketplace for existing public companies could have a positive uptick on the liquidity and overall growth and vitality of venture markets. Regulation A+ could have the benefit of pushing forward the much needed venture market for the secondary trading of securities of early-stage, small and emerging growth companies.

The Petition contains a pointed discussion on the market benefits, including noting that: “Regulation A+ allows smaller companies, traditionally lacking the backing of bulge bracket investment banks and the large base of institutional ownership needed to fund ongoing research coverage, to reach out to a broader pool of potential investors through ‘testing the waters’ provisions and the efficient economical reach of the Internet and social media. Emerging companies can use Regulation A+ online offerings to tap into large numbers of individual investors and efficiently target smaller institutions. Allowing fully SEC reporting companies the same ability to leverage technology and transparency to reach potential investors would be expected to provide a ready source of growth capital, and, equally important, an increase in liquidity in the secondary market.”

Interestingly, OTC argues that opening up Regulation A+ to small reporting companies may reduce or minimize the use of toxic financing options which carry substantial dilution and downward pricing pressure on company stock. Moreover, allowing small reporting companies to utilize Regulation A+ may raise the interest in these offerings for investment banks.

Furthermore, in order to make Regulation A+ the most useful for reporting companies, OTC Markets requests that the SEC also amend the rules to allow “at-the-market” offerings. Currently all Regulation A+ offerings must be priced. In the case of a security that is already trading, the ability to price accurately is difficult and the inability to adjust such pricing in response to fluctuating market conditions can impede the success of the offering.

The SEC has a well published mission of “protecting investors, maintaining fair, orderly and efficient markets and facilitating capital formation.” Regulation A+ offers significant investor protections in that a form of registration statement is filed with the SEC and subject to a review and comment process. In addition, Regulation A+ allows for pre- and post-filing marketing using the Internet, social media, presentations and the like, provided all such materials are filed with the SEC and subject to review and comment. This process provides significant investor protections, including a permanent record of disclosures made during the offering process. Regulation A+ also provides a streamlined, affordable registration process with access to an expanded pool of investors, thus facilitating capital formation.

To the contrary, private offering documents are not filed or reviewed with the SEC and the process and level of

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disclosure are far less regulated. Public offerings using Form S-1 limit offering communications, and those communications are not necessarily filed or reviewed by the SEC. The Form S-1 process does not allow for broad Internet, crowd or social media marketing. A Form S-1 process also does not preempt state law and accordingly has significant added costs for a company. A Form S-1 works best for larger issuers with strong underwriter and institutional support. Regulation A+ provides the best method of registered capital formation for small companies, including those that are already subject to the SEC reporting requirements.

As was understood in passing the JOBS Act in 2012, the transparent Regulation A+ process is a preferred method of capital raising for small businesses, especially companies already subject to the reporting requirements who have audited financial statements readily available and processes in place for meeting SEC reporting and review requirements.

Allowing small reporting companies to partake in Regulation A+ meets all the mandates of the JOBS Act while concurrently satisfying the SEC goal of providing investor protections, and I am a strong advocate in support of a rule change in that regard.

Sincerely,

Legal & Compliance, LLC:

s/s Laura Anthony
Laura Anthony, for the firm

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