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May 14, 2013

U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
Attn: Mr. Gerald Laporte
Chief, Office of Small Business Policy

Re: Proposed SEC rulemaking under the JOBS Act:
Title IV- Small Company Capital Formation

Dear Mr. Laporte:

It has been a pleasure for us to continue discussing with you the challenges affecting capital formation by small companies and the Commission's continued sensitivity to such issues. At your encouragement, we are pleased to provide our further input in anticipation of the Commission's JOBS Act rulemaking process.

As noted in various conversations between our firm and the Office of Small Business Policy, we have represented a number of issuers in the process of conducting Regulation A offerings and also represent numerous entities that would be terrific candidates for using Title IV of the JOBS Act (commonly referred to as "Reg A+") to form capital. However, we have noted issuer reluctance to enter the capital formation process thru current Regulation A without greater certainty as to how the Commission will craft rulemaking for Reg A+. We offer the following comments and suggestions particular to Reg A+ rulemaking, based on our recent experiences (and difficulties) under the current regulatory regime.

I. Electronic Filing

The Commission has long understood the efficacy of an electronic filing scheme having been one of the first agencies of the U.S. Government to introduce what is now a common and fundamental technology in the early 1990's. Electronic filing through EDGAR is mandated by Title IV and will be a logical and effective means to ensure dissemination of material information concerning Reg A+ issuers. That said, revisions to current Regulation A, if the same general framework is to be used in the context of Reg A+, need to be made to account for public access to all reporting through EDGAR. Currently, Rule 251(d)(2) requires physical delivery of the offering circular to the prospective investor, the need for which is obviated by having all disclosure related to an issuer generally available with the click of a button through EDGAR. In short, a Reg A+ analog to Rule 172 will be critical to furthering the JOBS Act's congressional intent.

Furthermore, it is our expectation that the vast majority of Reg A+ deals will be done on a continuous, best efforts basis. This will result in necessary updates to offering circulars. Currently Rule 253(e) requires any updated or revised Offering Circular to be filed with an amended Offering Statement and requalified with the Commission. This requalification requirement places an unnecessary burden on issuers engaged in such offerings, and one not seen in the context of a public registration where only information tripping the requirements of Item 512 of Reg S-K requires a post-effective registration statement amendment and other updates to the prospectus may be filed under Rule 424. For instance, in a recent offering filed by our firm the issuer has simply desired to add another jurisdiction (see: the state impediments under the current regulation below) and update some ancillary business information – disclosures which would, arguably, require requalification with significant offering disruption but with little or no investor protective impact. Again, an analog for Reg A+ needs to be adopted.

II. JOBS Act Section 401 and the definition of "Qualified Purchaser"

Stated in the broadest manner, the intent of the JOBS Act was to strike a more pragmatic balance between investor protections provided in the current regulatory scheme by providing a more efficient means for businesses falling within the "mid-market" or smaller to form the capital necessary for job creation - that is so important to the nation's economic recovery. A critical aspect of achieving these legislative objectives is addressing to what extent the current and wildly disparate scheme of state "blue sky" securities laws and regulations will have on the ability of issuers to avail themselves of this exemption.

While one must concede that Congress clearly demonstrated its unwillingness at the time of Title IV's passage to provide a wholesale exemption for Regulation A and A+ securities from blue sky review, Congress did express plainly its concern that 50 different regulatory schemes presently imposed on Regulation A would have a negative impact on the ability of small and mid-size businesses to raise capital.[1] It has been our firm's experience with current Regulation A to be **EXACTLY THE CASE**. In a filing declared qualified by the Commission in February, 2013 the issuer sought to offer equity units in five states - - two states ultimately granted approval, two states issued comments requesting significant changes to the issuer's organizational and offering structure (the issuer decided to forego the offering in those states) and one never acknowledged or reviewed the offering (whether due to staffing or budgeting or whatever reason remains unknown). In an effort to remedy this very real problem, Congress created an additional class of "covered security," under NSMIA for Regulation A where the securities are either listed on a National Exchange or sold exclusively to "qualified purchasers." In the latter instance, Congress specifically delegated to the Commission the authority to define "qualified purchasers" recognizing the Commission's expertise in balancing oversight and efficiency in capital formation.[2]

[1] *See* Section 402 of the JOBS Act requiring a study of the impact of state blue sky laws on offerings made under Regulation A.
[2] 15 U.S.C. § 77r(b)(4)(D)

We believe the "qualified purchaser" exemption, if defined appropriately, will be a powerful attracter to any number of small and mid-size issuers to use this exemption over others that might not provide the regulatory oversight of disclosure, transparency, and the potential liquidity for investors that Regulation A and A+ can provide.[3] At the same time, such definition would not only provide a balanced approach to state investor protection issues, but also allow the Commission to observe a "critical mass" of activity within the Regulation A and A+ so that the Commission can have the ability to determine what further regulation (or changes to present regulations) might be necessary to accomplish Congress's intent.

The North American Securities Administrators Association ("NASAA") and other groups have expressed legitimate concerns about investor protections and the scope of the ability that Reg A+ would provide to reach investors of different levels of sophistication, thus necessitating greater attention to current investor protections. However, we believe that a definition can easily be tailored that can address these concerns while having the intended effect of efficiency while preserving oversight. Specifically, we would propose a definition of "qualified purchaser" which combines a net worth/income test with a cap on the amount of investment by an investor in any one issuance. A qualified purchaser would be defined as a purchaser having, excluding (in the instance of natural persons) the value of a purchaser's primary residence, either:

- a net worth of at least $500,000; or
- a gross annual income of at least $150,000 and a net worth of at least $250,000.

Further, the amount of investment by a natural person who would be a qualified purchaser may not exceed 20% of the net worth, as determined in accordance with the above, of such natural person.

We believe that this is a reasonable and workable standard (well in excess of NASAA's standard guidelines for minimum investor suitability) designed to permit small issuers to reach an investor audience efficiently <u>while</u> addressing investor protection concerns – demanding a requisite amount of sophistication from the investor to review and digest disclosure that has been reviewed and qualified previously by the Commission **AND** limiting the exposure that an individual could have to a potential malefactor in a given instance.[4]

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[3] The GAO completed its required study in July 2012 entitled "SECURITIES REGULATION Factors That May Affect Trends in Regulation A Offerings," (the "GAO Study") and found that in fiscal 2010 and 2011 there were 8 qualified Regulation A offerings versus over 15,500 Regulation D offerings for $5 million or under, the vast majority of which were under Rule 506 with very limited oversight of disclosure. The GAO identified state securities law compliance as a factor in pushing issuers towards Regulation D and indicated that the GAO's research and conversations with securities attorneys and a small business advocate identified state securities registration requirements as time consuming and costly for small businesses. *See* pg. 17 of the GAO Study.

[4] Certain commentators have proposed the use of the "accredited investor" definition found in Rule 502 of Regulation D, if a net worth test for a qualified purchaser is to be adopted. We disagree adamantly with this suggestion. Given the need for audits, mandated forms of disclosure and periodic reporting under Reg A+, adopting such a definition would only have the result of causing issuers to default to Rule 506 of Regulation D, rather than adopting Reg A+, which provides for greater transparency and regulatory oversight, for the formation of capital.

As stated previously, this firm has conducted a number of these offerings. Our experience has shown that the alacrity with which states complete their review of offerings differs widely. Further, and more importantly, where states engage in merit review of Regulation A offerings, standards adopted by either statute or regulation vary and, indeed, even how various state securities commissions interpret those very statutes or regulations can vary further. As noted above, in the context of current Regulation A offerings, we have typically had to confine sales activity to a very limited number of states so that we can structure reasonably to meet these varieties in approaches.

As we move to the $50,000,000 per annum offering threshold, this lack of coordination amongst states will present an even greater and more considerable problem. There is the real potential to drive up transactions/offering costs to do the work related to a broader selection of states in an offering or have larger deals saturate selected jurisdictions; both of which could foreseeably hamper capital raising as well as turn out to be contrary to the investor protection to interests of the states.

Finally, there is a harsh practical reality which NASAA and other state securities administrators who have communicated to the Commission have not addressed. Even with a modest upswing in filings as we move to Reg A+, these state offices will have to deal with an increased volume of filings on top of the variety of filings they currently review. Most states are also budget-constrained to such an extent that, based on our conversations with these offices, it is unlikely that most will receive greater funding to permit increases in staff to deal with the greater volume of filings resulting from implementation of the JOBS Act.

Without a measured exemption here, we believe the current approach by the states, coupled with the current realities of our economy, could combine to subvert Congress's intent here to provide a meaningful apparatus for capital formation and job creation that is subject to the light of public disclosure.

III. Narrative and Financial Disclosure Requirements Generally

It has been our firm's experience that Regulation A issuers have been small to mid-size entities seeking to form capital to grow their businesses – resulting in the creation of new jobs. We believe this will hold true under Reg A+ to a very large extent. To the extent that the Commission opts to modify current Regulation A disclosure for Reg A+ or adopt a new disclosure regime, those changes should be composed and implemented with a view to providing a streamlined and practical narrative disclosure/financial statement environment in which to form capital.

For example, we would suggest that the Commission closely look at an issuer's ability to use projections in their offering circular, as well as the bases upon which such statements may be made. The Commission has had a long-standing policy to encourage the use of projections, and the use of management's business and operations experience as a basis for such projections.[5]

[5] See Rule 10(b) of Regulation S-K

Our experience to date under Regulation A is that the Commission adopts a contrary view to projections under Regulation A. Reg A+ will likely be used to a very significant respect by smaller or less mature businesses with limited operating histories. The pragmatic use of projections along with the appropriate disclosure of the bases and underlying assumptions for the same will be fundamental to the offering. One must simply recognize that, with new and emerging businesses, the "future" much more than the past is a material part of the investment decision. Further, our market experience has suggested that management's projections of the future of the business are essential to investors viewing an offering as a medium to long-term investment, rather than an IPO arbitrage opportunity. We suggest that the Reg A+ rules actually promote the usage of such information.

IV. Coordination with FINRA

We suggest that with the promulgation of regulations related to Reg A+, there will be a significant volume of these filings will begin to be made. Based on our experience, we would encourage the Commission to begin working on a collaborative effort with FINRA to educate their respective personnel conducting examinations of these offerings for compliance with FINRA rules on the particulars of Regulation A and Reg A+, which remains new territory for them. Also, the Commission should enter into dialogue with FINRA on ways to improve time and efficiency of review of these offerings so that they do not become lost in the volume of other public offerings subject to FINRA review, thus unintentionally subverting the JOBS Act. It has also been our experience that the level of FINRA/SEC coordination has been quite good on registered deals - - that same type of cohesiveness and deference should be provided in the Reg A+ context.

V. Alignment of Regulation A/Regulation D "Bad Actor" Provisions and Eligibility

We would agree with what appears to be the majority thoughts amongst commentators that the current "bad actor" provisions contained in Regulation A should be included in Reg A+ and should also be aligned with the bad actor provisions of Regulation D. For a fledgling marketplace for which Reg A+ has the potential to provide, this would be a reasonable and prudent investor protection.

We would note that some commentators have suggested that Reg A+ be limited strictly to operating companies. We would merely point out that we believe that there is an important distinction between SPAC's, blank check or shell companies commonly referred to in this context and offerings made by issuers where proceeds of that offering would be used to (i) acquire real estate or (ii) engage in business combinations specified in the particular offering. We believe these situations could play a significant role in the structure of capital formation efforts intended to create or preserve jobs in the future.

Furthermore, use of Reg A+ by real estate investment trusts (REITS) should not be precluded or delayed pending the creation of particularized disclosure rules, as suggested by NASAA. Nothing precludes a REIT currently from availing themselves of Regulation A, and nothing in the language of the statute or in the legislative history would belie an intent by

Congress to preclude certain types of issuers from using Reg A+, much less issuers beyond those enumerated presently in Regulation A. Presently, private REIT's can be distributed under Regulation D with impunity from such disclosure requirements. In light of these facts, we believe any specialized disclosure related to REIT's can be addressed by the Commission (with its relevant experience from the registration of REIT's) in the review of such offerings, similar to the development of standards of disclosure we have experienced in our practice to date. Such trusts present a critical source of organized capital for the real estate markets, and the acquisition, development and operation of commercial real estate could be an important source of a variety of jobs in the future.

We very much appreciate the opportunity to submit these comments. As I have noted in some of our past conversations. Following the events of the financial meltdown U.S. capital markets have been severely retarded in terms of efficient capital formation. We think the balanced and streamlined approach provided by Reg A+ could be a game changer. As always we stand prepared to render any assistance necessary to the Commission and its Staff as they perform their important work.

Sincerely,

/MAC/

Mark A. Cleaves

/RRK/

Robert R. Kaplan, Jr.

cc: Members of the Commission:
Mr. Lona Nallengara