FOLEY

FOLEY & LARDNER LLP

ATTORNEYS AT LAW

777 EAST WISCONSIN AVENUE
MILWAUKEE, WI 53202-5306
414.271.2400 TEL
414.297.4900 FAX
foley.com

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VIA EMAIL: rule-comments@sec.gov

Ms. Elizabeth M. Murphy
Secretary
U. S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

RE: Request for Public Comment under the Jumpstart Our Business Startups Act Title V – Private Company Flexibility and Growth

Dear Ms. Murphy:

We are submitting this letter with respect to the rules the Securities and Exchange Commission (the "Commission") is required to adopt pursuant to Section 503 of the Jumpstart Our Business Startups Act (the "JOBS Act"). We commend the Commission's invitation for the public to submit comments before it proposes enabling rules for the JOBS Act and hope that the Commission's response to these comments will provide helpful guidance for companies seeking to rely on Sections 501 and 502 of the JOBS Act.

Our comments discussed below relate to:

- When an issuer must make a determination of whether a shareholder of record is accredited or not under Section 501 of the JOBS Act — We believe the Commission should adopt a safe harbor provision that allows an issuer to rely on an ongoing basis on information it has obtained about the shareholder's accredited investor status at the time the issuer's securities are *initially* issued to the shareholder in determining its total number of shareholders of record who are not accredited investors at any given time. Alternatively, the Commission should adopt a safe harbor provision that allows an issuer to rely on an ongoing basis on information it has obtained about the shareholder's accredited investor status at the time the issuer's securities are *most recently* issued to the shareholder in determining its total number of shareholders of record who are not accredited investors at any given point in time.

- The definition of "employee compensation plan" under Section 502 of the JOBS Act — We believe the Commission should adopt a safe harbor provision that interprets the definition of "employee compensation plan" in a broad manner to include issuances of equity securities by private companies to their employees for compensatory, hiring, retention or motivational purposes regardless of whether pursuant to a formal written Rule 701 compliant plan.

1. Section 501 – Threshold for Registration

Section 501 of the JOBS Act amends Section 12(g)(1)(A) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), to increase the threshold number of shareholders of record for mandatory issuer registration under the Exchange Act to "(i) 2,000 persons, or (ii) 500 persons who are not accredited investors (as such term is defined by the Commission)." However, Section 501 does not specify when an issuer must make the determination of whether or not a shareholder of record is an accredited investor for this purpose.

To provide issuers clear guidance upon which to rely for purposes of determining accredited investor status under Section 12(g)(1)(A), as amended by Section 501 of the JOBS Act, we respectfully request that the Commission adopt a safe harbor provision that allows issuers to rely on an ongoing basis on information they have obtained about their shareholders' accredited investor status at the time the issuer's securities are *initially* issued to each such shareholder (or when such securities are subsequently transferred to a new shareholder following the original issuance) in determining whether or not the issuer has more than 500 shareholders of record who are not accredited investors at any given point in time. Under this formulation of a safe harbor, changes in a shareholder's status as an accredited investor after the time the issuer's securities are *initially* issued to such shareholder, including at the time of subsequent issuances of securities to such shareholder (whether from accredited investor to not an accredited investor or vice versa), would not change whether the issuer counted the shareholder for purposes of the limit of 500 shareholders of record who are not accredited investors. If the Commission does not find this formulation of a safe harbor acceptable, we alternatively respectfully request that the Commission adopt a safe harbor provision that allows issuers to rely on an ongoing basis on information they have obtained about their shareholders' accredited investor status at the time the issuer's securities are *most recently* issued to each such shareholder (or when such securities are subsequently transferred to a new shareholder following such issuance) in determining whether or not the issuer has more than 500 shareholders of record who are not accredited investors at any given point in time.

We believe the formulation of a safe harbor that relies on accredited investor status at the time an issuer *initially* issues securities to a shareholder would provide issuers with the most certainty with respect to whether they must register their securities under the Exchange Act. However, both alternatives would allow issuers to rely on information they have obtained about their shareholders' accredited investor status at the time securities are issued to such shareholder, which would be consistent with the exemptions from registration under the Securities Act of 1933, as amended (the "Securities Act"), for certain issuances of securities, such as Rule 506 of Regulation D under the Securities Act, that many private companies utilize and with which they are familiar.

Whether or not a shareholder of record is an accredited investor is subject to change over time as a result of factors outside of the issuer's control and knowledge (such as an individual's and/or his/her spouse's job loss or other changes in his/her personal financial situation) following a shareholder's investment in the issuer's securities. If an issuer is subject to the risk that shareholders who are accredited investors at the time of the issuance of securities to such shareholder can be subsequently considered non-accredited investors, then we believe it is likely that many issuers would decide never to exceed 500 shareholders of record due to the risk that some shareholders who initially are accredited investors might

be determined later to not be accredited investors, potentially resulting in the issuer's mandatory registration under the Exchange Act. This consequence would frustrate one of the principal purposes of the JOBS Act. Furthermore, if an issuer is required to periodically redetermine whether each shareholder of record remains an accredited investor after its issuance of securities to each such shareholder, such a task would be expensive and time consuming because the issuer would be required to continually and proactively conduct various ongoing due diligence inquiries with respect to the accredited investor status of each of its shareholders of record. We believe that imposing such an administrative burden and risk on issuers would be contrary to the purpose and intent of the JOBS Act.

Additionally, if issuers were subject to the risk of having shareholders who are accredited investors at the time of the issuance of securities to such shareholder later be considered to not be accredited investors, it may result in the unintended consequences of issuers requiring new investors to have a higher net worth (or income) than currently required under the securities laws to be an accredited investor to create a "buffer zone" of sorts or forcing issuers to impose mandatory buyback provisions in shareholder agreements or articles of incorporation (upon a determination that a shareholder of record is no longer accredited). Finally, allowing issuers to rely on information they have obtained about the shareholder's accredited investor status at the time the securities are issued to such shareholder would prevent subsequent Commission-adopted amendments to the definition of accredited investor (such as the amendment implemented on December 21, 2011) from having the unintended consequence of forcing issuers who had relied on prior definitions of accredited investor to potentially register their securities under the Exchange Act.

For the reasons set forth above, we respectfully request that the Commission adopt a safe harbor provision that allows issuers to rely on an ongoing basis on information they have obtained about the shareholder's accredited investor status at the time the issuers' securities are *initially* issued to each such shareholder (or when such securities are subsequently transferred to a new shareholder following the original issuance) in determining their number of shareholders of record who are not accredited investors at any given point in time. Alternatively, we respectfully request that the Commission adopt a safe harbor provision that allows issuers to rely on an ongoing basis on information they have obtained about the shareholder's accredited investor status at the time the issuers' securities are *most recently* issued to each such shareholder (or when such securities are subsequently transferred to a new shareholder following the such issuance) in determining their number of shareholders of record who are not accredited investors at any given point in time.

2. Section 502 – Definition of Employee Compensation Plan

Section 502 of the JOBS Act amends Section 12(g)(5) of the Exchange Act to provide that for purposes of registration under Section 12(g)(1)(A) of the Exchange Act, "held of record shall not include securities received pursuant to an employee compensation plan in transactions exempted from the registration requirements of section 5 of the Securities Act of 1933." We respectfully request that the Commission adopt a safe harbor provision that defines an "employee compensation plan" in a broad manner to encompass the intent of Section 502 of the JOBS Act, which we believe is to promote the issuance of equity securities by private companies to employees and to eliminate the need for private companies to scale back their employee equity programs because they are approaching the threshold limit

for mandatory registration under the Exchange Act. We believe that such a safe harbor provision defining an "employee compensation plan" should not be strictly limited to a written "compensatory benefit plan" as used in Rule 701 of the Securities Act.[1] Rule 701 contains limitations on the amount (and sales price) of securities that an issuer may issue and other technical requirements relating to the form of the plan and information delivery requirements that may not be easily satisfied by private companies. Furthermore, employee ownership of private company stock can be an effective tool to align employee interests with those of other shareholders. Employee stock purchase plans or other employee equity arrangements can also assist in the recruitment, retention and motivation of the issuer's employees, which is especially critical to growing startup companies or companies with insufficient cash resources to attract and retain highly qualified employees. We believe that encouraging job growth and retention was a principal purpose of the JOBS Act.

To promote the use of employee equity issuances and to provide issuers with clear guidance upon which to rely, we believe a safe harbor provision that specifies that any general practice, whether or not written, by an issuer of issuing equity securities (or rights to acquire equity securities) to employees in transactions exempt from section 5 of the Securities Act of 1933 that are intended by the issuer to be either (i) compensatory in nature and/or (ii) to promote the hiring, retention or motivation of employees be included in the definition of "equity compensation plan" under Section 502. We would suggest the following definition:

> An "employee compensation plan" is a plan or other arrangement or practice, whether or not written, that provides for the issuance of any equity securities or equity-related securities (or rights to acquire equity securities or equity-related securities) of an issuer to an employee of the issuer or its subsidiaries intended by the issuer to be either (i) compensation for past, current or future services and/or (ii) promoting the hiring, retention or motivation of the issuer's or its subsidiaries' employees.

We believe that such a broad interpretation of "equity compensation plan" would promote the use of equity programs for private company employees and encourage the creation and retention of jobs, which is especially critical to growing startup companies or companies with insufficient cash resources to attract and retain highly qualified employees. By adopting a broad definition of "employee compensation plans," issuers would be able to permit their employees to become owners and obtain a vested interest in the success of their company. It would also allow small companies to be more competitive in hiring, by offering equity to attract new hires who may have otherwise accepted employment with a more established company. By adopting the foregoing definition, consistent with the

[1] *See* Senator Toomey's comments on March 29, 2012 during session of the 112th Congress at page S2230, stating "[t]he definition of an employee compensation plan should be interpreted broadly" and should not be "limited to a written compensatory benefit plan or written contract as defined in SEC Rule 701 under the Securities Act of 1933."

purpose and intent of the JOBS Act, employers could adopt or maintain such employee equity practices without concern for being required to register their securities under the Exchange Act.

For the reasons set forth above, we respectfully request that the Commission adopt a safe harbor provision that interprets employee compensation plans in a broad manner, such as reflected in the suggested definition above.

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I appreciate the opportunity to comment on Title V of the JOBS Act. If you have any questions about this letter, please contact me at (414) 297-5662.

Sincerely,

Steven R. Barth, Esq.

cc: John K. Wilson, Esq.
John J. Wolfel, Esq.