BROADMARK CAPITAL

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July 29, 2019

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Re: Amendments to the Accelerated Filer and Large Accelerated Filer Definitions (File No. S7-06-19)

Dear. Ms. Countryman:

I am pleased to offer comments on the recent proposal (the "Proposal") by the Securities and Exchange Commission (SEC) to amend the definitions of an "accelerated filer" and "large accelerated filer" under the federal securities laws. Should the proposal be finalized, it would exempt a number of low-revenue, small public companies from the burdensome auditor attestation requirements under Section 404(b) of the 2002 Sarbanes-Oxley Act ("Sarbanes-Oxley").

I fully endorse the Proposal and believe it would make it more attractive for growing businesses to complete an initial public offering (IPO) and enter our public capital markets. This brings collateral benefits not just in terms of more robust economic growth and job creation, but also in affording Main Street households ("Mr. and Mrs. 401k") greater opportunities to build and sustain wealth. As someone who has spent a career helping small and mid-size businesses raise capital to expand and hire new employees, I believe this proposal is exactly the type of action necessary to revitalize our public markets and further promote entrepreneurship.

In fact, the Proposal is timely to Broadmark as we are going through the pre-IPO Sarbanes-Oxley auditor attestation process, which we have found to be incredibly costly, frustrating, and disruptive. For over fifteen years, policymakers have heard consistently that Sarbanes-Oxley swung the pendulum too far and would ultimately result in fewer companies willing to go public. Now that our company is experiencing this process firsthand, I can say unequivocally that these arguments are not theoretical: The Section 404(b) mandate has been one of the biggest self-inflicted wounds upon our capital markets in recent years. We can still achieve the desirable goal of reliable financial reporting without imposing a one-size-fits-all mandate for businesses that diverts precious capital away from productive uses.

I applaud the SEC for taking this action upon its own volition and not waiting for Congress to tell it to do so. I have little doubt this Proposal will have a positive impact upon our capital markets and broader economy without compromising important investor protections. My thoughts on this important topic are discussed in greater detail below.

Background

One of the more troubling developments in our economy over the last two decades has been the decline in the number of public companies in the United States. We now have roughly half the number of public companies than existed in the mid-1990s, and only slightly more than existed in 1982.[1] This decline directly impacts overall economic growth in the country and the ability of households to build wealth in order to have a dignified retirement or send a child off to college.

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[1] America's Roster of Public Companies is Shrinking Before Our Eyes. Wall Street Journal (January 6, 2017)

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Furthermore, not only are fewer companies going public, but the ones that do go public tend to be much larger and older than they were a generation ago. As Chairman Clayton has correctly pointed out, as companies stay private longer, middle-class Americans miss out on transformative capital growth opportunities that are now largely reserved for wealthy individuals or private investment funds. In other words, the decline in public companies – coupled with the disappearance of the "small" IPO – actually exacerbates wealth and income inequalities throughout the country. Fixing the public company model and bringing back the small IPO should be top priorities for both the SEC and Congress.

In 2011 and 2012, I was fortunate to work closely with policymakers on development of what became the Jumpstart Our Business Startups (JOBS) Act. The JOBS Act included several provisions that have helped companies raise capital through both public and private channels, including Title I of the bill which created the IPO "on-ramp" for emerging growth companies (EGCs). While there is little doubt that the JOBS Act helped revitalize a dormant IPO market, there is much more that policymakers should be doing to help businesses of all sizes raise capital to support the innovation economy.

Chairman Clayton's capital formation agenda so far has rightfully focused on building upon the JOBS Act and helping middle class Americans achieve wealth through our capital markets. This includes expanding the confidential filing and "testing the waters" provisions of Title I of the JOBS Act, as well as the recently released concept release on private offerings. The Proposal is part and parcel of this agenda and is one of the more significant actions the SEC has taken to address some of the unintended consequences of Sarbanes-Oxley.

<u>Section 404(b) and Auditor Attestation Requirements</u>

Sarbanes-Oxley was passed in response to the numerous accounting scandals that occurred in our public markets in 2001 and 2002. At the time it was passed and still today, it is widely accepted that those scandals warranted a national response and a new set of regulatory expectations for the audit industry. Like any major piece of legislation, however, Sarbanes-Oxley (in particular Section 404) has resulted in a number of unintended consequences that have contributed to the drop in U.S. public companies.

Sarbanes-Oxley Section 404 generally requires a public company to establish internal controls over financial reporting (ICFR) and to have management assess the effectiveness of those controls. Section 404(b) requires the company's independent auditor to examine and attest to management's assessment of the company's ICFR ("auditor attestation"). The goal of these provisions was to hold both management and their outside auditor accountable for the quality and dependability of their financial reporting.

Since the passage of Sarbanes-Oxley, however, costs associated with the auditor attestation requirement have not been scalable for small and mid-size public companies. It has also been frequently cited as a barrier to going public for companies – particularly low revenue companies - considering an IPO. The SEC even anticipated this problem in a 2003 rulemaking implementing the Section 404 provisions of Sarbanes-Oxley, stating that "the final rules increase the cost of being a public company; therefore the final rules may discourage some companies from seeking capital from the public markets."[2] As it turns out – and as noted in the 2011 IPO Task Force Report – the SEC significantly underestimated actual compliance costs associated with auditor attestation.[3]

[2] Management's Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports (June 5th, 2003)

[3] The June 2003 rulemaking estimated costs per company to be $91,000/year; a survey later completed by Financial Executives International found costs to be $4.36 million annually per company.

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It has been seventeen years since Sarbanes-Oxley was passed, and it is incumbent upon the SEC to conduct a retrospective review of how the law continues to impact our ever-evolving capital markets. It is by no means a coincidence that the public company crisis has largely coincided with the time that Sarbanes-Oxley has been in effect. The law has served to consolidate and reduce competition in the audit industry, and it has not served public company shareholders well by diverting capital away from research and development, hiring of employees, and innovation initiatives that are the hallmarks of American business. Put simply, we are long overdue for a rethink of Section 404.

Both the SEC and Congress have recognized this issue over the years and taken steps to address it. Section 989G of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act exempted non-accelerated filers from the auditor attestation requirements of Section 404(b). And the "on-ramp" provisions of Title I of the JOBS Act exempted EGCs from the mandate as well for as long the EGC exemption is maintained. Both of these actions have helped significantly reduce costs for young and growing companies, allowing capital to be invested in more productive purposes.

Another way of looking at it is that the question of whether small public companies should be exempt from the auditor attestation requirements has already been litigated, and it has not resulted in any reduction of investor protections. In fact, the exemption has helped make the public company model more attractive and boosted the IPO market in the years following the JOBS Act. The Proposal is therefore an incremental step towards helping a narrow set of companies access the public markets.

Currently, non-accelerated filers are generally eligible for the exemption if they have a public float below \$75 million. In 2018, the SEC amended a related exemption – for a small reporting company (SRC) to include companies with less than \$250 million in public float or less than \$100 million in annual revenues. Those amendments added a degree of complexity to the exemptions companies rely on, as many may now be eligible to file as an SRC but not as a non-accelerated filer.

The Proposal would extend the "revenue test" of the new SRC definition so that companies with less than \$100 million in revenue would be afforded an exemption from the auditor attestation requirements. The SEC is wise to extend this exemption on a revenue rather than a public float or market capitalization threshold. Revenue is typically a better indicator of a company's ability to withstand the costs associated with significant compliance requirements and is more predictable than the overall value of public float or market capitalization which can fluctuate significantly day-to-day.

It should also be noted that the exemption being considered under the proposal is entirely optional for issuers. If a company – after communicating with its shareholders – decides that complying with Section 404(b) is in the best long-term interests of the enterprise, it is fully within their power to do so. Furthermore, even though issuers would be exempt from the auditor attestation requirements of Section 404(b), they would still be required to maintain effective ICFR and comply with disclosure requirements under Section 404(a).

The Proposal is a very reasonable and well-developed policy solution to a problem that has afflicted the public capital markets for over fifteen years. I fully support its adoption and look forward to working with the SEC Commissioners and staff as they move towards finalizing the new exemptions.

Other Capital Formation Initiatives

Chairman Clayton has also emphasized the need for strong public *and* private capital markets. Early-stage private investment is critical in order to help a company grow from small to large and eventually complete an IPO.

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The relationship between public and private markets should not be viewed as a zero-sum game: the more you open up private investment early in the lifecycle of a business, the more businesses that will be prepared to go public down the road.

As the SEC considers further efforts to help companies raise capital, I respectfully urge the Commission to consider the following changes:

- **Fix accredited investor verification for general solicitation:** General Solicitation rules ("Title II of the JOBS Act or "506(c) offerings") were intended to boost capital formation by expanding Regulation 506. However, only $71 Billion of the $2.2 trillion raised since September 2013 under regulation 506 used general solicitation; while meaningful, the shift to general solicitation has been slow. The main challenge has been the requirement for third-party verification of accredited status for generally solicitated offerings. This has made the JOBS Act a limited success as third-party verification prevents Title II from reaching its full potential. It is also worth noting that pre-JOBS Act self-certification worked perfectly fine in practice and did not present any type of investor protection concerns. When the Commission promulgated the rules for general solicitation there was an assumption that a third-party verification regime would be created through accountants, broker-dealers, or others who could verify investors accredited status. Unfortunately, this regime has not taken hold, and onerous restrictions have disincentivized third parties from verifying accredited status of investors. Given that the doomsday predictions of gutted investor protections under the JOBS Act have not come to pass, the SEC should amend these rules to allow investors to self-certify in these offerings that they are accredited and understand the risks involved, similar to a 506(b) offering.

- **Amend the accredited investor rules:** Current rules only allow an investor to be deemed "accredited" (and thus eligible to invest in certain private offerings) if they meet certain income and net worth requirements. The underlying assumption of these rules is that only wealthy individuals are "sophisticated" enough to understand the risks of private offerings. With private markets more robust than ever, this has translated into wealthy individuals disproportionately benefiting from investment returns on privately-held businesses. The SEC should amend these rules to allow another path for accreditation based upon an individual's professional background or ability to demonstrate knowledge of the financial markets, regardless of their net worth or income.

Conclusion

The SEC is in the midst of pursuing one of its more significant capital formation agendas in recent memory. I appreciate the leadership of Chairman Clayton and his fellow Commissioners as well as the staff for their work on the Proposal and other capital formation initiatives. I stand ready to assist on this agenda in any way I can.

Sincerely,

Joseph L. Schocken
President & CEO