McCARTER &ENGLISH
ATTORNEYS AT LAW

February 19, 2014

Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File Number S7-11-13 (Proposed Rule Amendments for Small and Additional Issuers Exemption Under Section 3(b) of the Securities Act) (the "Proposed Rules")

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Ladies and Gentlemen:

The Proposed Rules are a comprehensive and very thoughtful effort to modernize Regulation A to implement intent of Congress in enacting Title IV of the JOBS Act. Title IV has significant potential to enable the financing of growth companies that need more capital than may be available from private placements but are not ready for a traditional IPO. At a roundtable discussion convened by the Milken Institute Center for Financial Markets on February 10, 2014, participants widely agreed that the biotechnology industry, in light of the capital intensive requirements for drug and medical device development, would be a major beneficiary of the Regulation A+ finance option. The U.S. is a world leader in this sector which creates many jobs in a great variety of related health care companies. Many states, including Massachusetts, have large commitments to this industry.

We offer comments related to your requests, enumerated as set forth in the Proposed Rules, as follows:[1]

Request for Comment No. 4 (Eligible Issuers – Canadian Issuers): The Proposed Rules note the purpose of the JOBS Act to create jobs within the United States. But insofar as the proposals leave intact the current Rule 251(a)(1) eligibility for Canadian companies that have a principal place of business in Canada (which may or may not result in more U.S. jobs), there is little reason not to extend Regulation A to all foreign private issuers. Attracting these companies, particularly at a relatively early stage of corporate development, to the U.S. capital markets has many economic benefits, even if there is uncertainty about whether U.S.-based jobs would be created.

[1] The comments below represent the suggestions and proposals by the undersigned and are not necessarily the views of this firm. In order to assist the rulemaking process of the Commission, we respectfully propose amended rule language for the staff's consideration.

Limiting issuer eligibility by means of a condition that most of the offering proceeds must be used in connection with the issuer's U.S. operations will preclude use of proposed Regulation A by many Canadian issuers who under current Regulation A are not subject to this condition. Canadian companies frequently access the U.S. capital markets and may desire to create a U.S. trading market for their shares,[2] but may find it impractical to conduct business operations in the U.S.[3]

Companies based in Canada could be the foreign entities for which Regulation A under the Proposed Rules has the most appeal. Canadian companies often "go public," as evidenced by the listings on the TSX-Venture Exchange, at an earlier stage than U.S. companies and in many cases might not be ready for a public offering in the U.S. even as an "emerging growth company" under Title 1 of the JOBS Act. In particular, Canadian companies listed on the TSX-Venture Exchange may well find a Regulation A offering (especially Tier 2) attractive and should not be precluded by a condition requiring use of proceeds in the U.S.

Request for Comment No. 11 (Shell Companies - Rule 144(i) consequences): For the reasons stated in the Proposed Rules, we agree that shell companies should be eligible to use Regulation A. As the comments note, early stage companies may have limited operations and few assets such that it may be difficult to reach a conclusion that they are not shell companies.

It would not be uncommon for shell companies (including those considering Regulation A) to conduct private offerings and/or have outstanding securities that are "restricted securities" within the meaning of Rule 144. Holders of such securities will desire to resell into the public markets, but as a result of Rule 144(i) will be ineligible to rely on the Rule 144 safe harbor unless shell company issuers comply with rule 144(i)(2).[4] It is difficult to understand why Rule 144(i) ineligibility should continue after a company has complied with the ongoing reporting requirements for a reasonable period, such that the investors have current and past information, similar to that as required by Rule 144(c).[5] As it stands, the Rule 144(i) "taint" on restricted securities issued by shell companies continues long after they have become a fully operational and reporting issuers, and Regulation A Tier 2 shell

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[2] Canada, with 336 companies, has by far the largest number of SEC reporting companies relative to other foreign jurisdictions. See "Number of Foreign Companies Registered and Reporting with the U.S. Securities and Exchange Commission" dated December 31, 2012.

[3] This is especially the case for companies in the natural resource industry that may be headquartered in Canada and have exploration and/or production properties outside the U.S.

[4] A prerequisite to use of Rule 144(i)(2) is filing "Form 10 information" and transitioning to becoming an Exchange Act reporting company resulting in "loss" of the Rule 257 reporting regime.

[5] An amendment to Rule 144(c) to accommodate Regulation A Tier 2 issuers is proposed below.

companies would encounter the same problem. We propose that Rule 144(i) be amended so as to have a "sunset" as follows:

> Rule 144
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> (i) *Unavailability to Securities of Issuers with No or Nominal Operations and No or Nominal Non-Cash Assets.*
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> (4) This subsection shall not apply to an issuer that has previously been described in paragraph (i)(1)(i) but has ceased to be an issuer described in subparagraph (i)(1)(i) that (a) has complied with subsection (i)(2) and has filed all reports and other information required to be filed under Section 13 or 15(d) of the Exchange Act, as applicable, during the [2] most recently completed financial years and the portion of the current year for which reports are required to be filed, other than Form 8-K reports, or (b) in the case of a Regulation A Tier 2 issuer, has filed all reports and information required to be filed under Rule 257 of the Securities Act during the [2] most recently completed financial years and the portion of the current year for which reports are required to be filed, other than Form I-U reports.

Request for Comment No. 26 -27 (Investment Limitation): The investment limitation at Rule 251(d)(2)(C) is unclear: does "purchaser" refer to institutional investors as well as natural persons? Moreover, institutions may find it confusing to make an investment limitation analysis based on asset or income tests more appropriate to natural persons. The offering circular cover page legend for a Tier 2 offering (Part II(a)(5) of the offering statement) suggests that the intention is to focus on natural persons, presumably with the aim to limit the risk for natural person investors who are not accredited. Insofar as accredited investors (whether institutional or natural persons) are deemed to have the financial sophistication sufficient to "fend for themselves" and, as a practical matter, may make an investment decision based on private placement disclosure for which there is no mandated disclosure under Rule 502 and no review by the Commission, there is little reason to subject accredited investors to the investment limitations imposed by Regulation A.

By clearly removing accredited investors from the types of investors subject to the limitation, issuers would avoid the difficult problem of ascertaining whether institutions meet the net income and assets test. Accordingly, we would urge amending Rule 251(d)(2)(C) by adding the words "other than a purchaser that is an accredited investor as defined in Rule 501," after "purchaser". In similar fashion, the offering circular legend could be introduced as follows: "Unless you are an

"accredited investor" as defined in Rule 501 of Regulation D, in which case the following does not apply: ..."

Request for Comment No. 44 (Non-Public Submission of Offering Statement): Rule 252(f) is an important accommodation to Regulation A issuers, similar to that afforded to emerging growth companies under Section 6(c) of the Securities Act, because non-public submission enables delaying publication of an offering until greater certainty of its "launch" or completion is achieved, or withdrawal may be effected without public notice. This feature should increase the attractiveness of Regulation A because, among other reasons, many early-stage companies often desire to avoid publicizing their finance strategies. Unlike Rule 252(c) with respect to a "traditional" confidential treatment request requiring approval by the Commission to avoid publication that could result in competitive harm, Rule 257(f) implies that the submission will automatically be treated as non-public and, as such, is not a "request" requiring action within the meaning of Rule 83(c). Rule 252(f) without clarification, however, may cause confusion. Clarification could be accomplished by adding an instruction as follows:

> *Instruction:* For purposes of Rule 83(c), an offering statement submitted on a non-public basis pursuant to this Rule 252(f) shall be marked on each page "DRAFT - Non-Public Submission By [Issuer] Pursuant to Rule 252(f)" and shall not require a written request for confidential treatment.

Request for Comment No. 54 (Disclosure in Form 1-A): Issuers undertaking a Regulation A offering will in all probability engage advisers familiar with Form S-1 and related Regulation S-K disclosure rules. Eliminating Model B disclosure and requiring disclosure and form requirements of Form S-1, except as scaled back specifically by certain Model B items stated in Rule 252 and/or Form 1-A will promote uniformity and consistent presentation and, over time, develop reliable disclosure models as the use of Regulation A increases. This could be accomplished by a cross reference in Form 1-A to the applicable Regulation S-K item subsection specifically designated for Regulation A issuers, similar to the current regime for smaller reporting companies (see, e.g., S-K Items 301(c), 302(c) and 303(d) that eliminate disclosure, and Items 304(d) and 402(m)ff that reduce or scale back disclosure).

Also, insofar as the Commission announced in December 2013 (in response to Section 108 of the JOBS Act) a major review of the Regulation S-K disclosure requirements, any amendments to Regulation S-K resulting from that review that are applicable to Regulation A issuers would be addressed, and minimize the need to re-visit (and possibly amend) the Regulation A rules.

Request For Comment No. 72ff (Continuous and Shelf Offerings): The capacity to undertake shelf and continuous offerings should be maintained. These finance techniques are all but essential for companies, e.g., in biotechnology, that cannot

fully finance their operations from revenue and, accordingly, need efficient access to the capital markets to continue funding their operations, which is afforded by a shelf offering. It is not unusual for young companies to offer securities comprised of units of shares and warrants, and require a continuous offering with respect to the underlying warrant shares. Elimination of this option would remove a major attraction of Regulation A to Tier 2 companies.

Request for Comment Nos. 88ff (Ongoing Reporting – Foreign Private Issuers): The proposed ongoing reporting regime strikes a reasonable balance between the need of investors for meaningful material periodic and current information and the need of issuers to limit burdensome disclosure obligations. This is especially notable in the scaled reporting requirements and the limited number of disclosure triggering events in Form 1-U.

Regulation A rules for ongoing reporting, however, should be revised to harmonize with the current rules for foreign private issuers. In particular, foreign private issuers could be disinclined to undertake a Tier 2 offering if it would result in ongoing U.S. reporting compliance greater than now required for entities (often much larger) that file annual reports on Form 20-F (or 40-F in the case of certain Canadian entities) and furnish all other information under cover of Form 6-K. In similar fashion, foreign issuers that avail themselves of the Rule 12g3-2(b) exemption under the Exchange Act would be disinclined to raise capital in the U.S. by means of Regulation A if doing so triggered inability to rely solely on the home country reports for purposes of ongoing reporting[6]. In contrast, similar to domestic issuers, the occasional foreign issuer that does not qualify as a foreign private issuer should be required to comply with the ongoing reporting requirements of Rule 257.

This "harmonization" could be accomplished by adding subsections to Rule 257 as follows:[7]

> Rule 257 Periodic and current reporting; exit report.
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> (b) *Tier 2: Periodic and Current Reporting.*
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[6] This election will be especially important to Canadian companies that desire access to U.S. capital markets but already report on SEDAR.

[7] Rules 13a-16 and 15d-16 would need to be amended by adding the phrase, "or which has elected to report under Rule 257(c)(5) of the Securities Act" after the words "subject to Rule 13a-1" and "Rule 15d-1" respectively. A similar amendment would be needed to the title and instruction A to Form 6-K.

(5) A foreign private issuer that currently makes public, files or distributes the information referred to in clauses (i), (ii) or (iii) of Instruction B to Form 6-K, may elect, in lieu of filing reports under Rule 257(c)(3) and (4), to furnish the information required to be furnished by foreign private issuers under cover of Form 6-K.

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(f) *Tier 2 Foreign Private Issuers Electing Rule 12g3-2(b) Exemption.* A foreign private issuer that (i) has filed an offering statement that has been qualified pursuant to this Regulation A with respect to an offering of securities within a class for which it meets the requirements to elect the exemption at Rule 12g3-2(b) of the Exchange Act and (ii) has elected, or following the qualification of such offering statement intends to elect, the exemption set forth at Rule 12g3-2(b) shall not be required to file reports required by this Rule 257. The offering statement of such issuer when qualified shall state that it has elected and intends to comply with the requirements of Rule 12g3-2(b) in lieu of filing reports under this Rule 257.

Request for Comment No. 100 (Rule 144 Availability – Current Information): One may presume that many companies that intend to rely on proposed Regulation A have previously conducted private placements and, accordingly, have issued "restricted securities" within the meaning of Rule 144. Holders of restricted securities issued by a Tier 2 company will presumably desire to rely on the Rule 144 safe harbor for resales and will need clarity as to whether the company has met the current public information requirement of Rule 144(c).[8] This will also promote efficiency by enabling existing security holders to resell without the need to file a Regulation A offering statement solely or largely to enable resales of outstanding securities. We suggest amending Rule 144(c) to add a new subsection as follows:

Rule 144

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(c) *Current Public Information.*

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(3) *Regulation A Tier 2 Issuers.* The issuer is a Regulation A Tier 2 issuer and (i) has been subject to the filing requirements of Rule 257 for at

[8] Technically, insofar as a Tier 2 company is not a reporting company for Exchange Act purposes, non-affiliates could rely on Rule 144(b)(1)(ii) but that would subject them to a 12-month holding period. This could reduce investor interest in a Tier 2 offering, and hence the attractiveness of Regulation A because the longer holding period would be perceived as adding resale risk.

least 6 months and (ii) has filed all reports required by Rule 257(b) during the 12 months preceding each sale, other than Form 1-U reports.[9]

Request for Comment No. 102 (Transition Pursuant to Section 12(g)): Although Section 12(g) was amended by the JOBS Act to enable private companies to delay becoming reporting companies under the Exchange Act, a Tier 2 issuer could be confronted with having to transition to full Exchange Act compliance earlier than it desires or is practicable. This could occur because a Tier 2 issuer (which has met the $10 million asset test) may not know whether purchasers in the Tier 2 public offering are accredited and hence be concerned about crossing the Section 12(g)(1)(A)(ii) threshold with respect to non-accredited investors. Moreover, it may reject the Regulation A finance option out of concern that its initial Tier 2 offering, combined with uncertainty about the accredited status of prior record holders of its equity securities, could result in its exceeding the threshold and hence compel it to file a Form 10 registration statement and commence preparations to comply with the proxy rules, Section 16 and other Exchange Act requirements – all of which add considerable burden. Also, utilization of Rule 151(c) for continuous or delayed offerings may be deterred by a similar concern. On the other hand, a Tier 2 issuer whose assets and shareholder base have considerably increased should at some point be required to become fully reporting under the Exchange Act so that the secondary trading market has adequate information about the issuer.

The comments in the Proposed Rules fairly note that an absolute exemption from Section 12(g), or enabling remaining Regulation A reporting regime for an indefinite period, could result in an issuer never becoming subject to mandatory Exchange Act reporting. A way to resolve this problem could be modeled on the definition of "emerging growth company" (at Section 2(a)(19) of the Securities Act) which enables transitioning out of EGC status upon certain clearly defined events. This election should be available only in connection with a Tier 2 issuer's first offering statement that has been qualified.

There are two possibilities worth considering, each for a stated period: one would defer Exchange Act compliance broadly (e.g., Sections 13, 15(d), 14(a) and 16) by electing a temporary exemption from 12(g) requirement to register a class of securities, and the other, narrower, would be to just to defer Exchange Act reporting.[10]

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[9] For purposes of consistency, and because a Tier 2 issuer does not file quarterly reports under the Exchange Act, Rule 144(b)(i) would need an added phrase: "or is, and has been for a period of 180 days, subject to the reporting requirements of Rule 257," after "(the Exchange Act)".

[10] We suggest that the Commission could adopt this rule by delegation of authority pursuant to Section 12(g)(5) of the Exchange Act to define the term "held of record" The public interest of the rule revised as suggested herein is to enhance the capital formation option afforded by Regulation A and more generally that of the JOBS Act to facilitate creation of

The "broad" approach would be to enable an issuer to determine when to file a Form 10 registration statement, but not later than certain events. A suggested rule amendment follows:

> Rule 151 Scope of the exemption
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> (e) *Election With Respect to Section 12(g) of the Exchange Act.* Unless the issuer has undertaken a registered offering under the Securities Act and solely in connection its first offering statement that has been qualified under this Regulation A, a Tier 2 issuer may exclude its holders of record for purposes of the determination required by Section 12(g) of the Exchange Act until the earliest to occur of the following:
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> (i) the last day of any fiscal year of the issuer during which it had annual gross revenues of $250,000,000;
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> (ii) the last day of any fiscal year following the fifth anniversary of the date of the first sale of equity securities of the issuer pursuant to a qualified offering statement under this Regulation A; and
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> (iii) the date on which the issuer had an aggregate worldwide market value of voting and non-voting equity held by its non-affiliates of at least $75 million computed as of the last business day of the issuer's most recently completed second quarter.
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> If the issuer intends to make the election permitted by this Rule 251(e) it shall report such election in either an offering statement or Form 1-U. Upon the occurrence of the first event to occur under clause (i), (ii) or (iii) above, all holders of record shall be included for purpose of the determination required by Section 12(g)(1)(A) of the Securities Exchange Act of 1934 and Rule 12g-5 thereunder.

An alternative (and narrower approach) would be to enable continuation of the ongoing reporting scheme required for Tier 2 issuers by adding a new subsection to Rule 257 as follows:

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jobs in young companies, widely considered an engine for new jobs in the U.S.. Protection of investors is effected by the ongoing reporting requirements of Rule 257 and presumably by risk factors (e.g., that investors do not have the benefit of full Exchange Act compliance) that may become standard or "best practices" for Regulation A offering circulars, much as they already have for prospectuses of emerging growth companies. In addition, there may be appropriate delegation of authority under Section 3(b)(4) of the Securities Act.

Rule 257 Periodic and current reporting; exit report.

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(f) *Election to delay compliance with Section 13 or 15(d).* Notwithstanding the requirement of subsection (d)(1) of this Rule 257, unless the issuer has undertaken a registered offering under the Securities Act and solely in connection with its first offering statement that has been qualified, a Tier 2 issuer may elect to delay filing reports otherwise required to be filed pursuant to Section 13 or 15(d), and to comply with Sections 14 and 16, of the Exchange Act until the earliest to occur of the following:

(i) the last day of any fiscal year of the issuer during which it had annual gross revenues of $250,000,000;

(ii) the last day of any fiscal year following the fifth anniversary of the date of the first sale of equity securities of the issuer pursuant to a qualified offering statement under this Regulation A; and

(iii) the date on which the issuer had an aggregate worldwide market value of voting and non-voting equity held by its non-affiliates of at least $75 million computed as of the last business day of the issuer's most recently completed second quarter.

If the issuer intends to make the election permitted by this Rule 257(f) it shall report such election in either an offering statement or Form 1-U. Provided that the issuer has duly made such an election and only for such period as is under the applicable clause (i), (ii) or (iii), the securities shall not be deemed "held of record" solely for purposes of the determination of the number of record holders required by Section 12(g)(1)(A) of the Securities Exchange Act of 1934 and Rule 12g-5 thereunder.

Finally, a Tier 2 issuer should have the option to enter the Exchange Act reporting regime simply by filing a Form 8-A rather than Form 10 (which would necessitate undergoing the customary review and comment process) if the Form 8-A is filed within a relatively short period after an information statement has been reviewed and qualified. This would obviate the need (and expense and incidental delay) for a Form 10 registration statement that would presumably include much the same information contained in an offering statement only recently reviewed and commented on by the Commission. This objective could be accomplished by amending Rule 151 as follows:

Rule 151 Scope of exemption

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> *(g) Election to Register Under Section 12(g) of the Exchange Act.* A Tier 2 issuer may elect to register the class of securities for which it has qualified an offering of such securities under this Regulation by filing a Form 8-A registration statement no later than 12 months after the date that the offering statement for the offering of such securities was qualified.

Request for Comment No. 114-115 (State Securities Law Pre-Emption): State securities law pre-emption is essential for Regulation A to succeed as a viable financing alternative, and the current definition of "qualified purchaser" appropriately addresses this issue. The Proposed Rules cites studies that concluded that state regulatory compliance was a major reason for the decline in use of current Regulation A.

It is difficult to imagine that any state securities regulator (or combination of several) could match the experience and resources (legal and accounting and with industry segments) that the Commission dedicates to review of disclosure documents.[11] Moreover, many practical problems could arise if state regulatory review is required. Although the Commission and many states adhere to the quality of disclosure standard, rather than merit review, a lead examiner from a merit state could present insuperable obstacles if a merit criterion were inconsistent with "market" practice in underwritten offerings, or merit disqualification could not be overcome with adequate disclosure. Difficulty or delay could also result from co-lead examiners where the disclosure examiner is satisfied as to an item which, from a merit examiner's criteria, should disqualify the offering. Would NASAA be willing to publish in one place all merit criteria so an issuer could knowledgeably select the states in which it will conduct a Regulation A offering?

Public securities offerings are generally time sensitive and hence time-consuming resolution of comments from numerous examiners could, for practical reasons, result in unacceptable delay or possible withdrawal of the offering. How would issuers expeditiously resolve potentially conflicting comments from the Commission and a state lead disclosure examiner? What happens if the aggregated state comments cannot be reconciled? Perhaps most important, how would a lead state examiner compel timely review and coordination of comments from each participating state reviewer?

If state review of Tier 1 Regulation A offerings is retained in the final rules, NASAA should be strongly be urged to issue new rules on coordinated review on a timely basis, or, as a practical matter, Tier 1 offerings will remain unavailable. If NASAA generates rules for coordinated review, they need to contain cut-off dates to avoid undue delay, a major factor cited for decline of use of current Regulation A. For example, if a state does not provide its comments to the lead examiner within "X" days it is deemed to comply with comments of the lead examiner, and, similarly, if

[11] See "Filing and Review Process" published by the Division of Corporation Finance.

the lead examiner does not provide comments to the Commission within "X" days, all applicable states are deemed to be satisfied with the Commission's decision on qualification. Also, NASAA should not require separate formatting of an offering statement and offering circular contained within it; Form 1-A should become the standard.

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In conclusion, we appreciate the care with which the Commission has approached and addressed the many issues intended under the JOBS Act to modernize Regulation A. We also appreciate the Staff's consideration of the comments herein which are intended to enhance the attractiveness of Regulation A by, among other things, integrating it more fully with other provisions of federal securities law. Please do not hesitate to call the undersigned if you have questions with respect to the foregoing.

Sincerely,

Jonathan C. Guest