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## ARKANSAS SECURITIES DEPARTMENT

February 20, 2014

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

Re: **Proposed Rule Amendments for Small and Additional Issues Exemptions Under Section 3(b) of the Securities Act (“Reg. A+”)**  
**(Rel. No. 33-9497; 34-71120; 39-2493; File No. S7-11-13)**

Dear Ms. Murphy:

As the state regulator responsible for the oversight and enforcement of the securities laws in Arkansas, I am writing in response to the request by the U.S. Securities and Exchange Commission (“SEC”) for comment on the recently proposed rulemaking to amend Regulation A to implement Section 401 of the Jumpstart Our Business Startups (“JOBS”) Act.

I am surprised and offended by the SEC’s proposed rules to implement Section 401 (commonly referred to as “Regulation A+” or “Reg. A+”) in a manner that would preempt the ability of Arkansas and other states to review these new offerings, consistent with my authority and responsibility to protect investors, and the expectations of Congress. The proposed rules not only disregard clear Congressional intent that states should *not* be preempted from reviewing Reg. A+ offerings, but threaten to place investors needlessly at risk and undermine the efficacy of the new exemption as a tool for capital formation.

As a practical matter, my office is often the first to identify new investment scams and bring enforcement actions to a halt and remedy a wide variety of investment related violations. This first-hand knowledge is essential to respond quickly and efficiently to investors in Arkansas. Considering that Congress did not grant the SEC any additional resources to tackle the new responsibilities contained in the JOBS Act (including the changes to Rule 506, Reg. A+, and crowdfunding), it is disingenuous to now support the preemption of state securities regulators when we would be the most knowledgeable and the first to act. Also, the proposed rules ignore the fact that given the local nature of Reg. A+ offerings, it is the states that have the greatest interest in seeing both the issuers and investors succeed.

Experience shows that preempting states’ ability to provide grass-roots investor protection can have drastic and negative consequences. Federal preemption of state consumer

and investor protection laws and regulations diminishes protections for ordinary investors and consumers. Most offerings made under the current Regulation A are of a localized nature, and many Reg. A+ offerings are likely to maintain this regional flavor, and be sold substantially in their issuers' home state and adjacent states.

During extensive debate of the JOBS Act, Congress considered and rejected calls to preempt states from review of Reg. A+ offerings. In fact, when Congress considered whether to increase the limit on Reg. A+ offerings, one of greatest concerns was the ability of the SEC to effectively police the new offerings given its limited resources. Ultimately, it was on the basis of an agreement by the bill's sponsor and the Chairman and Ranking Member of the House Financial Services Committee to amend the legislation to preserve state authority to rigorously review Reg. A+ offerings that the Committee was able to report the legislation favorably and on a bipartisan basis, and that it subsequently passed the full House of Representatives.

The SEC exceeded its appropriate authority in proposing the preemption of states with respect to Reg. A+. During the period that Congress was debating the Reg. A+ exemption, I was Chairman of the Corporation Finance Section Committee of the North American Securities Administrators Association ("NASAA"). In that capacity, in September 2011, shortly before the House of Representatives was to vote on the legislation, I testified before a House Financial Services subcommittee:

As the Subcommittee is aware, NASAA had significant concerns regarding the original version of this legislation...one of the most fundamental investor protections currently embodied in Regulation A is the review and oversight of Regulation A transactions by state securities regulators. H.R. 1070 [in its original form] placed this important investor protection mechanism in jeopardy... [because] offerings ... would be considered covered securities, and state review of these offerings would be preempted.<sup>1</sup>

Then, making direct reference to an agreement between the bill's sponsor and other members of the Committee to remove the preemptions contained in the legislation, in favor of a Government Accountability Office ("GAO") study, I stated:

In the intervening months, Representative Schweikert and his staff have worked with NASAA to improve and refine the legislation with respect to state authority, including a proposal to remove the critical provision when this bill is considered by the full House....

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<sup>1</sup> Testimony of A. Heath Abshure, Arkansas Securities Commissioner and Chairman of the Corporation Finance Section Committee of the North American Securities Administrators Association, Inc. Before the House Financial Services Subcommittee on Capital Markets and Government Sponsored Enterprises at a hearing entitled "Legislative Proposals to Facilitate Small Business Capital Formation and Job Creation." September 21, 2011. P. 8 Available at: <http://financialservices.house.gov/uploadedfiles/092111abshure.pdf>.

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we believe that the states' ability to review these offerings...will prove to achieve a proper balance of the issuers' needs with investor protection. Accordingly, NASAA no longer actively opposes H.R. 1070.<sup>2</sup>

Most importantly, the members of the Subcommittee plainly shared my expectation. This is evident from dialogue at the same hearing between the Committee's Ranking Democrat, Congressman Barney Frank (D-MA), and its sponsor, Congressman David Schweikert (R-AZ):

*Mr. Frank:*

I believe we have an agreement between the parties, for instance, on Mr. Schweikert's bill on Regulation A, which I assume will be coming to the Floor soon. We support that. ... where we may have a sharper difference is on the question of the preemption of State laws. That was an issue with regard to the Reg A bill. And I was glad that we are able to work that out. We have a study coming. ... I think it would be a great mistake to reject the voluntary help that States are prepared to give us. ... It has been my experience in general that at the State level, individual concerns, whether they be consumer concerns or investor concerns, get attention that is sometimes lost down here where we are doing mega policy.

So I am in favor of reducing some of the SEC registration requirements on the smaller entity... I also believe that, my own confidence in our ability to do this at the Federal level is strengthened by knowing that the States...would be the mix we could get, that we would reduce the paperwork at the Federal level, but not diminish the ability of the States to serve that protective function.<sup>3</sup>

*Mr. Schweikert:*

I am actually somewhat overjoyed with the progress we are making here. This happens to be one of those moments where we are actually understanding that this will help create jobs. And guess what? We are actually, on many of these, working through some of the partisan divide. To the ranking member and his staff, on a couple of our pieces of legislation, they have been very forthright in their concerns. And we really appreciate their working with our staff, because this really is one of those occasions where we are going to hopefully be disciplined, move bills through the process that do good things...<sup>4</sup>

The legislation that passed the House on November 2, 2011, with broad and bipartisan support, as well as support from state securities regulators, was uniformly understood to reflect a

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<sup>2</sup> Ibid. P. 8-9.

<sup>3</sup> U.S. House of Representatives. Financial Services Subcommittee on Capital Markets and Government Sponsored Enterprises. *Legislative Proposals to Facilitate Small Business Capital Formation and Job Creation*. (H. Rpt. 112-63). P. 3-4. Available at: <http://financialservices.house.gov/uploadedfiles/112-63.pdf>.

<sup>4</sup> Ibid, P. 4.

consensus by the House that state prerogatives to review Reg. A+ offerings, in the interest of investor protection, would not be impeded.<sup>5</sup> <sup>6</sup> Furthermore, the SEC's proposed reliance on the "qualified purchaser" definition as a means for achieving preemption is in direct conflict with Congress' intention that "qualified purchasers" be experienced and "sophisticated" investors who can protect themselves in the market.<sup>7</sup> The SEC has absolutely no authority to reverse and capriciously disregard Congress' determination in this regard. Should the Commission seek to do so, its rules will be subject to legal challenge. Defining "qualified purchaser" by referencing the offering rather than any trait, experience, expertise or aspect of the purchaser is nonsensical.

Finally, as the Commission is well aware, state securities regulators have been preparing for Reg. A+ for over a year and are in the final stages of developing a state-level review process that is efficient and practical for issuers who intend to sell unrestricted shares to retail investors.<sup>8</sup> This system will allow issuers in Reg. A+ offerings to receive just one state comment letter (rather than several) and to resolve the comments with two lead examiners who will be issuing

<sup>5</sup> In remarks to the House of Representatives immediately prior to passing the Bill (H.R. 1070), the Democratic bill manager, Rep. Gary Peters of Michigan, affirmed that the consensus reached by the Financial Services Committee with respect to preemption was embodied in the amended bill considered and passed by the House, stating, "[F]inally, the gentleman from Arizona (Mr. Schweikert) has also worked with Democrats on the remaining issue of contention, and that was the preemption of State law. The gentleman from Arizona's substitute amendment to H.R. 1070 removes the exemption from State level review that was previously provided to an issuer using a broker-dealer to distribute and issue. Regulation A securities can be high-risk offerings that may also be susceptible to fraud; making protections provided by the State regulators an essential future." 117 Cong Rec H 7229, 7231 (2011)

<sup>6</sup> Recognition of Congress' intentions regarding the role of states in reviewing Reg. A+ offerings is evidently shared by at least one member of the Commission. In remarks at the SEC's Open Meeting on December 18, 2013, Commissioner Kara M. Stein observed that: "*Congress did not explicitly preempt these smaller offerings from all state securities regulation. To the contrary, Congress deliberately revised the bill to ensure that state securities laws were not explicitly preempted before the bill's final passage. I am concerned that the Proposed Rule before us today does not yet achieve the appropriate balance between promoting capital formation for issuers and protecting investors. I believe that the states play an important role protecting investors. The Proposed Rule explicitly preempts the state securities laws for offerings relying upon this new exemption, notwithstanding Congress' decision not to do so.*" See Remarks at SEC Open Meeting, Commissioner Kara M. Stein, U.S. Securities and Exchange Commission. Washington, D.C. Dec. 18, 2013 <http://www.sec.gov/News/Speech/Detail/Speech/1370540516481#.UwUiGmJdVq0> (emphasis added)

<sup>7</sup> The Commission's use of the qualified purchaser definition under Section 18 is directly contrary to Congressional intent, which was that qualified purchasers must be investors who can protect themselves in the financial markets. A House Report discussing 18(b)(3) discussed the Congressional intent behind qualified purchasers. Specifically, the Report notes: "...The Committee intends that the Commission's definition be rooted in the belief that "qualified" purchasers are sophisticated investors, capable of protecting themselves in a manner that renders regulation by State authorities unnecessary." *H.Rep. No. 104-622, 31-32 (1996)*

<sup>8</sup> The core elements of the protocols for multistate coordinated review of Regulation A+ offerings are explained in Ohio Securities Commissioner and NASAA President Andrea Seidt's December 12, 2013 Pre-Comment Letter to the Commission, and, in the testimony of NASAA Deputy General Counsel Rick Fleming at the hearing of the Senate Committee on Banking, Housing and Urban Affairs' Subcommittee on Securities, Insurance, and Investment, entitled "*The JOBS Act at a Year and a Half: Assessing Progress and Unmet Opportunities.*" October 30, 2013.

comments on behalf of the states as a group. My office strongly supports the coordinated review protocols that are now being finalized by NASAA. Once these proposals are adopted as an official NASAA statement of policy, I anticipate that my office will effectuate them by signing onto a Coordinated Review Protocol Memorandum of Understanding (MOU).<sup>9</sup>

I disagree that the SEC has the authority to preempt state law through rule-making, especially in the face of clear Congressional direction to not preempt the states. Further, the preemption is based upon a definition of "qualified purchaser" that has nothing to do with the purchaser at all. Preemption ignores the fact that the SEC lacks the resources to properly review and oversee this market, and that the states have a much more vested interest in seeing both issuers and investors succeed with Reg. A+ offerings.

I urge the SEC to remove state preemption from the proposed rules in order to protect investors and the stability of our markets.

Sincerely,



A. Heath Abshure  
Arkansas Securities Commissioner

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<sup>9</sup> The NASAA Proposed Coordinated Review Program for Regulation A Offerings was approved by the NASAA Board of Directors on January 30, 2014, and was formally presented to the NASAA membership for a vote, by means of an electronic ballot, on February 4, 2014.