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February 28, 2014

Elizabeth M. Murphy
Associate Director, Division of Corporation Finance
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: Regulation A+

Dear Ms. Murphy:

I appreciate the opportunity to comment on the Commission's proposed overhaul of Regulation A, contained in Release No. 33-9497.[1]

In comment letters to the Commission, much has been made of the inefficiencies of overlapping review of Regulation A filings by the SEC and multiple States. In this letter, I recount my own recent experience with a Regulation A offering that, due to available exemptions, did not involve any State review. At least in that one instance, I believe that much of the delay and expense associated with the Regulation A offering was rooted in a lack of context-appropriate standards for the SEC Staff's review of these filings.

Average Time for Clearance

I read with interest the statement in the Proposing Release that, from 2002 to 2012, the average time to qualify a Regulation A offering was 301 days or 220 days or 167 days, depending on which disclosure format the issuer selected.[2] The format that takes longest to qualify is "Model A" of SEC Form 1-A, which is the original NASAA-designed Q&A format for its Form U-7, intended to be more issuer- and reader-friendly.[3] The format that receives the "quickest" qualification is Form S-1, the same form used for full-blown registered offerings (minus certain financial statement requirements). The other permitted format is "Model B," which is a simplified version of Form S-1.

One Issuer's Experience

I happen to have had experience with filing a Model A format offering statement in 2010 (my second Regulation A filing in about 30 years of practice). My client was a small, regulated utility with a relatively simple business. It wanted to make a common stock offering to its existing shareholder base, consisting of a few hundred people scattered across the United States. The CEO was intelligent, thoroughly conversant with the business, detail-oriented, and thrifty. After reviewing his options, the CEO opted for the Q&A format document, with the idea that he could assemble it himself and then have

[1] SEC File Number S7-11-13: *Proposed Rule Amendments for Small and Additional Issues Exemptions Under Section 3(b) of the Securities Act*, 79 Fed. Reg. 3926 (Jan. 23, 2014) (the "Proposing Release").

[2] See Note 250 of the Proposing Release.

[3] In 1999, NASAA published what it considered to be an improved Q&A version, but the Staff still refuses to accept that format, for reasons it has never announced.

me review and edit it. That approach was consistent with the NASAA's stated purpose in developing the original Q&A format, which the SEC later adopted as its Model A.

This offering was cleared in 192 days, which to my client and me felt like an inordinately long time (but which the Proposing Release reveals to be quite speedy, in relative terms). There was no State review, because the issuer qualified for a public utilities exemption in every relevant State in which it had shareholders.

Our original filing was made using NASAA's Revised U-7 format. We did so intentionally, with a cover letter that explained why we felt that the revised format should be acceptable for this offering:

> *The issuer has prepared its offering circular in the form of revised Form U-7 (as adopted by NASAA in September 1999), but modified to include the standard legends called for under Model A of Form I-A. The issuer chose to utilize the revised Form U-7, rather than the original Form U-7, for reasons having largely to do with ease of preparation (the initial drafts having been prepared by management, utilizing the revised Issuer's Manual). We have assisted the issuer in the final stages of preparation of the offering circular, and believe that the form utilized here includes in all material respects the information required under Model A, albeit in a somewhat different format and sequence.*

After 27 days we received an initial comment letter back from the Staff reviewer containing a number of comments, including the following:

> *8. We note your statement that you have provided the information required by Offering Circular Model A. Please provide the specific disclosure required by Model A to Form 1-A. Each question and any notes, but not any instructions thereto, shall be restated in their entirety. This would include headings such as "Cover Page" and parenthetical notes (See Questions 9 and 10), etc. We also note that some Items of Model A have not been included at all or have only been answered in part. Please <u>substantially</u> revise the offering circular to address each Question required by Model A. We may have additional comments. [emphasis in original]*

That comment ended our experiment with NASAA's Revised U-7 format.[4]

The accounting Staff raised questions about a long-term debt footnote in the utility's prior year audited financial statements. They later (98 days after the initial filing) insisted that the footnote be rewritten "to enhance an investor's understanding of your business," over the audit firm's objections that the footnote was entirely consistent with both GAAP and reporting standards customary among small public utilities. This one edit necessitated that the audit firm prepare a new, updated opinion to accompany the revised statements.

<u>Impressions Drawn from this Experience</u>

Not surprisingly, the person assigned to review my client's offering was a junior Staff member with Form S-1 review experience and (I assume) little Form 1-A experience. His review was very

[4] Including all the Model A headings in their stated order makes impossible the use of the Revised U-7 format, unless the issuer is prepared to engage in extensive cross-referencing that makes the document less readable and defeats one important purpose of the revised format.

thorough, as would be expected given the Staff's high standards. Most of his textual comments were aimed at eliminating internal inconsistencies and vagueness, and were easily addressed.

What struck me most was an evident lack of institutional sympathy or tolerance for the informal nature of the Model A document, much less for the concept that a competent businessperson should be able to play the major role in assembling the disclosure document. I am not claiming that the initial filing was perfect or should have sailed through without comment, nor do I find any fault with the junior Staff reviewer on the corporate side. Far from it. But I do feel that the process could have been far more streamlined and proportional, given the size and nature of the offering.

The accounting Staff comments were particularly burdensome. Form 1-A does not require audited financial statements unless the issuer already has them for other purposes, and Regulation S-X is expressly made inapplicable except for its auditor independence requirements. The clear implication is that the issuer uses the audited statements *it has on hand* (assuming auditor independence and compliance with GAAP), without further embellishment to meet supplemental SEC standards. In this case, my client's financial statements had been audited by a very competent PCAOB-registered accounting firm, and the role of the accounting Staff, in my opinion, should have been minimal. Instead, the accounting Staff insisted on a fairly arcane change to one footnote in the previously published audited statements, and did so without any attempt to tie their comment to GAAP and without regard to resulting expenses.

I also feel that the outright refusal to deal with the NASAA Revised U-7 format was arbitrary and bureaucratic, and had nothing to do with the quality of disclosures to prospective investors.[5]

Implications and Suggestions

I do not make these observations for the purpose of criticizing the Staff. Rather, my point is that Regulation A has received little attention in terms of process and protocols, and accordingly has been approached in a way that seems institutionally inconsistent with the original objectives of the exemption. Regulation A has multiple flaws, but much of what is wrong with it can be traced to neglect.

I have been impressed by the outpouring of energy and thought that has gone into the Commission's proposed rules for Tier 2 of Regulation A. With all due respect, let me suggest that Tier 1 not be allowed to languish where it is, but that some of that energy and thought be directed at this beleagured forerunner of Regulation A+.

Fixing Tier 1 is not that difficult – certainly nowhere near as difficult as producing a workable Crowdfunding Rule. Here are some suggestions:

1. As an interim step allow the Revised U-7 format as Model A, and then work with NASAA and the private bar to rectify any perceived deficiencies in that form.[6] Form U-7's original objective of simplifying the offering circular for both the preparer and reader is a laudable goal for smaller offerings, and to me seems entirely consistent with the Tier 1 offering size limitations.

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[5] *Cf.* § 404 of Regulation C (issuers not required to slavishly follow the format and headings of applicable registration statement form; all relevant items must be addressed somewhere in the prospectus).

[6] This suggestion is directly contrary to the Commission's proposal to eliminate the Q&A format altogether. The Proposing Release states, "Commission staff who review Regulation A filings indicate that Model A's question-and-answer disclosure format often results in disclosure that lacks uniformity and is hard to follow." My view is that this criticism reflects simple defects in the structure of and instructions for the early Form U-7 and also reflects a predictable bias toward the more familiar Form S-1.

2. Find ways to streamline the Staff review process, for example by (i) publishing FAQs for handling the trickier aspects of the Offering Price Factors, Capitalization, and the MD&A discussions, (ii) providing Staff reviewers with Regulation A-specific training, and with discretion to make judgments about materiality, (iii) setting internal standards for faster turnaround of comments, and (iv) allowing informal exchanges of drafts between reviewer and counsel to work through a comment from the reviewer.

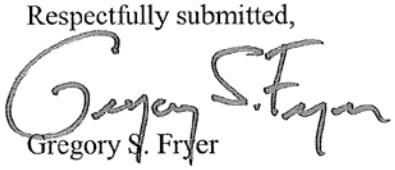
3. As the Commission proposes, publish Tier 1 offering statements and offering circulars on EDGAR. Doing so provides guidance to other preparers and should soon lead to improved quality of many submissions. Better yet, reduce associated expenses and clutter by allowing simplified electronic filing through the same mechanism as is being proposed for Crowdfunding offering materials, but provide public visibility only for the final, cleared version of the Form 1-A and (perhaps) any interim version actually used for pre-clearance solicitations of investors.

4. Apply a heavy presumption that the issuer's audited financial statements (where present) are sufficient *as is*, except in cases where the integrity of those statements is suspect. If the issuer files year-end or interim financial statements that are not audited but that are covered by a PCAOB-registered accounting firm's review report, similarly apply a heavy presumption that those statements are sufficient.

5. Work with NASAA to agree on protocols for appointing one lead reviewer for each Tier 1 offering, perhaps with the inside track going to the securities administrator in the issuer's home state. No offense intended, but it is not obvious to me that deferring to a State reviewer will necessarily result in a lesser document or delayed effectiveness.

Fixing Tier 1 deserves the Staff's and the Commission's immediate attention. Many public policy goals behind the Crowdfunding mandate in the JOBS Act would be advanced in doing so. A faster and less expensive Regulation A would offer private businesses a predictable and workable path toward raising capital through general advertising and general solicitation, while at the same time assuring a *professionally competent outside review* of the disclosure document through which the securities are offered. Once repaired, Tier 1 would allow associated legal and accounting costs to be spread across a potentially larger offering amount than the Crowdfunding Rule permits. That increased offering amount and the absence of restrictions on resales by individuals might also leave more room for the return of registered broker-dealers to this underserved market – a welcome development that would bring potential benefits to small businesses that seek capital and to their shareholders and employees who seek greater liquidity.

Respectfully submitted,



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