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January 17, 2014

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**
File No. S7-11-13

Ladies and Gentleman:

Set forth below are comments that relate to the Commission's Proposed Rule Amendments for Small and Additional Issues Exemptions Under Section 3(b) of the Securities Act (File No. S7-11-13) (the "Section 3(b) Proposal").

Because I expect that I may provide additional input through Committees of the Business Law Section of the American Bar Association concerning details of the Section 3(b) Proposal, this letter is restricted to comments that are particularly relevant to certain types of limited public offerings that would be primarily Pacific Northwest regional in nature. Although these comments have been discussed with other securities attorneys in the Pacific Northwest, they are mine alone and do not reflect any input from other members of the Business Law Section of the American Bar Association or the Securities Laws Committee of the Washington State Bar Association, nor does it constitute the official position of this firm or any of its clients on the subject.

I commend the efforts by the Commission and its Staff in developing the Section 3(b) Proposal, as the Proposal reflects substantial thought and analysis as to Congress' underlying policies in enacting JOBS Act Title IV regarding Small Company Capital Formation and constitutes an impressive balance in furthering both investor protection and small business capital needs.

Preemption of State Regulation

At the outset, the remark in my pre-proposal comment letter dated April 12, 2012 concerning JOBS Act Title IV regarding Small Company Capital Formation that "preemption of registration under state securities laws [is] a practical necessity in these offerings" needs

elaboration. That comment letter, which was cited as strong support for some form of state securities law preemption in footnote 475 of the Section 3(b) Proposal, was submitted twelve days after the JOBS Act was signed into law, and was made in ignorance of the coordinated review program that the North American Securities Administrators Association ("NASAA") was planning for Section 3(b)(2) offerings. I subsequently became aware of NASAA's efforts and am presently serving as Chair of a Regulation A+ Working Group of the Business Law Section of the American Bar Association which has provided feedback to the NASAA Small Business/Limited Offerings Project Group that has developed NASAA's coordinated review program.[1] In that capacity, I have reviewed the details of NASAA's coordinated review program and believe that, if adopted and supported by a significant number of states, it would provide a viable and efficient review protocol for state processing of Section 3(b)(2) offerings.[2] As to any state that might decline to adopt NASAA's coordinated review program, the Commission's defining "qualified purchaser" to mean any investor that might reside in such a state (as suggested in footnote 497 of the Section 3(b) Proposal) would constitute an appropriate complement to that NASAA program. Accordingly, and in light of NASAA's development of its coordinated review program, the remark in my April 12, 2012 comment letter that "preemption of registration under state securities laws [is] a practical necessity in these offerings." constitutes an overstatement. Please consider it so.

Another issue that needs to be addressed is the rather glib manner in which Rule 256 of the Section 3(b) Proposal attempts to effect preemption by defining "qualified purchaser" of a security offered or sold pursuant to Regulation A as "any offeree" of such security and, "in a Tier 2 offering, any purchaser of such security." Although never finalized, defining the term "qualified purchaser" for the purpose of preempting registration under state securities laws has previously been addressed by the Commission in a proposal that predates enactment of the JOBS Act, and the legislative draftspersons for the JOBS Act should be presumed to have had at least some awareness of that effort. On December 19, 2001 by Release No. 33-8041 (File No. S7-23-01) the Commission proposed to define "qualified purchaser," noting that "Congress authorized us to define the term 'qualified purchaser' under the Securities Act to include 'sophisticated investors, capable of protecting themselves in a manner that renders regulation by State authorities unnecessary,' thus preempting securities transactions with these persons from state 'blue sky' law." The Commission in that release went on to propose that the term "qualified purchaser" be defined to mean an accredited investor as defined in Rule 501(a) of Regulation D, saying, "We believe that it is appropriate to equate qualified purchasers with accredited investors because the regulatory and legislative history of both terms are based upon similar notions of the financial sophistication of investors and accredited investor is a long-standing concept familiar to the small business community and other industry participants." The lack of any substantive

[1] Please see "NASAA Coordinated Review of Section 3(b)(2) Offerings" posted on the NASAA website at http://www.nasaa.org/wp-content/uploads/2013/10/Request-for-Public-Comment-Regulation-A+.pdf.

[2] This view is mine personally and is not necessarily shared by other members of the ABA Regulation A+ Working Group.

concept akin to "sophisticated investors, capable of protecting themselves" in the currently proposed definition of "qualified purchaser" under Rule 256 of the Section 3(b) Proposal, which is designed for offerings to unsophisticated retail investors (individuals), is, at least from the perspective of this practitioner, unexpected and questionable. In effect, the use of the definition of "qualified purchaser" merely as a tool for effecting preemption of state regulation without providing any substantive element of investor protection, is jarring in this context and would not appear to be what Congress intended in enacting Section 401(b) of the JOBS Act.[3] The relevance of this aspect of the Section 3(b) Proposal is the possibility that, if adopted, it might not withstand legal challenge, and that possibility might discourage efforts by regional investment bankers from committing the significant resources required to properly service small business public offerings until the Section 3(b) Proposal's ability to withstand a challenge has been definitively decided by the courts – Section 19(a) of the Securities Act of 1933 notwithstanding. Presumably the Commission will consider this issue (including whether the 10% of investor annual income and net worth limitation for Tier II offerings of Rule 251(d)(2)(i)(C) itself constitutes adequate investor protection) and its implications carefully before adopting the final version of the Section 3(b) Proposal.

Canadian Offerings

Rule 251(b)(1) of the Section 3(b) Proposal indicates that an issuer in a Section 3(b)(2) offering may be a Canadian company with its principal place of business in Canada; however, the boxes in Item 5, Jurisdictions in Which Securities are to be Offered, of proposed new Form 1-A that is part of the Section 3(b) Proposal do not include boxes to designate Canadian provinces. This Item of that Form should be expanded by adding boxes so that the offering of securities in Canadian provinces may be designated in the same manner as the offering of securities in US states.

This expansion would also be appropriate for qualifying the securities of non-reporting US companies in cross-border offerings when the securities are to be listed on a Canadian stock exchange. Listing of securities of non-reporting US companies on Canadian exchanges will become more common for small businesses seeking after-market liquidity by exchange listings without having to register under Section 12 of the Securities Exchange Act of 1934 and thereby becoming subject to the the expensive and burdensome ongoing regulatory protocols mandated for public companies by the Sarbanes-Oxley Act of 2002 and the Dodd-Frank Wall Street

[3] Release No. 33-8041 proposed to preempt state registration in the shadow of the existing definition of "qualified purchaser" in Section 2 of the Investment Company Act of 1940, the standards for which are based upon the ownership of assets that are much larger in amount than are the net worth standards for accredited investors under Rule 501(a). State regulators through NASAA objected to the definition of Release No. 33-8041 as not providing sufficient investor protection. See comments of Joseph P. Borg, NASAA President and Director, Alabama Securities Commission on behalf of the North American Securities Administrators Association, Inc., March 4, 2002.

Reform and Consumer Protection Act. Such Canadian exchange listings are apt to become more common for securities that are offered and sold in Section 3(b)(2) offerings, as registration under Section 12 is required for listing on a US national securities exchange.

Under current practice, non-reporting US companies listing securities on a Canadian stock exchange must be as a Foreign Private Issuer under Rule 405 of the Securities Act of 1933 in order for the securities to be traded on the Canadian exchange without being deemed "restricted securities" under US securities law for a year following the offering, and requiring a special "s" designation on the Canadian exchange during that period. Restructuring a US issuer so that it may claim Foreign Private Issuer status typically involves reincorporation offshore, which may subject the issuer and its shareholders to significant and adverse US federal income tax consequences and result in a complicated capital structure (non-voting equity), as well as require that the issuer conduct substantial business activities in the jurisdiction of reincorporation, among other things. Unless the issuer already has significant non-US assets, management and directors, meeting these requirements may simply be too convoluted and involve too much risk to make achieving Foreign Private Issuer status worthwhile. See "Cross-Border Legal and Tax Considerations for US Issuers," which is posted on the Canadian exchange webpage at http://www.tmx.com/en/listings/sector_profiles/usa.html. See also the definition of Foreign Private Issuer under Rule 405.

If a non-reporting US issuer should be able to rely upon Section 3(b)(2) of the Securities Act of 1933 in a Regulation A offering rather than upon Regulation S, there would be no need for that issuer to attempt to achieve Foreign Private Issuer status. It could merely list the securities directly upon a Canadian exchange, and those securities would not constitute restricted securities and could be freely traded immediately. No "s" designation on the Canadian exchange would be required.

Because the accounting requirements of the Canadian regulators and exchanges generally impose International Financial Reporting Standards (IFRS), as set by the International Accounting Standards Board, rather than imposing US GAAP, it would be helpful if the Section 3(b) Proposal would expressly provide that financial statements based upon IFRS rather than GAAP might be used in Canadian cross-border Section 3(b)(2) Offerings by non-reporting US issuers. Part F/S of Form 1-A, and Item 3 of Form 1-SA, of the Section 3(b) Proposal only provide for the financial statements of Canadian issuers to be based upon IFRS.

Also, it would be appropriate for the language of the disqualification provisions of Rule 262((a)(3) to be expanded to include final orders of Canadian provincial regulators. Some Canadian provinces have information concerning criminal convictions posted on a publicly accessible website, so that bad actor "factual inquiry" for purposes of Rule 262(b)(4) and (d) may be expedited. For British Columbia, the address of such a website is https://eservice.ag.gov.bc.ca/cso/esearch/criminal/partySearch.do.

Miscellaneous

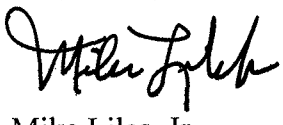
National Securities Exchange Listings. It is possible that a significant number of non-reporting US issuers may seek to list their securities on Canadian exchanges in connection with Section 3(b)(2) offerings in order for them to gain a reasonable measure of liquidity. It would be more simple and straightforward for non-reporting US issuers to obtain needed liquidity for their securities if they could list them directly on national securities exchanges without having to register them under the Securities Exchange Act of 1934, rather than listing them on a Canadian securities exchange. An easy method for accomplishing national securities exchange listing without Exchange Act registration, absent legislation, is not apparent to me. However, the Commission should explore this matter carefully and do so by rule if at all possible as part of the overall implementation of Section 3(b).

Separate Form for Qualifying Employee Benefit Plan Securities. It would be useful if the Commission would adopt a simplified form akin to a Form S-8 for qualifying under Regulation A the securities offered and sold under employee benefit plans of non-reporting issuers making Section 3(b)(2) offerings, so that non-reporting issuers could pursue such plans with an effective degree of liquidity for participants. Form 1-A, which would need to be kept "evergreen" by constant post-qualification amendments, appears to be too awkward to use for this purpose. Having adequate liquidity for the securities of their employee benefit plans is an important issue for most small public companies and needs to be addressed as part of the overall implementation of Section 3(b).

Offering Circular Model A. A question-and-answer format disclosure document on NASAA's Form U-7, upon which Offering Circular Model A is based, has over the years proved convenient for issuers that have raised funds in Rule 504 offerings qualified with state regulators without the use of securities counsel. For this reason, it would seem appropriate to retain Offering Circular Model A for Tier I offerings but to update it to parallel NASAA's most recent version of Form U-7.

Please let me know if you should have any questions or should otherwise require clarification. It is my hope the foregoing will be useful to the Commission and its Staff in developing the final version of the Section 3(b) Proposal.

Very truly yours,



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