March 24, 2014

U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090
Attn: Elizabeth M. Murphy
Secretary

Re: Release No. 33-9497 (the "***Release***")
File No. S7-11-13

Dear Ms. Murphy:

The Investment Program Association ("***IPA***")[1] respectfully submits this letter in response to the request for public comment by the Securities and Exchange Commission ("***SEC***") on the Release (Proposed Amendments to Regulation A emanating from the JOBS Act). We understand that the Release is intended to add a new tier to Regulation A known as Reg A+ to provide an alternative path for issuers to raise capital.

Background

The rule amendments to Regulation A are intended to implement Section 401 of the Jumpstart Our Business Startups Act (the "***JOBS Act***"). Specifically, the JOBS Act added Section 3(b)(2) to the Securities Act. Section 3(b)(2) requires the SEC to adopt rules exempting offerings of up to $50 million of securities annually from the registration requirements of the Securities Act of 1933, as amended (the "***Securities Act***"). The proposed rules include issuer eligibility requirements, content and filing requirements for offering statements as well as ongoing reporting requirements for issuers.

Summary of IPA's Position

The IPA applauds the SEC for seeking comments on proposed rules intended to facilitate and provide an alternative path to capital formation for certain issuers.

[1] Formed in 1985, the IPA provides the direct investment industry with effective national leadership, and today is the leading advocate for the inclusion of direct investments in a diversified investment portfolio. IPA members include direct investment product sponsors, FINRA member broker-dealer firms, and direct investment service providers.

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While we agree with the SEC regarding the philosophy behind the creation of Reg A+, we believe that there are certain elements of the release that require further consideration. These issues include:

- Section 12(g) implications;
- Limited availability based on type or size of issuer;
- Tier 2 Reporting Obligations and Costs;
- 10% net worth or net income investment limitation; and,
- Qualified Purchaser definition.

I. Section 12(g) Implications.

Issue

Section 12(g) of the Securities Exchange Act of 1934, as amended (the "***Exchange Act***"), provides that any company with more than \$10 million in assets and a class of equity securities held of record by either (i) 2,000 persons or (ii) *500 persons who are not accredited investors*, (emphasis added) must register and report under the Exchange Act.

Although the SEC expressly contemplated adjusting the 500 non-accredited investor[2] threshold for issuers of offerings conducted under the new tier proposed in Reg A+ ("***Tier 2 Offerings***"), it opted not to include such adjustment in the revised Regulation A rules as proposed.

Practically speaking, the 499 non-accredited investor cap means that nearly every issuer of Tier 2 Offerings will, if seeking to raise the full \$50 million permitted, become a full reporting company under Section 13 of the Exchange Act as a result of Section 12(g). For the reasons noted below, this will likely prevent many issuers from viewing a Tier 2 Offering as a viable alternative to Regulation D, Rule 506 ("Rule 506") offerings.

Analysis

Given the fact that an issuer willing to make an offering to only accredited investors could do so under Rule 506 with limited up-front costs and no ongoing reporting obligations, the primary benefit of a Tier 2 Offering is the ability to sell to non-accredited

[2] Understanding that the limit is on "holders of record" and not investors, at the outset an issuer will have no way of knowing whether any investors will hold directly or through a broker dealer holding in "street name," so a conservative issuer must assume all investors will come in directly.

investors without the need to register the offering with, or clear it through, the states (by virtue of the fact that securities offered in Tier 2 Offerings would be "covered securities" under the proposed rules)[3]. In order to take advantage of the ability to sell to non-accredited investors, an issuer of a Tier 2 Offering has a few options, each of which raises issues:

- Sell only to non-accredited investors with a reduced maximum offering. In order to raise $50 million, the issuer must set minimum investments at $100,000 ($50 million/499 investors = approximately $100,000 per investment)[4]. However, given that the proposed rules establish an investment cap of 10% of the greater of net worth or net income for Tier 2 Offerings, this minimum investment size would require the investors to have either a $1 million net income (in which case the investor would actually be accredited as that far exceeds the net income requirement under the current definition of "accredited investor") or $1 million in net worth (in which case the investor would actually be accredited as this is the current net worth standard under the definition of "accredited investor"). Given the combination of the 499 investor cap and the 10% investment limit, an issuer desiring to fully utilize the Tier 2 Offering exemption to raise $50 million and take advantage of the ability to sell to non-accredited investors must also sell to accredited investors.

  In order to sell to only non-accredited investors, the issuer must reduce the offering amount to allow for smaller investments (i.e., raise only $25 million and allow those with only $500,000 in net worth to buy in). However, smaller offerings mean that up-front registration costs and ongoing reporting costs, which, as noted below, are significant even under the reduced reporting requirements of new Regulation A, will have a greater impact on the offering and be a greater drag on returns. Furthermore, reducing the minimum investment size to a point where the issuer significantly opens up the pool of potential investors likely means a significantly lower maximum capital raise (i.e., minimum investment of $25,000 – allowing for investors with a net worth of $250,000 –allows for a raise of only about $12.5 million), with no corresponding reduction in registration or ongoing reporting expenses.

- Sell to a combination of accredited and non-accredited investors. This approach allows for lower minimum investments but again limits the amount of capital the issuer can raise from non-accredited investors. Assuming a full 1,499 accredited investors and 499 non-accredited investors participate, the minimum investment could be reduced to approximately $25,000 ($50 million/1998 investors = approximately $25,000 per investment). However, in this scenario only about $12.5

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[3] An additional benefit is the ability to generally solicit the offering even if sold only to accredited investors, but an issuer could conduct a generally solicited offering under Rule 506(c) without any up-front registration and without ongoing reporting obligations.

[4] Technically, in order to raise $50 million the *average* investment must remain at or above $100,000, so the minimum could be reduced if investments greater than $100,000 were expected. However, prior to the offering an issuer has no way to know whether any investors will invest more than the minimum.

million of the total raise will come from the non-accredited investors. Given that the issuer could have raised all of the other capital from accredited investors through a Rule 506 offering, this $12.5 million from non-accredited investors is the only benefit to conducting the offering through Regulation A. This means the issuer is taking on the additional registration and ongoing reporting costs attributable to Regulation A+ Tier 2 reporting obligations for only an additional $12.5 million in capital raised. Additionally, that $12.5 million must still come from investors with a significant amount of assets ($250,000 in net assets given the 10% cap), so the potential investor pool is not as broad as it might otherwise be. The $12.5 million in additional capital is likely not enough to make the registration and reporting costs, conservatively estimated at about $400,000 in the first year and $200,000 annually thereafter[5], worthwhile for most issuers.

- <u>Sell to any number of non-accredited investors and become a public reporting company under 12(g)</u>: Given the above, it is likely that an issuer would conduct a Tier 2 Offering rather than Rule 506 only if the issuer were willing to sell to more than 499 non-accredited investors and become subject to the full reporting requirements under Section 13 of the Exchange Act. While this approach still has significant benefits (i.e., no need to clear through the states, the issuer can generally solicit the offering and can sell to unlimited non-accredited investors), it is not without cost and risk.
  - *Cost and Effort*: The issuer will be subject to full reporting obligations under the Exchange Act. While this might be worthwhile for a much larger offering, at a cap of $50 million many issuers would not consider the up-front benefits worth the ongoing cost and effort of reporting, which can be conservatively estimated at approximately $650,000 per year.[6]
  - *Risk of Losing Exemption Mid-Offering*: The new Regulation A Tier 2 Offering exemption is not available to issuers subject to the reporting requirements of Section 13 of the Exchange Act. Section 12(g) triggers Section 13 reporting

[5] Although the reporting obligations proposed for Tier 2 Offering issuers under new Regulation A are reduced as compared to the full Section 13 reporting obligations, they still result in significant annual expense. Pursuant to SEC estimates in the Release and assuming a $400 per hour rate for external professionals (as assumed in the Release) and (conservatively) a cost of $200 per hour for internal time spent by the issuer's employees, the regulatory registration and reporting costs of a Tier 2 Offering would be approximately $400,000 in the first year and $200,000 annually thereafter. This is a significant amount of up-front and ongoing expenses to incur when weighed against the relatively minor benefit of raising an additional $12.5 million from non-accredited investors. In addition, for issuers not accustomed to any registration or ongoing reporting obligations the internal time and expense for the first few years could be significantly higher.

[6] This is the estimate of ongoing annual costs only, and does not include any cost of the initial registration triggered by Section 12(g). This estimate is based upon the SEC estimates outlined in the Release. In most instances, the SEC compared the burden of the reduced reporting obligation with the full reporting obligation under Section 13. Where that was not the case, the estimate is based upon the estimated burden hours noted on the applicable SEC form. This estimate uses the SEC estimated $400 per hour for external professionals and an estimated $200 per hour for internal time. Although this method yields the estimate of $650,000 per year, the costs could be much higher, especially for issuers new to public reporting requirements. In fact, the Release, citing an IPO Task Force report, stated that two recent surveys concluded that regulatory compliance costs following an IPO average $1.5 million per year.

requirements starting 120 days after the first fiscal year end where the issuer exceeds the applicable number of beneficial holders. Depending upon the timing of the offering, an issuer could trigger the Section 12(g) reporting requirement mid-offering and be forced to stop the offering (or register or find another exemption).

For example, assume an issuer with a 12/31 fiscal year end commenced a Tier 2 Offering in October and set a minimum investment of $10,000. If that issuer raised $4 million each month from October through December, at December 31 (the end of its fiscal year) the issuer would likely have more than 499 non-accredited investors (1,200 if all investments were for the minimum) and would have $12 million in assets (exceeding the $10 million threshold of 12(g)). On these facts, the issuer would become subject to the Section 13 reporting requirements as a result of the application of Section 12(g) at the end of April in the year following the commencement of the Tier 2 Offering. Assuming the capital raising pace of $4 million per month continued, the issuer would have raised only $28 million at the time it is required to register and begin reporting under Section 13 (with all of the costs associated therewith), at which point it would also have to stop the Tier 2 Offering as the exemption would no longer be available.

Conclusion

Given the costs of reporting under either the reduced requirements for Tier 2 Offering issuers or under Section 13 as a result of the application of Section 12(g), especially when considered together with the $50 million cap on Tier 2 Offerings, the 10% investment cap and the other potential drawbacks and risks discussed above, it is unlikely that many issuers will elect to utilize new Regulation A or the Tier 2 Offering exemption and will instead continue to rely upon Rule 506 (for smaller offerings) or state-registered public non-traded structures (for larger continuous offerings).

II. Limiting availability based on type or size of Issuer.

The SEC seeks comment on whether the Reg. A exemption should be limited to "operating companies" or drafted to exclude certain other types of issuers (i.e., shell companies and blank check companies). The SEC also seeks comment on whether to limit the exemption availability to issuers of a smaller size (i.e., less than $75 million in public float).

The IPA is of the view that the SEC should not limit the availability of this exemption based on type of issuer. Excluding the types of issuers contemplated by the SEC would have a significant impact on "start up" companies or new issuers with no prior operations. Those are the companies that have the greatest need for new capital raising options. While limiting the availability based on the size of the issuer likely doesn't have the same chilling effect, it is probably unnecessary because the exemption is unavailable to issuers subject to Section 13 reporting requirements. Most issuers with a large public float will likely be subject to those reporting requirements.

III. Tier 2 Reporting Obligations and Costs.

The SEC seeks comment upon whether the disclosure and reporting requirements should be simplified or modified.

The IPA is of the view that the disclosure and reporting requirements should be simplified to reduce costs associated with complying therewith. Based on the SEC's estimates of time to complete the various reporting and registration documents, Tier 2 issuers will face, conservatively, costs of about $400,000 in the first year and $200,000 in each year thereafter to comply with the proposed "reduced" Tier 2 reporting requirements. Given the fact that the maximum raise under this exemption is $50 million, these costs are not insignificant, especially for any issuers that invest proceeds in investments that do not produce cash flow. Accordingly, Issuers may not be willing to commit to develop the infrastructure and expertise necessary to comply with these requirements and commit to the costs of ongoing reporting for the benefit of raising $50 million.

IV. 10% of net worth or net income investment limitation.

The SEC seeks comment on whether the 10% of the greater of net worth or net income is an appropriate investment limitation. The SEC also proposes that verification of this limitation could be performed using a "check the box" questionnaire. Setting aside the issues this causes in connection with the application of Section 12(g) described above, the IPA views the 10% limit as reasonable and consistent with current caps on public non-traded offerings registered with the states. Accordingly, in the IPA's view the SEC should not raise this cap beyond the proposed 10%. However, the final rule should make it clear that this cap applies on an investment-by-investment basis and is not an aggregate cap on investments in Tier 2 Offerings. Finally, the IPA supports the verification standards proposed by the SEC in the Release.

V. Qualified Purchasers definition.

The SEC proposes to define "Qualified Purchaser" as any offeree and any purchaser in a Tier 2 offering. The IPA supports this definition and views making Tier 2 securities "covered securities" as consistent with the goal of expanding capital raising options for issuers. It should be noted, however, that this definition does not apply to resales, which will be important to any issuer looking to the possibility of a secondary market for its investors. Lastly, so long as the issuer is compliant with the Tier 2 reporting obligations of Regulation A+, resales of the securities of a Tier 2 issuer should similarly be "covered securities".

In conclusion, the IPA appreciates the opportunity to comment upon the proposing release, and we thank the SEC staff for its hard work and dedication in fulfilling its mandate under the JOBS Act. As always, the IPA stands ready to discuss any of the above at any time in order to work with the SEC towards creating an environment that encourages capital formation and job growth.

Respectfully submitted,

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