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

File Reference No. S7-11-13, *Proposed Rule Amendments for Small and Additional Issues Exemptions Under Section 3(b) of the Securities Act*

Dear Ms. Murphy:

Deloitte & Touche LLP appreciates the opportunity to comment on SEC File Reference No. S7-11-13, *Proposed Rule Amendments for Small and Additional Issues Exemptions Under Section 3(b) of the Securities Act* (the "proposed rule").

Below we provide detailed observations related to the proposed rule's audit requirements and financial information that an issuer of securities under Regulation A ("issuer")[1] would be required to provide. Our observations primarily address the following topics:

- *Audit and independence standards* — We believe that issuers of Tier 2 offerings should be permitted to file financial statements audited in accordance with AICPA standards and that auditors of financial statements in Tier 1 and Tier 2 offerings should be allowed to meet the AICPA's independence standards.
- *Transition provisions under U.S. GAAP* — We encourage the Commission to explicitly state whether financial statements of issuers may include accounting policy alternatives for private companies. We also encourage the Commission to consider whether exceptions similar to those provided for emerging growth companies (EGCs) (e.g., deferred effective dates of new accounting standards) should be permitted for private companies.

Audit and Independence Standards

The proposed rule would require Tier 1 issuers to provide financial statements in their offering circulars but would require Tier 1 issuers to include audited financial statements (i.e., include the auditor's report on such financial statements) only if they were already audited for other purposes, in which case the audits could be performed in accordance with either AICPA or PCAOB standards. For Tier 2 offerings, the proposed rule would require issuers to provide audited financial statements, with the audits performed in accordance with PCAOB standards (i.e., it would not permit Tier 2 issuers to file financial statements that were audited in accordance with the AICPA's standards). In addition, auditors of Tier 1 and Tier 2 issuers would be required to comply with the SEC's independence standards, although the auditors would not be required to be registered with the PCAOB.

[1] In this letter, we also use the term "issuer" to describe a company that would offer securities under the proposed amendments to Regulation A, rather than an issuer under the Sarbanes-Oxley Act of 2002.

Potential Expectation Gap Under Proposed Rule's Audit Requirements

Most commonly, PCAOB audits are performed for issuers defined under the Securities Exchange Act of 1934 and therefore by audit firms that are required to be registered with the PCAOB. Such PCAOB-registered audit firms are subject to PCAOB inspections for compliance with PCAOB standards — both at the audit level and at the firm level (e.g., with respect to monitoring controls). We believe that investors typically (1) expect auditors that perform PCAOB audits to be inspected and (2) understand that the PCAOB has enforcement power over PCAOB-registered firms. However, because an auditor performing a PCAOB audit for a Regulation A offering is not required to be registered, the auditor may not be subject to PCAOB inspection and enforcement. Even if the audit firm is registered, the PCAOB's inspections would not extend to audits of financial statements in Regulation A offerings since such audits are of nonissuers (i.e., the entities are not issuers as defined in the Sarbanes-Oxley Act of 2002) and, consequently, are not within the PCAOB's purview. Further, while auditors of nonissuers are subject to peer review under AICPA requirements, compliance with PCAOB standards would not be within the scope of a peer review.

For investors, the proposed rule's PCAOB audit requirement could create expectation gaps similar to the expectation gap that existed for investors under the former broker-dealer regulatory regime (which required an SEC rule[2] in 2013 "to facilitate the ability of the PCAOB to implement the explicit oversight authority over broker-dealer audits"). Such expectation gaps would center on whether the auditor of financial statements that are included in Tier 2 offerings and that refer to PCAOB standards is subject to a PCAOB inspection and, if so, the scope of such an inspection. Therefore, we recommend that like Tier 1 issuers, Tier 2 issuers be permitted to file financial statements that have been audited in accordance with AICPA standards.

Independence Considerations in Tier 1 and Tier 2 Offerings

The proposed rule's requirement for auditors to comply with SEC independence rules for audits of financial statements in Regulation A offerings would limit the number of accountants that can audit the financial statements of Tier 1 and Tier 2 issuers. All auditors are required to follow and ensure compliance with AICPA independence standards. However, accounting firms that are not registered with the PCAOB may not have the necessary controls and processes in place to comply with and monitor certain aspects of SEC independence rules (e.g., affiliate relationships among audit clients and any of their investors). Therefore, the proposed requirement could increase complexity and costs for issuers by requiring them to obtain reaudits of previously audited financial statements that were prepared for another purpose but performed by auditors that were not in compliance with the SEC's independence rules at the time the audit was performed.

We believe that both investors and issuers would benefit by leveraging audited financial statements that are already available. For example, as proposed, an issuer of a Tier 1 offering that obtained an audit of its financial statements for another purpose would be required to include such audited financial statements, but only if the auditor complied with the SEC's independence rules with respect to such audit. Otherwise, the issuer would need to file either (1) unaudited financial statements or (2) financial statements without

[2] SEC Final Rule Release No. 34-70073, *Broker-Dealer Reports*, includes amendments that require "broker-dealer audits [to] be conducted in accordance with standards of the Public Company Accounting Oversight Board ('PCAOB') in light of explicit oversight authority provided to the PCAOB by the Dodd-Frank Wall Street Reform and Consumer Protection Act ('Dodd-Frank Act') to oversee these audits."

an auditor's report that would appear unaudited to an investor. We believe that the SEC should consider whether, for Tier 1 offerings, the final rule would better serve investors by permitting issuers to include existing audited financial statements that meet the AICPA's independence standards rather than including financial statements without the auditor's report because the auditor did not meet the requirements of the SEC's independence rules.

Allowing auditor compliance with AICPA independence standards for audited financial statements included in Tier 1 and Tier 2 offerings could be a more flexible approach that would not only reduce compliance costs but also retain recognition of an accepted and recognized independence framework (i.e., the AICPA's *Code of Professional Conduct*, including its ethics and independence rules).

Transition Provisions Under U.S. GAAP

The proposed rule seeks to modernize Regulation A offerings by requiring a domestic issuer to submit on EDGAR for SEC staff review, an offering circular with financial statements that are prepared in accordance with U.S. GAAP (and audited for Tier 2 offerings). While entities that do not qualify as public business entities (PBEs) are now eligible under U.S. GAAP to apply private-company accounting policy alternatives, we believe that companies offering securities under Regulation A will not be able to apply these alternatives to the financial statements they include in their offering circulars and thus would need to revise their financial statements before making a Regulation A offering. We therefore encourage the Commission to explicitly state whether financial statements of issuers may include accounting policy alternatives for private companies.

Private-company accounting policy alternatives under U.S. GAAP seek to reduce the complexity and compliance costs associated with certain accounting and reporting requirements related to nonpublic entities.[3] The definition of a PBE will be the basis for determining whether, how, and when accounting and disclosure provisions in new FASB Accounting Standards Updates (ASUs) apply to "nonpublic" and "public" entities (e.g., provisions related to transition and effective dates). We believe that nonpublic entities will implement private-company accounting policy alternatives and apply other private-company alternative provisions — such as deferred transition provisions — in new ASUs. In addition, we believe that domestic companies that implement such alternatives or relief may consider using Regulation A to offer their securities.

ASU 2013-12[4] defines "public business entity" and is applicable to subsequently issued ASUs that use the term.[5] Under ASU 2013-12, an entity is a PBE if it is required to file or furnish financial statements with the SEC (or otherwise files or furnishes them, including on a voluntary basis). In addition, an entity would be a PBE if it is required to "file or furnish financial statements with a foreign or domestic regulatory agency in preparation for the sale of or for purposes of issuing securities that are not subject to

[3] Recent examples of private-company alternatives include FASB Accounting Standards Update No. 2014-02, *Accounting for Goodwill* — a consensus of the Private Company Council and FASB Accounting Standards Update No. 2014-03, *Accounting for Certain Receive-Variable, Pay-Fixed Interest Rate Swaps — Simplified Hedge Accounting Approach* — a consensus of the Private Company Council.

[4] FASB Accounting Standards Update No. 2013-12, *Definition of a Public Business Entity — An Addition to the Master Glossary*.

[5] ASU 2013-12 does not affect how a public entity is defined in preexisting provisions of the *FASB Accounting Standards Codification* (the "Codification"). Before the ASU was issued, one universal definition of a public entity did not exist and the term was variously defined in individual Codification topics, notable examples of which include segment reporting, pension disclosures, and earnings per share.

contractual restrictions on transfer."[6] Therefore, we believe that domestic issuers under Regulation A would qualify as PBEs and consequently would be ineligible to file financial statements that include private-company accounting policy alternatives under U.S. GAAP.

The FASB has not provided specific guidance on how nonpublic entities would transition to U.S. GAAP for PBEs ("public-company U.S. GAAP"). In the absence of such transition guidance, entities that become PBEs after using private-company alternatives may need to apply PBE accounting and reporting requirements retrospectively to all periods presented. Therefore, to the extent that a domestic company has previously incorporated private-company accounting policy alternatives in its financial statements, it would need to revise those financial statements to apply public-company U.S. GAAP before the issuer could include them in a Regulation A offering circular. Moreover, if the financial statements reflecting private-company alternatives were audited, a reaudit would be required of either (1) the adjustments needed to reverse private-company alternatives or (2) the revised financial statements as a whole — depending on the nature and extent of the adjustments and other facts and circumstances.

We also encourage the Commission to consider whether certain exceptions similar to those provided for EGCs should be permitted for Regulation A issuers. EGCs may defer implementing new or revised accounting standards on the basis of private-company transition provisions for up to five years after their IPO (assuming that they retain their EGC status), whereas issuers in Regulation A offerings would not receive the same relief. This inconsistency is notable considering that (1) EGCs file nonexempt, registered offerings and may offer securities significantly in excess of the proposed $50 million maximum threshold under Regulation A and (2) Regulation A is an exempt offering. We believe that Regulation A issuers that qualify as EGCs should be afforded the same flexibility.

In addition, under the proposed rule, a U.S. domestic company offering securities under Regulation A would also be required to submit the financial statements of any significant[7] acquired business. Significant acquired businesses will qualify as PBEs under ASU 2013-12 because their financial statements are filed with the SEC.[8] As a result, in a manner consistent with our previous comments about domestic companies that offer securities under Regulation A, financial statements of significant acquired businesses would also need to be revised and, potentially, reaudited.

Other Issues

Complexity, Consistency, and Clarity

Because we believe that unnecessary complexity increases costs to issuers and investors, we encourage the Commission to consider enhancing the clarity and consistency of the financial reporting disclosure requirements in the proposed rule. For example, we believe that terms and definitions in certain form instructions and Form 1-A references, such as those that request financial reporting measures or amounts that are derived from financial statements (e.g., "total revenues" and "investment income"), should be consistent with those used in U.S. GAAP and Regulation S-X.

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[6] For additional information, see ASU 2013-12, paragraph 2.

[7] Determined in accordance with SEC Regulation S-X, Rule 8-04, *Financial Statements of Businesses Acquired or to Be Acquired*.

[8] See ASU 2013-12, paragraph 2(a). However, paragraph 2 further clarifies that an "entity may meet the definition of a public business entity solely because its financial statements [are] included in another entity's [SEC filing]," in which case it "is only a public business entity for purposes of financial statements that are filed or furnished with the SEC."

In addition, it is unclear why issuers are required to disclose in Form 1-A the name of the auditor and fees paid in connection with the offering (especially since the requirement appears to apply regardless of whether audited financial statements are provided). We note that there is no similar requirement for a registered offering, whether by a smaller reporting company or otherwise.

Foreign Private Issuers

The proposing release seeks comment about whether foreign private issuers (FPIs) should be permitted to use Regulation A. If FPIs are permitted to offer securities under Regulation A, we believe that the final rule should allow FPIs to file financial statements that are prepared in accordance with (1) U.S. GAAP, (2) IFRSs as issued by the IASB, or (3) Item 18 of Form 20-F — in other words, the financial statement requirements applicable to such companies should be consistent with current FPI filing requirements.

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We appreciate your consideration of these matters and would welcome an opportunity to discuss them with you further. If you have any questions about our responses, please do not hesitate to contact William Platt at (203) 761-3755.

Very truly yours,

/s/ Deloitte & Touche LLP