CLEARY GOTTLIEB STEEN & HAMILTON LLP

ONE LIBERTY PLAZA
NEW YORK, NY 10006-1470
(212) 225-2000
FACSIMILE (212) 225-3999
WWW.CLEARYGOTTLIEB.COM

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February 27, 2015

BY ELECTRONIC MAIL

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

Re: File No. S7-12-14

Dear Ms. Murphy:

We are submitting this letter in response to the request of the Securities and Exchange Commission (the "Commission") for comments regarding the Commission's proposal (the "Proposal")[1] to amend registration requirements under the Securities Exchange Act of 1934, as amended (the "Exchange Act") to implement Titles V and VI of the JOBS Act. We appreciate the opportunity to comment on the matters discussed in the Proposal.

Title V of the JOBS Act amended Section 12(g)(1)(A) of the Exchange Act to require U.S. companies other than banks and bank holding companies to register a class of equity securities with the Commission if, at the end of any fiscal year, they have more than $10 million in assets and the class of equity securities is held by 2,000 or more holders of record or by 500 or more holders of record who are not accredited investors ("AIs"). This statutory change was immediately effective upon passage of the JOBS Act. The Proposal proposes to amend certain Exchange Act rules to make them consistent with the statutory change.

[1] Commission Release No. 33-9693 (Dec. 18, 2014).

After the JOBS Act was enacted, the Commission in 2012 solicited pre-rulemaking public comment on the rules the Act required the Commission to amend or adopt. With respect to Title V, several commenters highlighted the compliance concerns associated with verifying how many shareholders are AIs on an annual basis.[2] The definition of AI for the purposes of complying with Section 12(g)(1)(A) of the Exchange Act is that in Rule 501 of Regulation D under the Securities Act of 1933, as amended (the "Securities Act"), which includes any person who comes within, or who the issuer "reasonably believes" comes within, any of eight enumerated categories. Commenters on Title V of the JOBS Act urged the Commission, in conjunction with its required rulemaking, to consider adopting one or more safe harbors for companies to establish a "reasonable belief" regarding the AI status of their shareholders in order to comply with Section 12(g)(1)(A) of the Exchange Act.[3]

While the Commission did not adopt any such safe harbors in the Proposal, we appreciate that it did ask commenters to address whether safe harbors or other guidance for complying with Section 12(g)(1)(A) of the Exchange Act are necessary or advisable.[4] Our comments on the Proposal are limited to recommending that the Commission consider adopting the six non-exclusive safe harbors we set forth and discuss below.

The first two safe harbors we propose permit reliance on determinations of AI status made in prior offerings.

1. If a company issued equity securities during the three months prior to its fiscal year-end and concluded that all or some of the investors in those offerings were AIs, it should be able to rely on that conclusion, without more, to comply with Section 12(g)(1)(A) of the Exchange Act with respect to those investors at its fiscal year-end.

2. If a company issued equity securities more than three months but less than twelve months prior to its fiscal year-end and concluded that all or some of the investors in those offerings were AIs, it should be able to rely on confirmation (in the form of self-certification) from investors that they remain AIs to comply with Section 12(g)(1)(A) of the Exchange Act with respect to those investors at its fiscal year-end.

The remaining safe harbors we propose are those adopted by the Commission for confirmation of AI status in offerings made pursuant Rule 506(c) of Regulation D under the Securities Act.

3. Use of Internal Revenue Service records to verify investor income for the two most recent years.

4. Review of documentation of investor assets and liabilities that is dated within the prior three months, with written confirmation from the investor.

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[2] See letters from the American Bar Association Business Law Section (June 26, 2012), the New York City Bar Committee on Securities Regulation (June 6, 2012) and Foley and Lardner LLP (May 24, 2012).

[3] Id.

[4] Proposal, at 22-23.

5. Written confirmation from a third party, such as a registered broker-dealer, an SEC-registered investment adviser, a licensed attorney or a certified public accountant, of their verification of accredited investor status within the past three months.

6. Certification from an investor who qualified as an accredited investor prior to Rule 506(c)'s adoption, certifying that such person remains an accredited investor.

Private companies will need to determine how they will ensure compliance with Section 12(g) of the Exchange Act on an annual basis. As noted by the New York City Bar in its original comment letter on JOBS Act rulemaking, a company has no legal basis pursuant to which to compel shareholders to disclose or confirm their status outside the offering context.[5] The logistical and monetary burdens associated with determining the AI status of a company's shareholder base annually will be different for different companies based on their total number of shareholders, the composition of their shareholders (*e.g.*, institutions versus natural persons), the level of trading in their equity securities and the nature of the offerings in which the shares were originally issued (*e.g.*, whether non-AIs were included in one or more offerings), among other factors. We agree that companies should be able to rely on facts and circumstances to establish reasonable belief regarding their shareholders' AI status and, for some companies, the analysis may not be difficult. For others, however, the safe harbors set forth above would be helpful in reducing the relatively high logistical and cost burdens associated with determining AI status by providing several options to establish certainty with respect to compliance.

We acknowledge that the Commission in the Proposal rejected the idea that companies should be able to rely indefinitely on AI status determinations made in connection with prior offerings of securities because the information initially used to determine AI status could become outdated.[6] Accordingly, the first two safe harbors we recommend – each permitting reliance on information gained in earlier offerings – mitigate the risk of relying on outdated information. The first safe harbor we recommend is limited to allowing issuers to rely on AI status determinations made within three months of the Exchange Act Section 12(g)(1)(A) AI determination. The second safe harbor we recommend allows reliance on AI status determinations made in connection with offerings during the prior year, but requires recertification by investors, in effect to ensure the information remains current.

Companies issuing securities in reliance on Rule 506(c) of Regulation D under the Securities Act must meet a higher standard than "reasonable belief" to determine whether their investors are AIs – they must take "reasonable steps to verify" that investors are AIs. A company should be able to rely on the safe harbors established by the Commission to meet the more burdensome test in Rule 506(c) under the Securities Act to also establish compliance with Section 12(g)(1)(A) of the Exchange Act at fiscal year-end. The principles behind these safe harbors, as articulated by the Commission in its Rule 506(c) adopting release – namely, maintaining the flexibility of the verification standard while providing additional clarity and certainty that this requirement has been satisfied if one of the specified methods is used[7] – are equally applicable in the Exchange Act Rule 12(g)(A)(1) context.

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[5] Letter from the New York City Bar Committee on Securities Regulation (June 6, 2012), at 2.

[6] Proposal, at 19-20.

[7] Commission Release No. 33-9415 (July 10, 2013).

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We very much appreciate this opportunity to provide you with our thoughts on the Proposing Release. Please do not hesitate to contact Leslie N. Silverman or Andrea M. Basham (212-225-2000) if you would like to discuss these matters further.

Very truly yours,

CLEARY GOTTLIEB STEEN & HAMILTON LLP

cc: The Honorable Mary Jo White, Chairman, Securities and Exchange Commission
The Honorable Luis A. Aguilar, Commissioner, Securities and Exchange Commission
The Honorable Daniel M. Gallagher, Commissioner, Securities and Exchange Commission
The Honorable Kara M. Stein, Commissioner, Securities and Exchange Commission
The Honorable Michael S. Piwowar, Commissioner, Securities and Exchange Commission