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December 6, 2011

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

Re: Retrospective Review of Existing Regulations
Rel. Nos. 33-9257; 34-65262; IA-3271; IC-29781
File No. S7-36-11

Ladies and Gentlemen:

This letter is submitted on behalf of the Federal Regulation of Securities Committee (the "Committee") of the Business Law Section (the "Section") of the American Bar Association (the "ABA") in response to the request of the Securities and Exchange Commission (the "Commission") for public comments to assist the Commission in developing a plan for the retrospective review of its regulations.

The Committee appreciates that the Commission and its staff understand the importance of well-crafted rules and regulations designed to be sufficiently flexible to achieve their desired purposes against the backdrop of the dynamic nature of our markets, the evolution of the global regulatory landscape and developments in technology. Many of the comment letters the Committee has submitted to the Commission over the years have focused specifically on the importance of maintaining the effectiveness of the Commission's rules while minimizing unanticipated consequences and avoiding the imposition of unnecessary burdens on companies and other market participants. We also appreciate that the Commission has regularly reviewed its rules and regulations and, where appropriate, has proposed amendments to reflect current circumstances. These have included both minor modifications and interpretations to improve the clarity of specific Commission rules and to refine their focus, and major changes, such as the securities offering reforms adopted by the Commission a few years ago.

We support the President's call in his Executive Order for agencies to adopt more formalized plans to review existing regulations, and believe that the implementation of such a plan by the Commission will improve the Commission's ability to achieve the regulatory efficiency our capital markets require while at the same time effectively administering the securities laws.

I See Executive Order No. 13579 http://www.reginfo.gov/public.jsp/Utilities/EO_13579.pdf (the "Executive Order").

Although the Commission makes clear in its release that the Executive Order provided the impetus for its retrospective review of regulations, we believe it would be important for the Commission also to acknowledge its statutory responsibilities in connection with its rules and regulations. For example, Section 3(f) of the Securities Exchange Act of 1934 provides that “Whenever pursuant to this title the Commission is engaged in rulemaking, or in the review of a rule of a self-regulatory organization, and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.” Because considerations of efficiency, competition and capital formation evolve over time, a retrospective analysis of the Commission’s rules and regulations is fully within the Commission’s statutory mandate.

We therefore propose that the Commission consider the adoption of a formalized plan for the periodic review of its existing rules and regulations (the “Plan”). We emphasize that the Plan should supplement, and not supplant, the Commission’s ongoing rulemaking processes. Rulemaking pursuant to legislative mandates and the Commission’s own initiatives relating to investor protection, capital formation and market regulation should continue as they have in the past. The Plan would provide an additional element to the rulemaking process to assure that no rule or regulation remains unreviewed or unimproved over a substantial period of time.

There are a number of considerations we believe relevant to the formulation and operation of the Plan:

- i. All Commission rules and regulations are not alike in terms of their substantive application or implementation. For example, Exchange Act Rule 14a-8 mandates the use of the no-action process if a company seeks to exclude a shareholder proposal from its proxy statement in connection with a meeting of shareholders. It is also seasonal in nature, and the staff makes no-action determinations which may vary in relation to matters of concern to shareholders, the public interest and circumstances in the marketplace. Thus the Rule is interpreted in a unique manner.
- ii. Some rules contain exemptions and safe harbors, which themselves may require specific ongoing interpretation.
- iii. Judicial construction of the Commission’s rules and regulations has had, and is likely to have in the future, a significant impact on their meaning and implementation. Existing rules should be analyzed against the backdrop of the interpretation of such rules by the courts, and future rules should be drafted in order to maximize the likelihood that the Commission’s intent will be understood by courts and given effect. In some cases, this may require matters that have been the subject of staff interpretations which may preferably be included within the scope of the rules themselves.
- iv. Inasmuch as proposed changes to the Commission’s rules and regulations are required to be adopted pursuant to a legally mandated rulemaking process which provides an opportunity for public comment, the Commission’s Plan should take that process into account. The Commission’s rulemaking releases relating to proposals resulting from the implementation of the Plan should explain clearly the basis for the Commission’s proposals, the alternatives to the proposed rules considered by the Commission, and a conscientious cost-benefit review. As with many of its proposals, the Commission should pose a broad range of questions in order to elicit extensive and informed public comments.

- v. The rulemaking process involves a significant amount of time and attention from the members of the Commission and its staff. To the extent possible, the Plan should be crafted in a manner so as not to unduly burden the Commission and its staff while still achieving the purpose of the retrospective review.

We suggest that the Plan include the following procedures:

1. Each Division of the Commission that is principally responsible for the administration of rules and regulations adopted by the Commission should designate a Regulation Review Officer to oversee a periodic review of the rules and regulations principally administered by such Division. If more than one Division administers specified rules and regulations, we suggest that the Chairman of the Commission designate the Division responsible for the retrospective review.
 - a. The Regulation Review Officer would be responsible (in conjunction with other Division personnel) for reviewing each of the Division's rules and regulations on a periodic basis, and advising the Division Director as to whether or not any changes are appropriate. In this context, a review of rules and regulations would also include a review of the Commission's forms.
 - b. If the Regulation Review Officer determines that any changes to a rule or regulation are appropriate, the Regulation Review Officer should set forth in a report to the Division Director (i) the basis for concluding that changes are appropriate, and (ii) in general, the changes or alternatives the Regulation Review Officer would recommend. In addition, as discussed below, the Regulation Review Officer should assign a priority status to the need for the rule or regulation to be changed.
 - c. Although the principal focus of the review should be the Commission's rules and regulations, the Regulation Review Officer should be encouraged, as part of the review, to consider relevant interpretive guidance the Commission has provided in connection with such rules and regulations (including no-action or interpretive letters). Prior Commission guidance (including requests for no-action relief or interpretations) may indicate ambiguities or deficiencies in existing rules and regulations that could be obviated by updated rulemaking.
2. The Commission should announce publicly the rules and regulations that are scheduled to be subject to review over the next six month period, and invite public comment regarding such rules and regulations.
 - a. Timely public comment would provide the responsible Regulation Review Officer with additional information regarding the functioning and effectiveness of the Commission's rules and regulations that may be helpful to the Officer in preparing his or her report and formulating recommendations to the Division Director regarding the rule or regulation under review.
 - b. The public comments should be posted publicly on the Commission's website, so as to permit further public review and comments.

3. The nature and extent of public participation in the current process should be clearly established in the Plan.
 - a. Currently, members of the public who believe that an amendment to the Commission's rules or regulations would be appropriate can advise the staff informally of their views, or file a petition for rulemaking with the Commission pursuant to Rule 192 of the Commission's Rules of Practice. We recommend that the Commission's Plan include a review of whether Rule 192 should be amended in any way. Among other things, we note that many public petitions that were submitted many years ago remain in the Commission's files (and on its website) and have never been acted upon. The Commission may want to consider whether it should respond in some manner to public petitions for rulemaking within a specified period of time, e.g., within five years (even if to state that the Commission has not yet decided to act on the petition), and whether petitions not acted upon within a specified period should be deemed withdrawn. The Commission may also want to consider whether, and in what circumstances, its own proposed rules that have not been adopted, withdrawn or repropose within a specified period of time should be deemed withdrawn.
 - b. We believe that the Plan being developed by the Commission should include a component that functions as a regulatory "suggestion box", providing members of the public a more flexible and inviting opportunity to present informal rule proposals. This process would not, of course, supplant the public comment process mandated by the Administrative Procedures Act.
 - c. The Commission may want to consider creating a template for the submission of informal suggestions. The template would identify the rule or regulation proposed to be changed, the proposed change, the basis for the request, and other relevant factors, including an opportunity for a general discussion regarding the change. The informal suggestions relating to a particular rule should be incorporated into the Regulation Review Officer's consideration of that rule. Systematizing the format of the public input would assist the effort of the appropriate Regulation Review Officer to determine whether a particular rule or regulation should be scheduled for review. It may also assist the Officer in understanding whether a request represents a commonly shared view that a particular Commission rule or regulation should be changed. Such requests could also be considered by the Division and the Commission in connection with rulemaking outside the scope of rulemaking review initiated pursuant to the Plan. If the Commission believes that the information elicited pursuant to a template is helpful, it may also determine to adopt a template for proposals submitted pursuant to Rule 192.
 - d. The public submissions pursuant to this request should also be posted to the Commission's website and available for review, in order to provide an opportunity for a general discussion regarding such change.
4. The Plan should support the Commission's overall rulemaking process.
 - a. Because the Plan will consider whether the rules and regulations previously adopted by the Commission remain viable or require change, the implementation of the Plan can provide an important tool for the Commission to evaluate its overall rulemaking process. It can, for example, provide the Commission with insight as to what factors contribute to the making of a "good" rule, and what factors cause a rule not to be

effective in achieving the Commission's desired goals. Among the questions to which the Plan may require an answer are the following: If it is determined that a rule does not need to be changed, is it because the circumstances giving rise to the rule have remained static or, if the circumstances have changed, does the rule remain viable because it was drafted with the requisite flexibility to accommodate such change? Similarly, if a rule is determined to require modification, is the modification due to deficiencies in the original rule, changes to the market, unintended consequences or other factors? We believe that the lessons learned from a critical analysis of existing rules can assist the Commission's efforts to draft new rules and regulations in a more informed manner.

- b. In its current proposed rulemaking process, the Commission generally requests comments in response to a wide range of questions. The guidance developed as a result of the implementation of the Plan may assist the Commission in posing an even broader series of questions in connection with future rulemaking. For example, public comment may be sought with respect to whether proposed rulemaking is likely to be sufficiently flexible to operate as intended in evolving market conditions, and what factors may lead to a need to revisit or revise the rulemaking.
 - c. In its review, the Commission should not necessarily limit its consideration to whether there is any reason to change an existing rule or regulation. We suggest that the Commission's inquiry may be broader and that the Commission consider first whether an investor protection, capital formation or market efficiency purpose continues to justify the need for the rule and, if it does, how the rule should be drafted were it being drafted *ab initio* by the Commission. This fresh look at the Commission's rules may provide the Commission an excellent opportunity to craft rules that speak to current regulatory needs.
5. The Divisions and the Regulation Review Officers should determine the sequence of rules and regulations identified for review.
- a. As discussed above, each Division's Regulation Review Officer should periodically review all of the rules and regulations administered by the Division. Because some rules and regulations are narrowly tailored, and others have very broad application and are interrelated to other rules and regulations, we would leave it to the Division Director to determine the priority and sequence of reviews, subject to the Division's obligation to review all its rules and regulations over the course of a specified number of years.
 - b. In our view, the Divisions and the Regulation Review Officers should focus on rules and regulations which may impede capital formation or competitiveness, or otherwise are significant, and should consider the extent to which those rules and regulations are justified by the need to protect investors and to maintain market integrity. The process should proceed to a review of whether there are less burdensome ways to accomplish those objectives, and should subject all such rules to a rigorous analysis of whether the benefits of regulation are justified.

- c. In this context, we note that 5 U.S.C. Section 801² discusses the procedures applicable to Congressional review of agency rulemaking, and draws a distinction between “major rules” and other rules. A “major rule” is defined in 5 U.S.C. Section 804³, and relates, among other things, to rules that will have an annual effect on the economy of \$100 million or more. We suggest that the Commission conduct a census of those rules that should be considered “major rules” under the Section 804 definition, and provide for their review more frequently than the review period that would apply to rules that are not deemed to be major rules. For example, major rules might be reviewed at least every five years, while rules that are not major rules might be reviewed at least every ten years. The review timetable should be sufficiently flexible, though, in order to enable the Divisions to expedite the review of particular rules and regulations based on market changes, Commission priorities or public comments.
6. The Plan should specify the matters the Regulation Review Officers should consider.
- a. The Commission should include in the Plan a series of questions the Regulation Review Officers should consider in planning and performing their reviews. A non-exclusive list of such matters might, for example, include the following:
 - i. To what extent is the rule or regulation under review serving its intended purpose?
 - ii. To what extent has the rule become ineffective in achieving its intended purpose? For example, have loopholes been exploited to vitiate the rule’s effectiveness?
 - iii. What difficulties or challenges have been encountered in connection with the implementation and operation of the existing rule?
 - iv. Can the existing rule be amended consistent with its purpose to be less complex or burdensome while serving its intended purpose?
 - v. Are the difficulties or challenges that have been encountered with the existing rule imposing material costs or burdens on the persons or entities affected?
 - vi. Are the costs and burdens experienced with the rule consistent with those that were estimated by the Commission at the time the rule was adopted, or do they exceed the estimated costs? If they materially exceeded the estimated costs, did the differential arise because the estimate was inaccurate, or did circumstances arise following the adoption of the final rule that were not anticipated in the Commission’s cost-benefit analysis? Does compliance with the rule involve burdens, complications or consequences that are not fairly measured on a monetary basis?

² http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=browse_usc&docid=Cite:+5USC801

³ http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=browse_usc&docid=Cite:+5USC804

- vii. Has the market provided an effective and satisfactory work-around to the difficulties or challenges encountered with the existing rule?
 - viii. Do the difficulties or challenges with the existing rule affect a small number of persons or entities, or a large number? How significantly?
 - ix. Does the existing rule impose an unreasonable burden on smaller reporting companies? If so, is a scaled implementation of the rule appropriate?
 - x. Does the existing rule impose burdens on foreign private issuers that are likely to cause them to consider deregistering under the Exchange Act (or not to enter the U.S. markets)? If so, are any accommodations appropriate?
 - xi. Do the difficulties or challenges with the existing rule include unintended consequences and, if they do, what are the nature, magnitude and cause of such unintended consequences? Did these unintended consequences arise because the rule did not take into account the likely conduct of persons or entities subject to the rule? Alternatively, was the rule drafted too broadly or were the unintended consequences due to other factors?
 - xii. Is the nature of the difficulties or challenges with the existing rule one that can be changed by an interpretive clarification or minor revision to the existing rule, or are the difficulties or challenges more complex (such as involving more rules, or affecting a major concept)?
 - xiii. What are the consequences of not revising a rule that is identified as needing revision?
 - xiv. Is the Division considering other rulemaking that would moot or otherwise affect the changes that might otherwise be proposed?
7. The report by each Regulation Review Officer should assign one or more numerical categories to each rule or regulation which has been reviewed.
- a. Were a scale of 0 to 5 to be used, a ranking of "0" might mean that no change to the rule or regulation is recommended. Rankings above "0" would be based upon specified criteria.
 - b. For example, one category could identify the importance to the marketplace of revising the rule, perhaps based on purpose and materiality. A rule that is determined to be ineffective to achieve its desired purpose, that imposes excessive burdens on reporting companies without commensurate investor protection benefits, or that has resulted in materially harmful unintended consequences, would have a high priority designation, while a rule that requires change, but where the consequences are less material, would have a lower designation.
 - c. The Commission may also want to consider assigning a separate numerical category based on the relative "ease" by which a suggested change can be made. For example, a modest change to a line item in a particular form that does not implicate

other rules or regulations might be assigned a high designation, whereas a change that would be extremely complex and require significant analysis and the revision of multiple associated rules could be assigned a lower priority. Please note, though, that a change that may rank lower on the basis of “ease” may nonetheless be justified if making the change would be highly important.

- d. Were the above criteria used, an assignment of a high (e.g. “4” or “5”) ranking in either category (very important to change or very easy to change) would suggest a high priority for the Division to suggest rulemaking to the Commission. This is not to suggest, though, that a lower ranking should not lead to rulemaking. Each Division would make its own determinations based on its assessment of the importance of a change. Every rule or regulation that the Regulation Review Officer has identified as meriting a change should be evaluated by the Division.
 - e. On the basis of the reports by the Regulation Review Officer and the recommendations set forth therein, the Division Director would prepare a final recommendation to the Commission, which may include the specifics of proposed rulemaking.
 - f. We believe that proposed amendments to any of the “major rules”, as discussed above, that could increase the compliance burdens of persons or entities subject to the amendments, should be subject to a cost-benefit analysis by the Commission’s Division of Risk, Strategy and Financial Innovation. We believe that this Division should also be involved in the retrospective review of rules and regulations, specifically with respect to the items referred to in Section 6(a)(v) above.
8. The review process itself should be periodically reviewed by the Commission.
- a. The purpose of the retrospective review of rules and regulations is to eliminate or update ineffective, unnecessary, burdensome or antiquated rules and to make compliance more workable and efficient.⁴ It is critically important, therefore, that the review process itself be efficient and that it not interfere with the Commission’s ongoing rulemaking agenda. Specifically, the process should be used to streamline existing rules, and not to provide proponents of new initiatives an additional avenue through which to lobby the Commission. The use of the retrospective review process in this manner would undermine the goals set forth in Executive Order 13579.
 - b. We suggest that an evaluation of the review process itself be undertaken within 24 months after the date it is initially implemented, in order to consider whether the Commission and its staff believe any changes are required in order to permit the process to be conducted in a more efficient manner.
9. The Commission should encourage the SROs to engage in a similar retrospective review of their rules.

⁴ As provided in the Executive Order, the purpose of the Order is for “independent regulatory agencies [to] consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.”

- a. FINRA and the national securities exchanges also have had in effect rules that were adopted a number of years ago and which may not have been subject to retrospective scrutiny. Just as the Executive Order is intended to prompt independent regulatory agencies to eliminate their outmoded, ineffective or excessively burdensome rules, we encourage the Commission to suggest to the SROs that they undertake similar reviews of their rules. Because of the interlinkage between SRO rulemaking and the Commission's rulemaking, we believe that improving the efficiency of SRO rules would help to eliminate requirements that inhibit capital formation and discourage companies from accessing our capital markets, and that impose unnecessary burdens on public companies. In addition, such a review would help to streamline the registration and regulation of brokers and dealers.

The Committee appreciates the opportunity to submit these comments and we hope that they will be of assistance to the Commission in its consideration of this important subject. Members of the Committee are available to meet and discuss these matters with the Commission and its Staff and to respond to any questions.

Very truly yours,

/s/ Jeffrey W. Rubin

Jeffrey W. Rubin
Chair, Federal Regulation of Securities Committee

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