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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17551

In the Matter of

MED-X, Inc.,

Respondent.

RESPONDENT'S PRE-HEARING BRIEF

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Pursuant to the Order On Revised Schedule and Advice-Of-Counsel Defense in this Proceeding dated December 2, 2016, Respondent Med-X, Inc. ("Respondent"), through its undersigned counsel, submits its pre-hearing brief.

Preliminary Statement

The only issue that needs to be decided at the hearing on this matter is: Whether Respondent's ability to use the exemption of Regulation A+ to raise funds should be permanently suspended and Respondent labeled a "bad actor" because it was admittedly approximately four months late in filing the required annual report subsequent to the qualification of its Tier 2 Offering Statement.

Immediately upon being informed by the Division of Corporate Finance that the filing was late, Respondent and its outside attorney (who conceded responsibility for the filing error) worked to prepare the required annual report (including audited financial statements) and as a testament to the seriousness and importance given to the task, filed it 18 days (11 business days) later. (The Final Rules adopting Regulation A+ estimate that compliance with this Form 1-K filing requirement will result in a burden of 600 hours per response.[1])

Respondent has timely filed all other reports and has no prior record of filing deficiencies or other disabling conduct. In the meantime, Respondent's Regulation A+ offering has been temporarily suspended since September 2016 and the company has been prevented from raising the funds needed to survive in a highly competitive, fast-

[1] Amendments for Small and Additional Issues Exemptions Under the 8 Act (Regulation A), Rel. No. 33-9741, March 25, 2015 ("Final Rule Release 33-9741"), at p. 328 (Form 1-K), 330 (Form 1-SA: 187 hours per response), *available at* www.sec.gov/rules/final/2015/33-9741.pdf.

growing industry for nearly four months.[2] Respondent was one of the first few companies to be qualified under the new Regulation A+, and its suspension has garnered negative attention by the media and investors.

Incredibly, the Division now seeks to *permanently* suspend Respondent's ability to use the Regulation A+ exemption because of the single late filing. If permitted, this would result in Respondent being deemed a "bad actor" and unable to raise capital under *any* of the regulations designed to assist small businesses.[3]

The company's late filing has already come with a steep cost: important initiatives have been delayed at a critical time for this nascent business because capital raising has been suspended, prospective investors have been lost because of the suspension, and current investors are concerned about the safety of their investments and the company's viability if its access to capital is permanently curtailed. This draconian result for one untimely filing that was promptly corrected is not what Regulation A+ requires nor is it consistent with the JOBS Act or regulatory responses for much more significant delays in making periodic filings. Indeed, it is a punitive response wholly disproportionate to the filing error which was quickly admitted and corrected.

Respondent respectfully requests this Court to exercise its discretion and deny a permanent suspension under Rule 258 and vacate the temporary suspension so that Respondent and its investors are not disproportionately penalized.

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[2] On November 8, 2016, California voters passed Proposition 64 legalizing the recreational use of Cannabis in California. Dozens of companies are now rushing to compete for business in the state, and such competition is significant risk-factor with respect to an investment in the Company. (See Offering Circular at 1, 3, 12, 15; 2015 Annual Statement 2, 8, 12.) The passage of Proposition 64 presents a significant opportunity for the Company which may be lost if the Company is unable to quickly access operating capital.

[3] E.g., Regulation A of Section 3(b) and Regulation D of Section 4(a)(2).

Factual Background

A. Med-X, Inc.

Respondent Med-X, Inc. was formed in February 2014 to "(1) acquire, create and publish high quality Cannabis industry media content through the Company's media platform, www.marijuanatimes.org, to generate revenue from advertisers as well as through the sale of industry-related products, (2) sell Nature-Cide products to Cannabis cultivators throughout the world, and (3) research and develop, through state of the art compound identification and extraction techniques, and market and sell medically beneficial supplements made from the oils synthesized from the Cannabis plant." (See, e.g., Form 1-A Regulation A Offering Statement at page 9, DIV. EX. 3 ("Offering Circular").

The company's website, www.marijuanatimes.org, has been publishing Cannabis industry news and information since its launch in July 2015, with "content . . . designed to cover a wide variety of topics relating to the industry . . . including news and current events, as well as the business, financial, legislative, legal, cultural, medical, scientific and technological aspects of the industry on a national and international level." (Id.; see also Annual Report for Year Ending December 31, 2015, DIV. Exhibit 11 ("2015 Annual Report"), at page 4.) Med-X's primary source of revenue currently is proceeds from advertising earned from content published on www.marijuanatimes.org. (2015 Annual Report at page 2; see Offering Circular at 5, 9.) During the period July 30, 2016 through August 28, 2016, that media platform recognized 1.3 million unique visitors who visited the website 1.9 million times during the same period. (2015 Annual Report at p. 2.)

The Company also supplies products to the Cannabis agricultural and provisioning industries, including its Nature-Cide products and a special insecticide soil. (Id. at 3-4; see Offering Circular at 5, 9.) Nature-Cide is a proprietary all natural essential oil insecticide/miticide/nematicide that repels and kills a wide variety of pests, including insects that are commonly known to damage Cannabis crops.[4] (Id.) Nature-Cide has been approved by the States of Colorado, Washington and Oregon as an all natural pesticide for use on cannabis. Unlike other repellants and insecticide products which contain toxic chemicals, Nature-Cide is safe for all environments, and its organic properties could be particularly beneficial and appealing to the medical marijuana industry.

The premise of the Company's anticipated extraction research and development operation is to make Cannabis oil from the plant, extract a variety of medicinal compounds from the oil, testing the efficacy of the supplement prototypes, and producing, marketing and selling natural supplements containing these compounds. (See Offering Circular at 9; 2015 Annual Report at 4.) Preliminary research indicates that such compounds may be effective in treating the symptoms of certain neurological pathologies, including pain and nausea. (Id. at 10; 2015 Annual report at 5.)

The Company's Chief Executive Officer and a director is Dr. David E. Toomey. Dr. Toomey is a board-certified physician specializing in, among other things, geriatric, hospice and palliative care for more than twenty years. He is a practicing physician and

[4] See www.nature-cide.com and www.naturecidecannabis.com.

Medical Director for several hospice and palliative care organizations. (Offering Circular at 23; 2015 Annual Report at 21.)[5]

Matthew Mills is the Company's Chairman of the Board, President and Chief Operating Officer. He is responsible for the day-to-day operations of the Company. Prior to the launch of Med-X, Inc. in 2014 and its affiliate Pacific Shore Holdings, Inc. in 2008, Mr. Mills held several positions at online auction company Bidz.com, and previously was a regional manager for Ford Motor Company. (Id.)

The Company's board includes Dr. Allan Kurtz, a practicing physician who is board certified in internal medicine and who, since 1986, has been the Medical Director of Warner Medical Center and the California Center of Longevity Medicine. (Offering Circular at 24; 2015 Annual Report at 22.) Another director is Dr. Morton Hyson, a board certified Neurologist in private practice, who also is a Clinical Assistant Professor at Touro University in San Francisco, CA and who serves as a Clinical Associate Professor at the University of Nevada, School of Medicine. Dr. Hyson is the inventor and grantee of three patents in the medical field. (Id.)

Three of the Company's four executive officers (including its CEO, President and COO, and CFO) have received no salaries since the Company's inception.[6] (Offering Circular at 25; 2015 Annual Report at 23.) There currently are six directors, two of whom are "independent" as defined in Rule 4200 of FINRA's listing standards. (Offering Circular at 26; 2015 Annual Report at 24.) Directors are not currently paid any

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[5] Dr. Toomey and Mr. Mills are also founders and officers of Pacific Shore Holdings, Inc., an affiliate of Med-X, Inc.

[6] Jennifer Mills, the Company's Executive Vice President of Human Resources and Corporate Secretary, has received an annualized salary of $36,000 since April 2015. (Offering Circular at 25; 2015 Annual Report at 23.) She is the wife of Matthew Mills. (Offering Circular at 23; 2015 Annual Report at 21.)

compensation for their services as board members. (Offering Circular at 27; 2015 Annual Statement at 25.) As of September 1, 2016, the Company had three full-time employees and five part-time employees (four of whom are executive officers of Med-X.) (2015 Annual Report at 9.) This workforce is supplemented by eleven contract writers who support the marijuanatimes.org content. Company plans to actively hire employees at such time as it has sufficient capital or financing to fund the expanded launch of its business plan. (Id.)

B. Regulation A+

On April 5, 2012, the Jumpstart Our Business Startups (JOBS) Act was signed into law by President Obama. The Act was designed to facilitate capital formation in smaller companies and required the SEC to write rules and issue studies in capital formation, disclosure and registration requirements.[7] On December 18, 2013 the SEC proposed rule and form amendments to implement Section 401 of the JOBS Act.[8] On March 25, 2015, the SEC "adopted final rules to facilitate smaller companies' access to capital. The new rules provide investors with more investment choices" and "update and expand Regulation A, an existing exemption from registration for smaller issuers of securities."[9] The new rules became effective on June 19, 2015.[10]

The updated exemption was designed to "enable smaller companies to offer and sell up to $50 million of securities in a 12-month period, subject to eligibility, disclosure

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7 See SEC Spotlight at www.sec.gov/spotlight/jobs-act.shtml.

8 Proposed Rule Rel. No. 33-9497, Dec. 18, 2013; *available at* www.sec.gov/rules/proposed/2013/33-9497.pdf.

9 SEC Press Rel. 2015-49; *available at* www.sec.gov/news/pressrelease/2015-49.html.

10 Final Rule, Rel. No. 33-9741, *available at* www.sec.gov/rules/final/2015/33-9741.pdf.

and reporting requirements.[11] SEC Chair Mary Jo White said "It is important for the Commission to continue to look for ways that our rules can facilitate capital-raising by smaller companies."[12] The final rules, referred to as Regulation A+, provide for two tiers of offerings. Tier 1, for offerings up to $20 million in a 12-month period, and Tier 2 (which is relevant here) for offerings of up to $50 million in a twelve-month period.[13] An offering statement is qualified only upon action by the Commission (or the Division of Corporation Finance, pursuant to delegated authority) in the form of a "notice of qualification."[14]

Issuers electing to proceed under Tier 2 are required to provide audited financial statements and to file annual (Form 1-K), semi-annual (Form 1-SA) and current event (Form 1-U) reports. Rule 257(b)(1) provides:[15]

> Each issuer that has filed an offering statement for a Tier 2 offering that has been qualified pursuant to this Regulation A must file with the Commission the following periodic and current reports:
>
> (1) Annual reports. An annual report on Form 1-K (§ 239.91 of this chapter) for the fiscal year in which the offering statement became qualified and for any fiscal year thereafter . . . . Annual reports must be filed within the period specified in Form 1-K.

Form 1-K General Instructions state:[16]

> Annual reports on this Form shall be filed within 120 calendar days after the end of the fiscal year covered by the report.

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11 SEC Press Release 2015-49.
12 Id.
13 Id.
14 See Rule 252(e); Final Rules release at 142-44.
15 C.F.R. 230.257(b)(1).
16 Form 1-K(A)(2); DIV. Ex. 21.

Thus, an annual report must be filed for the fiscal year in which the offering statement became qualified.

C. Med-X Elects to Raise Capital by a Tier 2 Offering

On August 27, 2015, Med-X filed an Offering Statement on Form 1-A, seeking to raise up to $15 million pursuant to Regulation A of Section 3(b) of the Securities Act of 1933. (Offering Statement; DIV. Ex. 1.) Because Med-X sought to raise up to $15 million, it could elect whether to proceed under Tier 1 (which has no ongoing reporting requirements) or Tier 2.[17] Med-X opted to proceed under Tier 2. The net proceeds from the offering were to be used to

> provide capital for us to publish our online content regarding the Cannabis industry, market our products to the Cannabis agricultural and provisioning industries, research, develop and market beneficial Cannabis based compounds for medicinal applications derived from state of the art Cannabis compound identification and extraction techniques, develop our planned Cannabis pharmacy automation system, lease and acquire farm property, establish Cannabis growing operations, comply with all federal and state legal and regulatory requirements, and for general working capital purposes.

(Offering Statement, DIV. Ex. 1 at p. 7.) Although Regulation A+ does not limit offerings to "accredited investors," the Offering Statement described the offering as intended for "Sophisticated Investors Only," and no sale could be made to an investor if the aggregate purchase price paid is more than 10% of the greater of the investor's annual income or net worth, not including the value of his primary residence. (See id. at cover page, page 30.) Each investor was required to represent in writing (utilizing attached subscription documents) that he/she met the applicable requirements set forth above, and

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[17] SEC Press Release 2015-49.

broker-dealers and other persons participating in the offering were required to make a reasonable inquiry in order to verify an investor's suitability for an investment in the Company. (Id. at 30.)

The offering originally was set to terminate on March 15, 2016 unless extended for up to an additional 180 days. (Id.) As required, the Offering Statement included Med-X's audited financial statements as of December 31, 2014 (id. at F-1 through F-14), and unaudited financial statements as of June 30, 2015 (id. at F-15 through F-18). Page one of the Offering Circular contains a **"SUMMARY OF RISK FACTORS"** and states that "The purchase of shares of our common stock involves substantial risks." The summary of risks is four pages long, and the more detailed risk section contains seven pages of risk factors. (Id. at pages 1-4; 12-18.)

By letter dated September 28, 2015, the SEC's Division of Corporate Finance indicated it had only one comment to Respondent's Offering Statement, asking Med-X to revise the use of proceeds section to "estimate the amounts you intend to spend on each identified use," and to "provide information about the priority of each of these uses in the event that less than the maximum amount is raised in the offering." (Letter from S. Hayes to Dr. Toomey, dated September 28, 2015, DIV. Ex. 2.)

Thereafter, Respondent filed an Amended Offering Statement on October 15, 2015, providing details regarding the use of proceeds from the offering and the priority in which they would be used.[18] (Amended Offering Statement, dated October 12, 2015, DIV. Ex. 3, at pages 7-8.)

[18] The subscription period indicated that the offering would terminate on April 12, 2016 unless extended by Med-X. (Id. at 31.)

By letter dated October 30, 2015, Med-X requested that the SEC declare its Offering Statement "qualified" on November 3, 2015. (DIV. Ex. 4.) On November 3, 2015, the SEC issued a "Notice of Qualification" regarding Respondent's Amended Form 1-A. (DIV. Ex. 5.) Med-X was now qualified to begin offering shares, but instead of commencing the offering, Med-X thereafter filed three amended, post-qualification offering statements addressing changes to its Plan of Distribution for the Offering. The amended, post-qualification offering statements were filed on December 4, 2015 (RESP. Ex. B), December 21, 2015 (RESP. Ex. C), and January 26, 2016 (RESP. Ex. D) and each included material revisions to its Plan of Distribution addressing (i) the anticipated engagement of FundAmerica Securities, LLC, a registered broker-dealer ("FundAmerica"), to perform certain administrative functions in connection with the offering in addition to acting as the escrow agent; and (ii) an agreement with a crowdfunding website, StartEngine.com, to host Med-X's offering in return for cash and warrants to purchase common stock. (Compare, e.g., RESP. Exs. B, C and D at 32-33 to DIV. Ex. 3 at 32.) These amended A-1 Offering Statements required review by FINRA[19] and re-qualification by the SEC. Med-X was optimistic that the SEC would accept the amendments to the Offering Statement and qualify the post-qualification January 26, 2016 Offering Statement so that the offering could commence.

On January 28, 2016, Mark Richardson, Respondent's outside counsel, received a call from the SEC indicating that the "post-effective amendments" were now "qualified." This was wonderful news to Med-X – its long-delayed offering could finally commence. On February 9, 2016 Med-X launched its offering on the StartEngine Platform. On

[19] This is referred to as a FINRA Rule 5110 review.

February 10, 2016 it filed a change to the subscription period pursuant to Rule 253(g)(2) extending the termination to July 14, 2016. (Form 1-A, RESP. Ex. E at 31.) On July 11, 2016 Med-X extended the termination to October 14, 2016.[20] (Form 1-A, DIV. Ex. 6 at 3.)

D. Med-X Learns That Its Annual Report Under Rule 257(b)(1) Is Late

On Friday, September 2, 2016, Med-X's CFO emailed the Company's outside counsel Mark Richardson (who was responsible for all SEC filings), stating: "Attached is a letter received today. **Please review and call us ASAP!**" (RESP. Ex. G1; emphasis added.) The reason for the urgency was evident. Attached to the email was a letter addressed to Med-X's CEO, dated August 30, 2016 (sent via certified mail), from Tim Henseler, Chief, Office of Enforcement Liaison, Division of Corporation Finance, informing him that:

> We are writing to address the reporting responsibilities of the referenced company under Regulation A. . . .
>
> The Commission qualified a Tier 2 securities offering by [Med-X] under the Regulation A exemption on November 3, 2015. According to our records, [Med-X] is not in compliance with the requirement of Tier 2 of Regulation A to file an annual report under 17 CFR § 230.257(b)(1). An annual report was due April 30, 2016, 120 calendar days after the end of [Med-X's] fiscal year. *See* 17 CFR § 239.91; General Instruction A.(2) of Form 1-K. Please be aware that the Commission may, without further notice, issue an order temporarily suspending [Med-X's] Regulation A exemption under 17 CFR § 230.258. If such an order is issued by the Commission, you will receive notice of the temporary suspension and be given an opportunity to request a hearing before the Commission.
>
> If you wish to speak with a member of the Commission staff about this matter, please contact the undersigned at (202) 551-2015 or Sebastian Gomez Abero at (202) 551-3460.

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[20] Pursuant to Rules 251(d)(3)(i)(F) and 252(f), Med-X could extend the offering period up to and including January 28, 2017 and could file additional post-qualification amendments to extend it for up to two more one-year periods.

(DIV. Ex. 7.) No deadline to fix the deficiency was provided.

Med-X officers were incredulous that a filing deadline had been missed – lacking any internal legal department, they relied entirely on Mr. Richardson to insure compliance with such requirements. In a subsequent company conference call Mr. Richardson explained that he had misinterpreted the filing requirement, erroneously believing that the 120-day period ran from the end of 2016 – the fiscal year when the final post-qualification amended Offering Statement filed on January 26, 2016 was qualified.[21] Upon reflection, Richardson determined that he was incorrect and the filing was, in fact, late. He promised Med-X he would reach out to the SEC with a phone call, as per Mr. Henseler's August 30, 2016 letter. (RESP. Ex. G2.)

On September 6th (September 5th was the Labor Day Holiday), Mr. Richardson called and left a voicemail message for Mr. Henseler, stating:

> I just want to reassure you that we will be filing our 1-K and our 1-S within the next couple of weeks to be completely caught up on Med-X.[22] I was going off the date of the last post-effective amendment so I didn't -- I didn't realize we had an annual report due on April 30th. But I acknowledge your correspondence and we're going to take care of it. If you have any questions you can call me at the law office 310-393-9992. Thank you Tim. Appreciate it.

(DIV. Ex. 8.) Mr. Richardson did not hear back from Mr. Henseler, but later received an email from Nancy Singer, with the SEC's Division of Enforcement, inviting him to call her the next day (September 20th). In the meantime, Mr. Richardson and the company were focused on completing the required filings, which were made on September 20,

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[21] See RESP. Ex. H, a voicemail from the SEC to Richardson dated January 29, 2016 stating that the post-effective amended offering statement was now "qualified." No securities were offered for sale until after this January 2016 qualification was received from the SEC.

[22] Med-X's semi-annual report on Form 1-SA would be due on September 30, 2016.

2016.[23] Reflecting the importance of the task and the urgency and seriousness assigned to it, in just 18 days (11 business days) Richardson and the company prepared two filings that the SEC itself estimates would require 787 hours of work (600 hours for the 1-K and 187 hours for the 1-SA).[24]

Just one day earlier on September 19, 2016, by cover letter dated September 16, 2016, Med-X received an "Order Temporarily Suspending Exemption Pursuant to Section 3(b) of the Securities Act of 1933 and Regulation A Thereunder, Statement of Reasons for Entry of Order, and Notice of And Opportunity for Hearing. (DIV. Exs. 9, 9A, 10, 10A.) Mr. Richardson then spoke with Ms. Singer, who informed him that she wanted to be copied on all correspondence with the Commission.

On September 21, 2016, Med-X requested a hearing pursuant to Rule 258(b)(2) to vacate the temporary order of suspension "in light of the fact that on September 19, 2016, at 5:53 PM EDT we filed our Annual Report on Form 1-K . . . ." Thus, Med-X was "completely current with its filing requirements under Rule 257 of Regulation A." (DIV. Ex. 13.) These proceedings followed.

ARGUMENT

The Jumpstart Our Business Startups Act ("JOBS Act") was intended to encourage capital raising by small businesses by easing various securities regulations. (See Report of Gerald J. Laporte at ¶ 1; "Laporte Report" attached as Appendix 1 hereto.) Few companies were utilizing Regulation A, and Title IV of the Act required the SEC to

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[23] The filings were actually made after 5:30 September 19, 2016 and filed-stamped by the SEC on September 20, 2016.

[24] Final Rule, Rel. No. 33-9741, at pp. 328, 330; Form 1-K, Form 1-SA.

amend Regulation A to create an expanded exemption from registration under the Securities Act, in order to enhance the ability of smaller companies to raise money.[25]

The SEC's new rules with respect to Regulation A (referred to as Regulation A+) went into effect on June 19, 2015. (See p. 6, *supra.*) The new Tier 2 of Regulation A+ "allows companies to offer and sell securities to the public, but with more limited disclosure requirements than what you currently would expect from publicly reporting companies. In comparison to registered offerings, smaller companies in earlier stages of development may be able to use this rule to more cost-effectively raise money."[26]

Of course, while the JOBS Act and the rules implemented thereunder are designed to facilitate capital formation by smaller businesses, the Act and regulators must also address investor protection, market integrity and market confidence. [27] The rules under Tier 2 of Regulation A that went into effect in June 2015 are designed to increase the options available to small businesses to publicly raise capital, including lessening the periodic reporting requirements that would be triggered by full registration of a securities offering under the Securities Act, while instilling market confidence.[28]

The Form 1-A Offering Statement (which includes an offering circular) is the primary disclosure document in Regulation A offerings. It contains a wealth of information to assist investors in learning about the company they are investing in, such

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[25] Jumpstart Our Business Startups (JOBS) Act of 2012, Pub. L. 112-106, April 5, 2012; and "Investor Bulletin: Regulation A," Securities and Exchange Commission, July 8, 2015 ("Investor Bulletin: Regulation A"), *available at* https://www.sec.gov/oiea/investor-alerts-bulletins/ib_regulationa.html.

[26] *E.g.*, Investor Bulletin: Regulation A.

[27] 2016 Government-Business Forum on Small Business Capital Formation, Opening Remarks by Commissioner Kara M. Stein, Public Statement, November 17, 2016 ("2016 Small Business Forum") available at https://www.sec.gov/news/statement/stein-opening-remarks-small-business-forum.html, ("[Reg A+ and other] initiatives were adopted with the purpose of increasing the options available to small businesses to raise capital. These initiatives also incorporated the Commission's consideration of investor protection, market integrity and market confidence.").

[28] Id.

as information about the offering and the securities offered, the risks of the investment, use of proceeds, any selling shareholders, and the company's business, management, performance, plans and financial statements.[29]

Companies offering securities under Tier 2 of Regulation A (wherein they offer up to $50 million in securities during any 12-month period) also are subject to ongoing reporting requirements under Rule 257: "Like public companies that regularly disclose their financial results, companies raising money under Tier 2 will also file regular reports with the SEC. However, unlike the quarterly reporting that you may be use [sic] to, Tier 2 companies are only required to file a semiannual and annual report as well as interim current reports upon the occurrence of certain enumerated events."[30] These reports are the 1-K (annual report), 1-SA (semiannual report), and 1-U (current report).[31]

As previously noted (p. 7, *supra*) newly enacted Rule 257(b)(1) provides:

> Each issuer that has filed an offering statement for a Tier 2 offering that has been qualified pursuant to this Regulation A must file with the Commission the following periodic and current reports:
>
> (1) Annual reports. An annual report on Form 1-K (§ 239.91 of this chapter) for the fiscal year in which the offering statement became qualified and for any fiscal year thereafter . . . . Annual reports must be filed within the period specified in Form 1-K.

Form 1-K General Instructions state:

> Annual reports on this Form shall be filed within 120 calendar days after the end of the fiscal year covered by the report.

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29 Investor Bulletin: Regulation A.

30 Investor Bulletin: Regulation A; and 17 C.F.R. § 230.257.

31 In considering the proposed revisions to Regulation A, and those regarding periodic reporting in particular, the SEC noted "We are mindful that an ongoing reporting regime that is suitable for one type of entity and its investor base may prove too onerous for another entity or provide its investors with more or more frequent information than they necessarily need or seek, resulting in undue costs to the issuer." See Proposed Rule Rel. No. 33-9497, at pp. 136–37.

(Form 1-K(A)(2); DIV. Ex. 21.) Thus, an annual report must be filed for the fiscal year in which the offering statement became qualified.

Here, Med-X does not dispute that the annual report required by Rule 257(b)(1) (the "Annual Report") was late. It was due on April 30, 2016 and was filed on September 20, 2016. (See p. 1-2, 12, *supra.*) However, Med-X's officers were unaware that the Annual Report was overdue until they were so informed by the SEC on September 2, 2016. (See page 11, *supra*; DIV. Ex. 7.) As a tiny start-up company, they relied on their outside counsel, Mark Richardson, to stay abreast of and comply with all required filings. Upon receiving notice that a filing was late, they immediately reached out to Mr. Richardson to discuss the Commission's letter and remedy the problem. (RESP. Ex. G1.) Richardson knew that the new rules required a Form 1-K to be filed "for the fiscal year in which the offering statement became qualified and for any fiscal year thereafter." He knew, of course, that Respondent's Offering Statement was initially qualified on November 3, 2015. (See page 9, *supra.*) But he believed – erroneously – that Med-X's first annual report under Rule 257 would not be due until April 30, 2017 (as opposed to April 30, 2016). The reasons for his belief were as follows:

(1) There were three post-qualification amendments to the Offering Statement originally qualified on November 3, 2015, including one on January 26th *in 2016* that was "qualified" by the SEC on January 29, 2016 (see pages 9-10, *supra*).

(2) No securities were offered pursuant to the Offering Statement that was qualified in November 2015. All securities offered and sold were pursuant to the post-qualification Offering Statement that was qualified by the SEC in January 2016. (Id.)

(3) Therefore, the first annual report required under Rule 257 would be for the fiscal year 2016, making the report due 120 days after the end of 2016 (or April 30, 2017).

After receiving notice from the SEC that the filing was late and re-considering the text of Rule 257, Mr. Richardson concluded that he was incorrect and the filing was overdue. He immediately faced the grim task of informing his client of his mistake, and called the SEC (as its notice letter invited the Company to do) to explain the reason for the error and assure them that the deficiency would be promptly remedied. Reflecting the seriousness of the task and his mandate to correct the mistake, Mr. Richardson and the Company filed the required Form 1-K (and the soon-to-be-due 1-SA) within 18 days – a singular achievement for a company with a total of 8 employees and one outside lawyer (a sole practitioner) responsible for SEC filings. (As previously noted, the SEC estimates that those two reports would require 787 hours of work to complete. *Supra* at 12.)

Notwithstanding those filings, and the reason for the inadvertent delinquency, the SEC now seeks to *permanently* suspend Med-X's ability to raise money under Regulation A+.[32] Nothing in Rule 258 requires this result. Section 230.258(a) provides that the "Commission may at any time enter an order temporarily suspending a Regulation A exemption if it has reason to believe that" among a number of things, "(1) . . . the terms,

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[32] "[T]he rules as implemented by the SEC are not always clear. Indeed, the purpose of the [SEC's] Small Business Office is, to some extent, to assist companies and businesses in navigating their way through various rules. This exercise involves some discretion. Indeed, it is not unusual for regulators, securities practitioners, and companies to have legitimate questions about how new rules work. As to the new Regulation A+, they are not simple questions with simple answers. New and sometimes ambiguous rules can and do cause confusion, and how the confusion is addressed can impact the effectiveness of the Act and the rules promulgated thereunder." Laporte Report at ¶ 6; see id. at ¶ 7 ("Because the filing requirements such as those under Rule 257 are somewhat complex, and because small businesses often lack legal and compliance programs, it should be no surprise that inadvertent filing errors occur.").)

conditions or requirements of Regulation A have not been complied with."[33] Here, Respondent does not dispute that the SEC had reason to believe that Med-X had not complied with Rule 257 by filing its annual report by April 30, 2016.

Rule 258(b) provides that "upon the entry of an order under paragraph (a) of this section, the Commission will promptly give notice to the issuer . . .(1) That such order has been entered, together with a brief statement of the reasons for the entry of the order; and (2) That the Commission, upon receipt of a written request within 30 calendar days after the entry of the order, will . . . order a hearing at a place to be designated by the Commission.[34]

Rule 258(c) and (d) address the suspension order now being sought:[35]

> (c) Suspension Order. If no hearing is requested and none is ordered by the Commission, an order entered under paragraph (a) of this section shall become permanent on the 30th calendar day after its entry and shall remain in effect unless or until it is modified or vacated by the Commission. Where a hearing is requested . . . the Commission will, after notice of and opportunity for such hearing, ***either vacate the order or enter an order permanently suspending the exemption.***"
>
> (d) Permanent suspension. The Commission ***may,*** at any time after notice of and opportunity for hearing, enter an order permanently suspending the exemption for any reason upon which it could have entered a temporary suspension order under paragraph (a) of this section. Any such order shall remain in effect ***until vacated by the Commission.***

Thus, the language regarding a permanent suspension is *permissive* not mandatory, and the SEC and this Court have the discretion to vacate the temporary suspension rather than permanently suspend the exemption.

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33 17 C.F.R. § 230.258(a)(1).
34 17 C.F.R. § 230.258(b)(1), (2).
35 17 C.F.R. § 230.258(c), (d).

Under the circumstances, permanently suspending Med-X from the exemption would be inconsistent with regulatory custom and practice in addressing late periodic filings and contrary to the statutory scheme and purpose and intent of Section 401 of the JOBS Act. (Laporte Report at ¶ 1.)

Mr. Laporte, the Chief of the SEC's Office of Small Business Policy from 2002 through 2013, unequivocally opines that a permanent suspension under these circumstances would be improper, in part because "Rule 258 has been interpreted by the SEC, the courts and securities practitioners as being remedial, and not punitive, in nature. Under this interpretation, once a Rule 257 reporting violation has been remedied, *there is no basis for a permanent suspension under Rule 258 or even proceedings addressing a permanent suspension, even when a temporary suspension was appropriate.*"[36] (Laporte Report at ¶8; emphasis added.)

Indeed, under an analogous provision in Section 8(d) of the Securities Act governing stop orders that are issued when a Securities Act registration statement is not updated to reflect material current information, the stop order is *not* permanent and *ceases to be effective* once the registration statement is updated to reflect the information required by the SEC.[37] Like Section 8(d) stop orders, a temporary suspension of an exemption from registration under A+ should *not* be permanent and should be vacated once the filing is made. Permanently suspending an exemption from registration or issuing a stop order for a registered offering for a single delayed periodic filing that has

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[36] As previously noted, nothing in the language of Rule 258 (and nothing in the history of its enactment) provides a basis for – much less *requires* -- suspending a Regulation A exemption for a single historic failure to comply with a periodic reporting requirement of Regulation A once the issuer has complied with the reporting requirement. See 17 C.F.R. § 230.258.

[37] See Securities Act of 1933 § 8(d), 15 U.S.C. § 77h(d).

promptly been corrected is entirely inconsistent with regulatory practices in the securities industry. (See Laporte Report at ¶ 9.)

In addition, although thousands of companies have been required to file periodic reports with the SEC under Section 12(g) and 15(d) of the Exchange Act and the rules promulgated thereunder, and the SEC has the power to revoke Section 12(g) registrations and to bring other enforcement actions for violation of the filing rules, it is highly unusual (indeed, we are aware of no case) for the SEC to permanently revoke a Section 12(g) registration or bring an enforcement action as a result of a single late periodic filing that was subsequently cured, absent other aggravating factors such as repeated failures to file.[38]

In fact, in deciding what type of sanction to impose for a Section 12(g) company's failure to file periodic reports, the SEC has repeatedly stated that it will consider, among other things, (1) the seriousness of the issuer's violations; (2) the isolated or recurrent nature of the violations; (3) the degree of culpability involved; (4) the extent of the issuer's efforts to remedy its past violations and ensure future compliance; and (5) the credibility of the issuer's assurances against future violations.[39] Although a failure to file required reports is a serious issue, revocation of a Section 12(g) registration is virtually unheard of, absent the presence of other aggravating factors.[40]

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[38] Similarly, we know of no cases the SEC brought an enforcement action seeking a stop order under Section 8(d) of the Securities Act to suspend effectiveness of a registration statement or other sanction for a single violation of the periodic reporting requirements of Section 15(d) of the Exchange Act, which are generally analogous to those of Rule 257. Moreover, the exchanges that police trading in registered securities do not permanently suspend trading for such violations without any opportunity to cure.

[39] *Gateway International Holdings, Inc.*, Securities Exchange Act Rel. No. 53907, 2006 SEC LEXIS 1288 (May 31, 2006).

[40] See *Scanner Technologies Corp.*, Initial Decisions Rel. No. 1059, 2016 SEC LEXIS 2822 (Sept. 14, 2016)(Revocation of registration is an appropriate sanction for repeated failures to file periodic reports, failure to heed delinquency letters sent by the Division of Corporate Finance, failure to participate in

E-Smart Technologies,Inc.,[41] is instructive. There, periodic reports due under Section 13(a) of the Exchange Act were filed an average of 990 days late. After a public hearing the court issued an Initial Decision that found e-Smart had violated the periodic reporting requirements of the Exchange Act and therefore, as a sanction, revoked the registration of its common stock. Following its review, the Commission remanded the proceeding to provide the court an opportunity to assess the sanction in light of the fact that e-Smart had remedied the late filings. On remand, the court reviewed the importance of periodic reporting requirements, stressing they "help ensure that the investing public receives current, accurate information concerning the operation and financial condition of the company.[42] It further noted that "The reporting requirements of the Exchange Act are the primary tool which Congress has fashioned for the protection of investors from negligent, careless, and deliberate misrepresentations in the sale of stock and securities."[43]

The court further noted that the Division believes revocation "continues to be the only appropriate sanction for e-Smart's repeated failure to comply with applicable periodic reporting requirements, even in light of the company's 'belated efforts' to bring itself into compliance."[44] "According to the Division, the public interest factors still weigh in favor of revocation, and even though e-Smart 'may have now satisfied' its filing obligations, this 'should not shield it from sanctions for its past reporting failures." Id.

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administrative proceedings to address any efforts to remedy their past violations and failure to give assurances against future violations).

41 Initial Decisions Rel. No. 272, 2005 SEC LEXIS 253 (February 3, 2005). E-Smart Technologies later reverted to its "egregious conduct" which was, in any event, appalling in its scope, and far removed from the single delayed filing here.

42 Id. at *5 citing, e.g., *SEC v. Kalvax, Inc.*, 425 F. Supp. 310, 315-16 (S.D.N.Y. 1975).

43 Id. citing *SEC v. Beisinger Indus. Corp.*, 552 F.2d 15, 18 (1st Cir. 1977).

44 Id.

The court noted the Division's warning that "lifting the sanction . . . would undermine the principal objective of the reporting requirements . . . [and to] hold otherwise would encourage noncompliance by issuers until they are actually faced with a revocation order and would be contrary to the interests of the investing public." Conversely, e-Smart argued that "no punitive sanction is necessary to protect investors because each and every periodic filing is now publicly available" and that imposing the sanction of revocation would be unprecedented and unwarranted, and would serve only to damage, and not protect, investors." Id. at *6.

Recognizing that the only issue was the appropriateness of the sanction (which was authorized under the Exchange Act), the court considered the public interest factors set forth in *Steadman v. SEC:*[45] (1) the egregiousness of respondent's actions, (2) the isolated or recurrent nature of the infraction, (3) the degree of scienter involved, (4) the sincerity of the respondent's assurances against future violations, (5) the respondent's recognition of the wrongful nature of its conduct, and (6) the likelihood of future violations.

Based on this analysis, and despite recognizing that the company's reporting violations were both "recurrent and egregious" (including being *four years* late in filing its annual report), and "deprived investors, as well as potential investors, of vital information regarding e-Smart's business operations and financial condition" (id.) the court concluded that "I find the likelihood of future violations absent and the need for a strong sanction no longer necessary." Therefore, the SEC's request for revocation of the registration of e-Smart's common stock was denied and the suspension of its registration

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[45] 603 F.2d 1126, 1140 (5th Cir. 1979).

was equally inappropriate. (Id. at *7.) The court stated: "The effect of any suspension . . . would be to harm investors, unfairly, rather than to serve any deterrent or remedial function now that the company has filed, albeit untimely, all its delinquent reports." (Id.)

This analysis applies here, although the conduct of Med-X was nothing close to that of e-Smart. Indeed, Med-X was late with only *one* report, was unaware of the violation until informed by the SEC, and then quickly remedied the mistake. There is no evidence it is likely to repeat the mistake. Under these circumstances, a permanent suspension would be manifestly unjust.

Indeed, a permanent suspension of Med-X's exemption under Rule 258 would have extremely serious and far-reaching consequences significantly disproportionate to the inadvertent misconduct. Suspending an issuer's Regulation A exemption under Rule 258 is an extremely serious sanction because, under SEC Securities Act Rules 262(a)(7) and 506(d)(1)(vii), the suspension results in "bad actor" disqualification of the issuer from relying on securities offering exemptions under both Regulation A and D for five years, absent a waiver from the SEC, making it very difficult for the issuer to engage in exempt offerings of securities to finance a growing business.[46]

Allowing a one-time failure to comply with a periodic reporting requirement of Rule 257 that has been cured by the issuer to serve as the basis for an order of permanent suspension of the Regulation A exemption under Rule 258 would have a chilling effect on the use of Regulation A for small offerings by the growing companies it was designed to help. (See Laporte Report at ¶ 11.) Companies would not use Tier 2 of Regulation A for small offerings if technical, even accidental, noncompliance with its reporting

[46] 17 C.F.R. § 230.262(a) 2015; and 17 C.F.R. § 230.506(d). A waiver from the SEC of this type is discretionary.

provisions would result in bad actor disqualification under Regulations A and D and permanent suspension of the exemption after the violation has been cured. (Id.)

This "chilling effect" is particularly poignant in that of the approximately 140 issuers that filed to conduct a Regulation A+ offering, only 81 offerings seeking $1.5 billion have been qualified since 2015.[47] And it appears only a small fraction of those companies actually have raised money: approximately $190 million.[48] A prevailing view in the industry is that although Regulation A+ has shown a lot of promise, it has not been as widely embraced as had been hoped, largely because of the burdens imposed by Tier 2 ongoing reporting.[49]

If Rule 258 is misapplied so that permanently suspending companies from the exemption as a result of a late filing becomes the order of the day, the stated intent of the JOBS Act to foster increased access to capital by small businesses (and more investment opportunities for their investors) will be stymied, as few companies are likely to risk a "bad actor" designation and its potentially ruinous consequences (blocking access to capital under Regulations A and D) as a penalty for an inadvertent delay in making a filing.

A permanent suspension from the exemption also is misguided when a late filing has been corrected because it potentially harms those investors who have provided capital

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47 Anzhela Knyazeva, "Regulation A+: What Do We Know So Far?" Securities and Exchange Commission, 2016, p. 1; and 2016 Small Business Forum, Remarks of Keith Higgins, at 17:00, *available at* https://www.sec.gov/video/webcast-archive-player.shtml?document_id=gbforum111716.

48 "Regulation A+: What Do We Know So Far?" p. 1.

49 2016 Small Business Forum, Remarks of Ryan Feit, at 1:11:30 ("A lot of companies are getting caught up on audited financials and on-going reporting"). Recommends modifying Tier 2 reporting obligations so that companies that are not being listed on exchanges do not have on-going reporting obligations. See also id. Remarks by Commissioner Kara M. Stein ("By some accounts the new capital raising options have not been widely adopted.").

to the company.[50] If a late filing virtually automatically triggers "bad actor" disqualification, and the company is limited in the ways it can raise capital, people who have already invested in an offering under the exemption may see their investment devalued as the company struggles to raise money as a "bad actor" (a misnomer for an inadvertent late filer). In this way, the investors as to whom the JOBS Act encourages participation could themselves be unnecessarily harmed. This is entirely inconsistent with the regulatory scheme of Regulation A+, and the discretion accorded regulators and this Court should be exercised to protect not only *potential* investors (who may benefit from timely periodic filings), but also *actual* investors in Med-X, who could be significantly harmed if there is a permanent suspension for an untimely filing.

CONCLUSION

For the foregoing reasons, and those to be developed at the hearing on this matter, Respondent Med-X respectfully submits that the SEC's request for a permanent suspension of the exemption under Regulation A should be denied and the temporary order suspending the exemption be vacated.

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50 E.g., E-Smart Technologies, Initial Decisions Rel. No. 272, 2005 SEC LEXIS 253 (February 3, 2005). ("The effect of any suspension, as with revocation, would be to harm investors, unfairly, rather than to serve any deterrent or remedial function *now that the company has filed, albeit untimely, all its delinquent reports.*" Emphasis added.).

Dated: January 4, 2016

Respectfully submitted,

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Counsel for Respondent Med-X, Inc.

APPENDIX 1

TO RESPONDENT'S PRE-HEARING BRIEF

In the Matter of MED-X, Inc.

Admin. Proceeding File No. 3-17551

Expert Report of

Gerald J. Laporte

December 28, 2016

Table of Contents

I. Qualifications

My qualifications include approximately 15 years at the U.S. Securities and Exchange Commission, approximately 20 years in law practice, and in leadership positions, as summarized below:

Current Position

- Securities Regulation Consultant, Laporte Consulting, 3154 Key Boulevard, Arlington, VA 22201

SEC Experience

- Chief, Office of Small Business Policy, SEC Division of Corporation Finance, 2002 to 2013.
    - Oversaw SEC legal and policy initiatives for smaller exempt securities offerings under Securities Act of 1933, including offerings under Regulations A and D, and investor disclosure rules for smaller public companies under the Securities Act of 1933 and Securities Exchange Act of 1934.
    - Played significant role in legislation and rulemaking in those areas, including initiatives in connection with passage and implementation of Title IV of the Jumpstart Our Business Startups (JOBS) Act of 2012, which directed the SEC to expand and update the rules for smaller public offerings under Regulation A.
- Counsel to SEC Commissioner Joe Grundfest, 1985–1987
- Special Counsel and Senior Special Counsel, Legislation and Investment Management Branch, Office of the SEC General Counsel, 1982–1985

Law Firm Experience (Washington, D.C.)

- Hogan & Hartson L.L.P., 1996–2002 (securities and corporate law practice focusing on real estate securities offerings and transactions and private equity fund formation)
- Patton Boggs L.L.P., 1988–1996 (securities and corporate law practice focusing on smaller public companies, private securities offerings, and municipal finance)

- Nutter McLennen & Fish, 1987–1988 (securities and corporate law practice focusing on venture capital, private equity fund formation, and Investment Company Act matters)
- Wilmer, Cutler & Pickering, 1977–1982 (securities, corporate and litigation law practice primarily involving real estate and oil and gas syndication, partnerships, litigation)

Leadership Positions

- Chairman, Corporation Finance and Securities Law Section, District of Columbia Bar, 1997–1998
- Vice Chairman, Securities Law and Disclosure Committee, National Association of Bond Lawyers, 1994–1996

II. Assignment

I am being compensated for my work in this matter at an hourly rate of [redacted] per hour. My compensation does not depend upon the opinions that I deliver or the outcome of this matter. I have been assisted by members of the staff of Cornerstone Research, who worked under my direction.

I have been retained by Moyle LLC on behalf of Respondent Med-X, Inc. in this matter.

My opinions in the matter are based on my analysis of case documents and other publicly available documents, interpreted in light of my experience during 11 years as Chief of the Office of Small Business Policy (the "Small Business Office"), SEC Division of Corporation Finance, and my 38 years of experience in the securities industry on the following issue:

Whether a permanent suspension of an exemption to registration under Regulation A pursuant to Rule 258 is, in the case of a company that has corrected a single delinquent periodic filing and otherwise has no record of delinquent filings or other extenuating circumstances, consistent with (a) regulatory custom and practice in addressing late periodic report filings, and (b) the statutory scheme and the purpose and intent of Section 401 of the JOBS Act?

Appendix A contains a list of the materials that either I, directly, or Cornerstone Research, working under my direction, considered, in preparing this report.

III. Summary of Opinions

1. As applied to a company that has corrected any failure to file a required report, and in the absence of other periodic report filing deficiencies or other extenuating circumstances, a permanent suspension of an exemption to registration under Regulation A pursuant to Rule 258 would be (a) inconsistent with regulatory practices and (b) inconsistent with the statutory scheme and the purpose and intent of Section 401 of the JOBS Act.

   A permanent suspension of an exemption under Regulation A for a delinquent filing that has been remedied, absent extremely serious extenuating circumstances, would have a chilling effect on the use of Regulation A by small companies to raise capital, and could potentially harm investors who have provided capital to the company.

Reasons for Opinion

1. The Jumpstart Our Business Startups Act ("JOBS Act") was intended to encourage capital raising by small businesses by easing various securities regulations. While at the SEC, I was involved in the rulemaking process that later culminated in the adoption of Regulation A+. As required by Title IV of the Act, the SEC amended Regulation A in 2015 to create an expanded exemption from registration under the Securities Act, in order to enhance the ability of smaller companies to raise money.[1]
2. The new Tier 2 of Regulation A ("Regulation A+" is a term often used to refer to the 2015 rules expanding old Regulation A) "allows companies to offer and sell securities to the public, but with more limited disclosure requirements than what you currently would expect from publicly reporting companies. In comparison to registered offerings, smaller companies in earlier stages of development may be able to use this rule to more cost-effectively raise money."[2]

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[1] Jumpstart Our Business Startups (JOBS) Act of 2012, Pub. L. 112-106, April 5, 2012; and "Investor Bulletin: Regulation A," Securities and Exchange Commission, July 8, 2015, available at https://www.sec.gov/oiea/investor-alerts-bulletins/ib_regulationa.html, accessed on December 20, 2016.

[2] "Investor Bulletin: Regulation A."

3. Of course, while the JOBS Act and the rules implemented thereunder are designed to facilitate capital formation by smaller businesses, the Act and regulators must also address investor protection, market integrity and market confidence. [3] The rules under Tier 2 of Regulation A adopted by the SEC that went into effect in June 2015 are designed to increase the options available to small businesses to publicly raise capital, including lessening the periodic reporting requirements that would be triggered by full registration of a securities offering under the Securities Act, while instilling market confidence.[4]
4. The Form 1-A Offering Statement (which includes an offering circular) is the primary disclosure document in Regulation A offerings. It contains a wealth of information to assist investors in learning about the company they are investing in, such as information about the offering and the securities offered, the risks of the investment, use of proceeds, any selling shareholders, and the company's business, management, performance, plans and financial statements.[5]
5. Companies offering securities under Tier 2 of Regulation A (wherein they offer up to $50 million in securities during any 12-month period) also are subject to ongoing reporting requirements under Rule 257: "Like public companies that regularly disclose their financial results, companies raising money under Tier 2 will also file regular reports with the SEC. However, unlike the quarterly reporting that you may be use [sic] to, Tier 2 companies are only required to file a semiannual and annual report as well as interim current reports upon the occurrence of certain enumerated events."[6] These reports are the 1-K (annual report), 1-SA (semiannual report), and 1-U (current report).[7]

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[3] "2016 Government-Business Forum on Small Business Capital Formation Opening Remarks by Commissioner Kara M. Stein," Public Statement, November 17, 2016, available at https://www.sec.gov/news/statement/stein-opening-remarks-small-business-forum.html, accessed on December 20, 2016 ("[Reg A+ and other] initiatives were adopted with the purpose of increasing the options available to small businesses to raise capital. These initiatives also incorporated the Commission's consideration of investor protection, market integrity and market confidence.").

[4] "2016 Government-Business Forum on Small Business Capital Formation Opening Remarks by Commissioner Kara M. Stein."

[5] "Investor Bulletin: Regulation A."

[6] "Investor Bulletin: Regulation A"; and 17 C.F.R. § 230.257 2015.

[7] In considering the proposed revisions to Regulation A, and those regarding periodic reporting in particular, the SEC noted "We are mindful that an ongoing reporting regime that is suitable for one type of entity and its investor

6. The SEC Small Business Office and securities practitioners recognize that the rules as implemented by the SEC are not always clear. Indeed, the purpose of the Small Business Office is, to some extent, to assist companies and businesses in navigating their way through various rules. This exercise itself involves some discretion. Indeed, it is not unusual for regulators, securities practitioners, and companies to have legitimate questions about how new rules work. As to the new Regulation A+, they are not simple questions with simple answers.[8] New and sometimes ambiguous rules can and do cause confusion, and how the confusion is addressed can impact the effectiveness of the Act and the rules promulgated thereunder.
7. Because filing requirements such as those under Rule 257 are somewhat complex, and because small businesses often lack robust legal and compliance programs, it should be no surprise that inadvertent filing errors occur. In adopting the periodic reporting requirements in Rule 257, the SEC tried to achieve a balance between the costs of those requirements to smaller companies and their benefits to investors.
8. Rule 258, which preceded Regulation A+, was considered an important tool to suspend an issuer's ability to rely on the Regulation A exemption when a company failed to comply with a term, condition or requirement of Regulation A. This was before the addition of periodic reporting requirements to Regulation A with the adoption of the current version of Rule 257. Rule 258 has been interpreted by the SEC, the courts and securities practitioners as being remedial, and not punitive, in nature. Under this interpretation, once a Rule 257 reporting violation has been remedied, there is no basis for a permanent suspension under Rule 258 or even proceedings addressing a permanent

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base may prove too onerous for another entity or provide its investors with more or more frequent information than they necessarily need or seek, resulting in undue costs to the issuer." See "Proposed Rule Amendments for Small and Additional Issues Exemptions Under Section 3(b) of the Securities Act, SEC Release Nos. 33-9497; 34-71120; 39-2493," December 18, 2013, at pp. 136–37, available at https://www.sec.gov/rule/proposed/2013/33-9497.pdf, accessed on December 20, 2016.

[8] "2016 Government-Business Forum on Small Business Capital Formation Opening Remarks by Commissioner Kara M. Stein" ("Ultimately, we have to ask how our rules should work for all small businesses and their investors. These are not simple questions with simple answers.").

suspension, even when a temporary suspension was appropriate.[9] Under an analogous provision in Section 8(d) of the Securities Act governing stop orders when a Securities Act registration statement is not updated to reflect material current information, the stop order is not permanent and ceases to be effective once the registration statement is updated to reflect the information required by the SEC.[10]

9. Permanently suspending an exemption from registration or issuing a stop order for a registered offering for a single delayed periodic filing is entirely inconsistent with regulatory practices in the securities industry. In addition, although thousands of companies have been required to file periodic reports with the SEC under Section 12(g) and 15(d) of the Exchange Act and the rules promulgated thereunder, and the SEC has the power to revoke Section 12(g) registrations and to bring other enforcement actions for violation of the filing rules, I am aware of no case where the SEC has permanently revoked a Section 12(g) registration or brought another enforcement action as a result of a single late periodic filing that was subsequently cured, absent other aggravating factors such as repeated failures to file. Similarly, I am aware of no cases where the SEC brought an enforcement action seeking a stop order under Section 8(d) of the Securities Act to suspend effectiveness of a registration statement or other sanction merely for violation of the periodic reporting requirements of Section 15(d) of the Exchange Act, which are generally analogous to the Rule 257 reporting requirements (indeed, the Rule 257 periodic filing requirements are in large part modeled on the Section 15(d) periodic filing requirements). Moreover, the exchanges that police trading in registered securities do not permanently suspend trading for such violations. In fact, in deciding what type of sanction to impose for a Section 12(g) company's failure to file periodic reports, the SEC has repeatedly stated that it will consider, among other things, (1) the seriousness of the issuer's violations; (2) the isolated or recurrent nature of the violations; (3) the degree of culpability involved; (4) the extent of the issuer's efforts to remedy its past violations and

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[9] Nothing in the language of Rule 258 or its history provides a basis for – much less *requires* -- suspending a Regulation A exemption for a historic failure to comply with a periodic reporting requirement of Regulation A once the issuer has complied with the reporting requirement. See 17 C.F.R. § 230.258 2015.

[10] Securities Act of 1933 § 8(d), 15 U.S.C. § 77h(d).

ensure future compliance; and (5) the credibility of the issuer's assurances against future violations.[11] Although a failure to file required reports is without doubt a serious issue, revocation of a Section 12(g) registration is virtually unheard of, absent the presence of one of these other aggravating factors.[12]

10. In fact, suspending an issuer's Regulation A exemption under Rule 258 is an extremely serious sanction because, under SEC Securities Act Rules 262(a)(7) and 506(d)(1)(vii), the suspension results in "bad actor" disqualification of the issuer from relying on securities offering exemptions under both Regulation A and D for five years, absent a waiver from the SEC, making it very difficult for the issuer to engage in exempt offerings of securities to finance a growing business.[13] A waiver from the SEC of this type is discretionary and not necessarily simple to obtain.
11. In my experience, allowing a historic failure to comply with a periodic reporting requirement of Rule 257 that has been cured by the issuer to serve as the basis for an order of permanent suspension of the Regulation A exemption under Rule 258 would:
    a. have a chilling effect on the use of Regulation A for small offerings by the growing companies it was designed to help; and
    b. be contrary to the policy of Congress in directing the Commission to expand significantly the accommodations in Regulation A in the Title IV of the Jumpstart Our Business Startups ("JOBS") Act of 2012 and the Commission's policy in adopting rules to implement that mandate.

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[11] "In the Matter of Gateway International Holdings, Inc. and Lawrence A. Consalvi. Opinion of the Commission, Section 12(j) Proceeding, Cease-And-Desist Proceeding," May 31, 2006.

[12] "In the Matter of Scanner Technologies Corp., Seville Ventures Corp., Starinvest Group, Inc., and The Digital Development Group Corp, Initial Decision of Default as to Three Respondents," September 14, 2016. Revocation of registration is an appropriate sanction for repeated failures to file periodic reports, failure to heed delinquency letters sent by the Division of Corporate Finance, failure to participate in administrative proceedings to address any efforts to remedy their past violations and failure to give assurances against future violations.

See also "In the Matter of E-Smart Technologies, Inc., f/k/a Plainview Laboratories, Inc. Initial Decision on Remand," February 3, 2005. Multiple periodic reports were filed an average of 990 days late. Nonetheless, the court determined that "despite the egregiousness and recurrent nature of e-Smart's violations, I find the likelihood of future violations absent and the need for a strong sanction no longer necessary." Therefore, the SEC's request for revocation of the registration of e-Smart's common stock was denied and the suspension of its registration was equally inappropriate.

[13] 17 C.F.R. § 230.262(a) 2015; and 17 C.F.R. § 230.506(d) 2015.

Companies would not use Tier 2 of Regulation A for small offerings if technical, even accidental, noncompliance with its reporting provisions would result in bad actor disqualification under Regulations A and D and permanent suspension of the exemption after the violation has been cured.

12. This "chilling effect" is particularly poignant in that of the approximately 140 issuers that filed to conduct a Regulation A+ offering, only 81 offerings seeking $1.5 billion have been qualified since 2015.[14] And it appears only a small fraction of those companies actually have raised money: approximately $190 million.[15] A prevailing view in the industry is that although Regulation A+ has shown a lot of promise, it has not been as widely embraced as had been hoped, largely because of the burdens imposed by Tier 2 ongoing reporting.[16] If Rule 258 is misapplied so that permanently suspending companies from the exemption as a result of a late filing becomes the order of the day, the stated intent of the JOBS Act to foster increased access to capital by small businesses (and more investment opportunities for their investors) will be stymied, as few companies are likely to risk a "bad actor" designation and its potentially ruinous consequences (blocking access to capital under Regulations A and D) as a penalty for an inadvertent delay in making a filing.
13. A permanent suspension from the exemption also is misguided when a late filing has been corrected because it potentially harms those investors who have provided capital to the company. If a late filing virtually automatically triggers "bad actor" disqualification, and the company is limited in the ways it can raise capital, people who have already invested in an offering under the exemption may see their investment devalued as the

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[14] Anzhela Knyazeva, "Regulation A+: What Do We Know So Far?" Securities and Exchange Commission, 2016, p. 1; and Remarks of Keith Higgins, "Government-Business Forum on Small Business Capital Formation," November 17, 2016, at 17:00, available at https://www.sec.gov/video/webcast-archive-player.shtml?document_id=gbforum111716, accessed on December 20, 2016.

[15] "Regulation A+: What Do We Know So Far?" p. 1.

[16] Remarks of Ryan Feit, "Government-Business Forum on Small Business Capital Formation," at 1:11:30 ("A lot of companies are getting caught up on audited financials and on-going reporting"). Recommends modifying Tier 2 reporting obligations so that companies that are not being listed on exchanges do not have on-going reporting obligations. See also "2016 Government-Business Forum on Small Business Capital Formation Opening Remarks by Commissioner Kara M. Stein" ("By some accounts the new capital raising options have not been widely adopted.").

company struggles to raise money as a "bad actor" (a misnomer for an inadvertent late filer). In this way, the investors as to whom the JOBS Act encourages participation could themselves be unnecessarily harmed. In my experience at the SEC, this is entirely inconsistent with the regulatory scheme of Regulation A+, and the discretion accorded regulators and this Court should be exercised to protect not only *potential* investors (who may benefit from timely periodic filings), but also *actual* investors in Med-X, who could be significantly harmed if there is a permanent suspension for an untimely filing.[17]

Gerald J. Laporte

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[17] "In the Matter of E-Smart Technologies, Inc., f/k/a Plainview Laboratories, Inc. Initial Decision on Remand" ("The effect of any suspension, as with revocation, would be to harm investors, unfairly, rather than to serve any deterrent or remedial function *now that the company has filed, albeit untimely, all its delinquent reports.*" Emphasis added.).

Dated: December 28, 2016

Gerald J. Laporte

Gerald J. Laporte

Appendix A

Materials Considered List for Expert Report of Gerald J. Laporte

Correspondence

Email from Kevin P. O'Rourke (SEC) to Mark J. Richardson, Esq. (Richardson & Associates), "In the Matter of Med-X, Inc. File No. 3-17551," October 28, 2016.
Email from Suzanne Haynes (SEC) to Dr. David Toomey (Med-X, Inc.), "Med-X, Inc. Offering Statements on Form 1-A Filed August 27, 2015 File No. 024-10472," September 28, 2015, DIV EX 2 DIV000144 – DIV000145.
Letter from Brent J. Fields (SEC) to Dr. David Toomey (Med-X, Inc.), "In the Matter of Med-X, Inc.," September 16, 2016, DIV EX 10 DIV000242.
Letter from Brent J. Fields (SEC) to Mark J. Richardson, Esq. (Richardson & Associates), "In the Matter of Med-X, Inc.," September 16, 2016, DIV EX 10a DIV000243.
Letter from Mark J. Richardson (Richardson & Associates) to Kevin P. O'Rourke et al (SEC), "In the Matter of Med-X, Inc. Administrative Proceeding File Number 3-17551," November 7, 2016, DIV EX 18 DIV000575 – 6.
Letter from Mark J. Richardson (Richardson & Associates) to SEC, "Med-X —Request for Hearing Under Rule 258(b)(2) to Vacate Order Temporarily Suspending Exemption Pursuant to Section 3(b) of the Securities Act of 1933, as Amended, and Regulation A, Entered September 16, 2016," September 21, 2016, DIV EX 13 DIV000568.
Letter from Matthew Mills (Med-X, Inc.) to Suzanne Haynes (SEC), "Med-X, Inc. – Request for Qualification DIV EX4 Offering Statement on Form 1-A Filed August 27, 2015 File No. 024-10472," October 30, 2015, DIV EX 4 DIV000227.
Letter from Tim Henseler (SEC) to Dr. David E. Tommey (Med-X, Inc.), "Med-X, Inc. File No. 024-10472," August 30, 2016, DIV EX 7 DIV00234.
Voicemail from Mark Richardson, DIV EX 8.
Voicemail from SEC to Mark Richardson, January 29, 2016.

SEC Filings

Med-X, Inc., SEC Form 253G2, filed on July 11, 2016, DIV EX 6 DIV000229 – 233.
Med-X, Inc., SEC Form 1-A, filed on August 27, 2015, DIV EX 1 DIV000001 – 143.
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Note: In addition to the materials on this list, I considered all materials cited in my report to form my opinions.

CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing document were served on the following, this 4th day of January 2016, in the manner indicated below:

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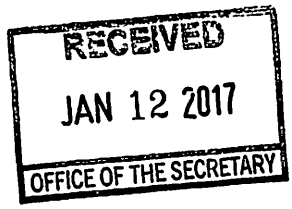

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RE: Med-X, Inc. Admin. Pro. File No. 3-17551

No Pages (incl. cover): 33

Faxed on Jan. 4, 2017
w/o attachment.
J. Moyle