SEPTEMBER 2017

FINAL REPORT OF THE

Securities and Exchange Commission Advisory Committee on Small and Emerging Companies

SECURITIES AND EXCHANGE COMMISSION
ADVISORY COMMITTEE ON
SMALL AND EMERGING COMPANIES

Washington, DC 20549-3628

September 21, 2017

The Honorable Jay Clayton
Chairman
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1070

Dear Chairman Clayton:

The Securities and Exchange Commission organized the Advisory Committee on Small and Emerging Companies to provide the Commission with advice on the Commission's rules, regulations, and policies with regard to its mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation, as they relate to the following:

(1) capital raising by emerging privately held small businesses and publicly traded companies with less than $250 million in public market capitalization;

(2) trading in the securities of such businesses and companies; and

(3) public reporting and corporate governance requirements to which such businesses and companies are subject.

Established voluntarily by the SEC in 2011 in accordance with the Federal Advisory Committee Act, the Committee's third two-year term expires on September 24, 2017. We are pleased that Congress recognized the importance of the Committee's work in December 2016 by adding a provision to the Securities Exchange Act that establishes a similar advisory committee on a permanent basis. We look forward to the continuation of our worthy mission by the Small Business Capital Formation Advisory Committee.

We have prepared this Final Report to memorialize the recommendations made by the Committee over the past six years and to identify areas for continued focus. We each stand ready to lend any further assistance in carrying out these recommendations.

Thank you for the opportunity to serve, and for the generous support provided by the Commission and staff throughout.

Respectfully submitted on behalf of the Advisory Committee,

Stephen M. Graham	Sara Hanks
Committee Co-Chair	Committee Co-Chair

<u>Current Members of the Advisory Committee</u>
Robert Aguilar
Xavier Gutierrez
Brian Hahn
Jenny Kassan
Catherine V. Mott
Jonathan Nelson
Patrick Reardon
Lisa Shimkat
Annemarie Tierney
J.W. Verret (appointed June 1, 2017)*
Gregory C. Yadley
Laura Yamanaka

<u>Non-voting members</u>
Michael Pieciak
Joseph Shepard (appointed May 9, 2017)

Enclosure
cc: Commissioner Michael S. Piwowar
Commissioner Kara M. Stein
William H. Hinman
Robert Evans
Elizabeth Murphy
Sebastian Gomez Abero
Julie Z. Davis

*Mr. Verret abstained from voting on this report.

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I. History of the SEC Advisory Committee on Small and Emerging Companies

In 2011, the Commission formed the Advisory Committee on Small and Emerging Companies (ACSEC) to focus on interests and priorities of small business and smaller public companies.[1] The ACSEC was preceded by an SEC Advisory Committee on Smaller Public Companies established on December 16, 2004, to assist the Commission in examining the impact of the Sarbanes-Oxley Act and other aspects of the federal securities laws on smaller public companies.[2] That Advisory Committee delivered its Final Report on April 23, 2006.[3]

As SEC Chairman Mary Schapiro said at the first ACSEC meeting on October 31, 2011:

> The regulatory decisions affecting small businesses must be informed by the real world experience of people who are building a business, raising capital, and complying with regulations. That makes your work, providing counsel to our efforts and providing a conduit through which others can contribute, vitally important. Your experience will become a vehicle for better understanding on our part of the impact a new regulation or changes to old rules might have.
>
> The structure of this Advisory Committee is one sign of how seriously we take this task. First, it's composed of a team from a variety of backgrounds with differing perspectives that will be able to examine the issues from all angles and offer opinions based not just on what has worked in the past, but how things can work better going forward. And second, rather than being brought together to write a single report framed by a single series of issues or static marketplace conditions, the Committee is structured to provide ongoing input to the Commission. You can adjust priorities and the guidance you give us as marketplace and regulatory changes occur.[4]

In accordance with the Federal Advisory Committee Act, the ACSEC Charter adopted on October 4, 2011 provided for a two-year term. The Commission renewed the Committee for an additional two-year term on September 24, 2013 and again on September 24, 2015. The latest ACSEC Charter and Bylaws are included in Appendix A.

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1 Press release "SEC Announces Formation of Advisory Committee on Small and Emerging Companies," September 13, 2011, is available at https://www.sec.gov/news/press/2011/2011-182.htm. Additional information on the ACSEC is available at https://www.sec.gov/spotlight/advisory-committee-on-small-and-emerging-companies.shtml.

2 Press release "SEC Establishes Advisory Committee to Examine Impact of Sarbanes-Oxley Act on Smaller Public Companies," December 16, 2004, is available at https://www.sec.gov/news/press/2004-174.htm. Additional information on the SEC Advisory Committee on Smaller Public Companies is available at https://www.sec.gov/info/smallbus/acspc.shtml.

3 The Final Report of the Advisory Committee on Smaller Public Companies to the Securities and Exchange Commission, April 23, 2006, is available at https://www.sec.gov/info/smallbus/acspc/acspc-finalreport.pdf.

4 Transcript of the October 31, 2011, ACSEC meeting is available at https://www.sec.gov/info/smallbus/acsec/acsec103111-transcript.pdf.

II. Recommendations

Between 2011 and 2017, the ACSEC met 22 times, and 35 speakers from outside of the Commission gave presentations during these meetings.[5] The ACSEC adopted the following 18 recommendations, copies of which are included in Appendix B.

1. Recommendation Regarding Relaxing or Modifying Restrictions on General Solicitation in Certain Private Offerings of Securities (January 6, 2012)

2. Recommendations Regarding Registration Requirements and Reporting Obligations under Securities Exchange Act of 1934 (February 1, 2012)

3. Recommendation Regarding Improving Access to Public Markets for Small and Emerging Companies (February 1, 2012)

4. Recommendation Regarding Separate U.S. Equity Market for Securities of Small and Emerging Companies (February 1, 2013)

5. Recommendations Regarding Trading Spreads for Smaller Exchange-Listed Companies (February 1, 2013)

6. Recommendation Regarding Specialized Disclosure Requirements (February 1, 2013)

7. Recommendations Regarding Disclosure and Other Requirements for Smaller Public Companies (February 1, 2013)

8. Recommendation on the Proposed Amendments to Regulation D, Form D, and Rule 156 under the Securities Act (September 17, 2013)

9. Recommendations Regarding the Accredited Investor Definition (March 9, 2015)

10. Recommendation Regarding the "4(1½) Exemption" (June 11, 2015)

11. Recommendation to Modernize Rule 147 under the Securities Act of 1933 (September 23, 2015)

12. Recommendations about Expanding Simplified Disclosure for Smaller Issuers (September 23, 2015)

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5 Agendas, transcripts, presentations, recommendations, and other materials from each of the ACSEC meetings are available at https://www.sec.gov/spotlight/advisory-committee-on-small-and-emerging-companies.shtml.

13. Recommendations Regarding the Regulation of Finders and Other Intermediaries in Small Business Capital Formation Transactions (September 23, 2015)

14. Recommendations Regarding the Accredited Investor Definition (July 20, 2016)

15. Recommendation Regarding Corporate Board Diversity (February 16, 2017)

16. Recommendations Regarding Secondary Market Liquidity for Regulation A Securities (May 15, 2017)

17. Recommendation Regarding the Regulation of Finders and other Intermediaries in Small Business Capital Formation (May 15, 2017)

18. Recommendation Regarding Securities Act Rule 701 (September 21, 2017)

III. Changes in the Securities Landscape since the Establishment of the ACSEC

When the Commission formed the ACSEC in 2011, small businesses had fewer options for raising capital. If a business wanted to conduct a widespread offering of its securities using general solicitation, frequently it would have been required to register the offering with the Commission.[6] Businesses not needing to engage in a general solicitation likely would have conducted an offering under Rule 506(b), which limited purchasers to accredited investors and no more than 35 sophisticated investors.[7] Businesses that were not ready to conduct a registered offering and did not have access to accredited or sophisticated investors had limited options.

While registered offerings and exempt offerings under Rule 506(b) continue to play the dominant role in the current market, the exempt offering framework has been expanded to allow new capital raising avenues for small businesses and updated to reflect developments in modern business practices and technology. The ACSEC's recommendations played a role in many of the changes leading to the current framework.

On April 5, 2012, the Jumpstart Our Business Startups (JOBS) Act was enacted. A few years later, on December 4, 2015, the Fixing America's Surface Transportation (FAST) Act was enacted. These legislative changes and Commission rulemakings led to significant changes to how small businesses may raise capital today, including:

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6 While a couple exemptions from registration permitted general solicitation, including former Regulation A and Rule 504(b)(1)(i), (ii) or (iii), offerings were infrequently conducted under those exemptions.

7 Rule 506(b) is a safe harbor for offerings under what then was Section 4(2) (now Section 4(a)(2)). Other exemptions from registration that a business could have used to raise capital in the United States included Regulation A, Rules 504 and 505 of Regulation D, and intrastate offerings under Section 3(a)(11) and Rule 147. Offerings, however, were infrequently conducted under those exemptions.

- New Section 4(a)(7) of the Securities Act to exempt certain secondary sales of securities that are purchased by an accredited investor;[8]
- Amendments to Rule 506 of Regulation D to permit the use of general solicitation where the issuer takes reasonable steps to verify that each purchaser is an accredited investor and the issuer had a reasonable belief that each purchaser was an accredited investor at the time of the sale of securities;[9]
- Amendments to Regulation A to, among other things, create two tiers of public offerings, each with increased offering amounts – Tier 1 for offerings of up to $20 million in a 12-month period; and Tier 2 for offerings of up to $50 million in a 12-month period;[10]
- New Regulation Crowdfunding to enable businesses to offer and sell securities on an internet-based platform through an intermediary that is a registered broker-dealer or registered funding portal;
- Amendments to revise the rules related to the thresholds for registration, termination of registration, and suspension of reporting under Section 12(g) of the Securities Exchange Act of 1934;[11]
- Amendments to the intrastate offering framework to update and modernize how businesses can raise money within their state;[12] and
- Amendments to Rule 504 to increase the aggregate amount of securities that may be offered and sold from $1 million to $5 million.

For the new and amended exemptions, it is too early to assess the extent to which these changes will affect capital formation over the long run. However, we have seen some evidence that the market is changing.[13]

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8 The Committee's recommendation regarding the "4(1½) Exemption," dated June 11, 2015, is available at https://www.sec.gov/info/smallbus/acsec/acsesc-4a-one-and-a-half-recommendation.pdf.

9 The Committee's recommendation regarding relaxing or modifying restrictions on general solicitation in certain private offerings of securities is available at https://www.sec.gov/info/smallbus/acsec/acsec-recommendation-010612.pdf.

10 The Committee's recommendation regarding Regulation A and improving access to the public markets for small and emerging companies, dated February 1, 2012, is available at https://www.sec.gov/info/smallbus/acsec/acsec-recommendation-020112-improve-access.pdf.

11 The Committee's recommendation regarding registration requirements and reporting obligations under the Securities Exchange Act of 1934, dated February 1, 2012, is available at https://www.sec.gov/info/smallbus/acsec/acsec-recommendation-020112-registration.pdf.

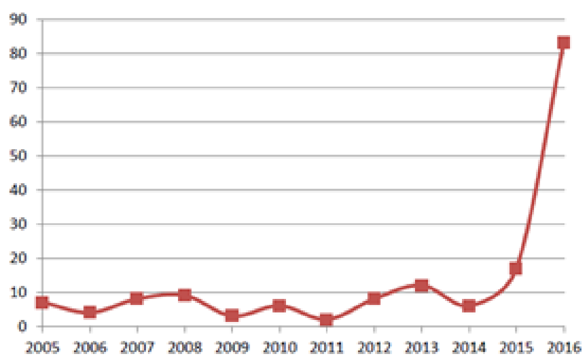
12 The Committee's recommendation to modernize Rule 147 under the Securities Act of 1933, dated September 23, 2015, is available at https://www.sec.gov/info/smallbus/acsec/acsec-recommendation-modernize-rule-147.pdf.

13 The Committee's discussion about "Data on the size and scope of small business capital raising through unregistered securities offerings" is reflected on pages 35-78 of the transcript of the February 25, 2016,

From the adoption of Rule 506(c) on September 23, 2013, until December 31, 2016, almost $108 billion was reported sold in reliance on Rule 506(c). During that same period, $4.1 trillion was reported sold in reliance on 506(b).[14] So while the reported dollar amounts raised under 506(c) are not insignificant, issuances claiming the new exemption have accounted for only 3% of the reported capital raised pursuant to Rule 506 since becoming effective.[15]

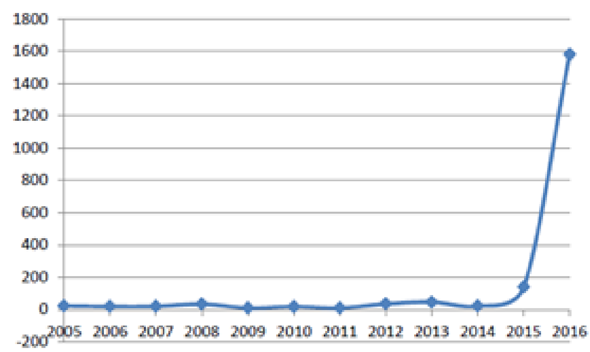
With respect to Regulation A, the number of qualified offerings and the aggregate amount sought in Regulation A offerings substantially increased relative to the pre-amendment numbers. According to the DERA Access to Capital and Market Liquidity Report, "early signs indicate that amended Regulation A may offer a potentially viable public offering on-ramp for smaller issuers as an alternative to a traditional registered IPO and offer either an alternative or a complement to other securities offering methods that are exempt from Securities Act registration."[16] The following graphs are from the DERA Report:

Number of qualified Regulation A offerings, 2005-2016



Source: DERA analysis

Aggregate amounts sought in qualified Regulation A offerings, 2005-2016



Source: DERA analysis

Effective since May 16, 2016, the data available so far on Regulation Crowdfunding is limited. However, initial evidence shows that some small pre-revenue growth firms are beginning to use crowdfunding as a securities offering method.[17]

ACSEC meeting, which is available at https://www.sec.gov/info/smallbus/acsec/acsec-transcript-022516.pdf. See also "Access to Capital and Market Liquidity Report to Congress by the Staff of the Division of Economic and Risk Analysis of the U.S. Securities and Exchange Commission"(August 2017), available at https://www.sec.gov/files/access-to-capital-and-market-liquidity-study-2017.pdf ("DERA Access to Capital and Market Liquidity Report").

14 DERA Access to Capital and Market Liquidity Report at 6, 65.

15 Id.

16 Id, at 47-53.

17 See Ivanov, Vladimir and Knyazeva, Anzhela, "U.S. securities-based crowdfunding under Title III of the JOBS Act" (Feb. 28, 2017) available at https://www.sec.gov/files/2017-03/RegCF_WhitePaper.pdf; see also DERA Access to Capital and Market Liquidity Report at 59.

As the exempt market continues to grow and evolve, it will be important for the Commission to continue to gather and examine data that assesses the effectiveness of these new exemptions. ACSEC members have repeatedly raised the lack of reliable data covering the exempt markets as an impediment to informed policy-making.

IV. Recommended Areas for Continued Focus

While a number of the ACSEC recommendations have been implemented, there are others that remain outstanding. We recommend these be areas of continued focus for the Commission, SEC staff, and the future Small Business Capital Formation Advisory Committee.

1. Facilitating Exempt Offerings

A. Finders

Identifying potential investors is one of the most difficult challenges for small businesses trying to raise capital. However, only 13% of Regulation D offerings reported using a financial intermediary, such as a broker-dealer or finder, between 2009 and 2012. This is due, in part, to (a) the legal costs and risks involved in undertaking small transactions which make them unattractive to registered brokers, and (b) the reluctance of those not registered as broker-dealers to provide assistance because of the ambiguities in the definition of "broker." This has led to significant uncertainty in the marketplace about what activities require broker-dealer registration under Section 15 of the Securities Exchange Act of 1934. Companies seeking to comply with the rules often find it hard to determine under what circumstances they can engage a "finder" or online platform that is not registered as a broker-dealer. Due to the complexities and expense for small brokers to comply with the laws, there is widespread non-compliance by those that should be registered. Therefore, we believe the 13% rate at which financial intermediaries are reportedly used is understated and misleading data.

As documented in the findings of an American Bar Association Business Law Section Task Force in 2005,[18] recognized by the SEC Advisory Committee on Smaller Public Companies in 2006,[19] and endorsed in numerous Final Reports of the Congressionally-mandated annual SEC

18 The Report and Recommendations of the American Bar Association Business Law Section Task Force on Private Placement Broker-Dealers, June 20, 2005, is available at https://www.sec.gov/info/smallbus/2009gbforum/abareport062005.pdf.

19 The Final Report of the SEC Advisory Committee on Smaller Public Companies, Recommendation IV.P.6, April 23, 2006, is available at https://www.sec.gov/info/smallbus/acspc/acspc-finalreport.pdf.

Government-Business Forum on Small Business Capital Formation,[20] there are a number of considerations when it comes to the topic of finders:

a) Failure to address the regulatory issues surrounding finders and other private placement intermediaries impedes capital formation for smaller companies,

b) The current broker-dealer registration system and FINRA membership process is a deterrent to meaningful oversight,

c) Appropriate regulation would enhance economic growth and job creation, and

d) Solutions are achievable through Commission leadership and coordination with FINRA and the states.

The ACSEC first made recommendations to the Commission urging action on this matter in 2015.[21] Most recently, on May 15, 2017, the Committee recommended:[22]

> The Commission adopt rules in the near future to provide regulatory certainty for finders, private placement brokers, and platforms not registered as broker-dealers involved in primary and secondary transactions of unregistered securities. Pending adoption of any new rules, staff in the Division of Trading and Markets should with all deliberate speed bring clarity and certainty in this area by promulgating appropriate guidance.

The Committee considers this issue to be critical for many aspects of capital formation, and is disappointed that, despite repeated meetings and conversations by interested members of our Committee and the securities bar with senior staff in the Division of Trading and Markets and longstanding requests, the Commission has not taken actions to help address the concerns.[23] We urge the Commission to take prompt action on this matter and encourage the future Small Business Capital Formation Advisory Committee to carefully monitor this situation.

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20 The Final Reports from the annual Government-Business Forum on Small Business Capital Formation since 1993 are available at https://www.sec.gov/info/smallbus/sbforum.shtml.

21 The Committee's recommendation regarding the regulation of finders and other intermediaries in small business capital formation transactions, dated September 23, 2015, is available at https://www.sec.gov/info/smallbus/acsec/acsec-recommendations-regulation-of-finders.pdf.

22 The Committee's recommendation regarding the regulation of finders and other intermediaries in small business capital formation transactions, dated May 15, 2017, is available at https://www.sec.gov/info/smallbus/acsec/acsec-recommendation-051517-finders.pdf.

23 The Division of Trading and Markets did issue a no-action letter dated January 31, 2014, revised February 4, 2014, addressed to Faith Colish and other interested members of the securities bar. This letter addresses persons assisting in transfers of control of smaller businesses but does not provide any relief for capital raising by smaller companies. The no-action letter is available at https://www.sec.gov/divisions/marketreg/mr-noaction/2014/ma-brokers-013114.pdf.

B. Accredited Investor Definition

While new and enhanced exemptions have become available in the past several years, the provisions in Rule 506 of Regulation D under the Securities Act of 1933 continue to be the most widely used. In 2016, issuers utilizing Regulation D raised over $1.32 trillion,[24] an amount comparable to what was raised in registered offerings. The "accredited investor" definition is a centerpiece of Regulation D intended to encompass persons whose financial sophistication and ability to sustain the risk of loss of investment or ability to fend for themselves render the protections of the Securities Act's registration process unnecessary.

The Dodd Frank Act of 2010 directs the Commission to review the accredited investor definition as it relates to natural persons every four years to determine whether the definition should be modified or adjusted. In December 2015, the SEC staff published a report in connection with that review.[25] In 2015 and 2016 the Committee made recommendations to the Commission regarding the accredited investor definition.[26]

The core of those two recommendations was the same: the overarching goal of any changes the Commission might consider to the definition should be to "do no harm" to the private offering ecosystem. If the individual income and net worth thresholds underlying the definition of accredited investor were raised significantly, it would considerably decrease the number of households that qualify as accredited investors. This decrease would have a disparate impact on those areas having a lower cost of living, which are areas that often coincide with regions of lower venture capital activity. The Committee also is concerned that a decrease in the accredited investor pool would have a disproportionate effect on women and minority entrepreneurs. Similarly, the Committee has concerns with the concept of the government applying a percentage limitation on investments – such a limitation would have a negative impact on the capital pool and be overly-complicated for an issuer to verify.

The Committee would support expanding the definition to take into account measures of sophistication, regardless of income or net worth, thereby expanding rather than contracting the pool of accredited investors. That said, simplicity and certainty are vital to the utility of any expanded definition of accredited investor, so any non-numerical criteria should generally be ascertainable with certainty.

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24 DERA Access to Capital and Market Liquidity Report at 39.

25 The SEC Staff Report on the Review of the Definition of "Accredited Investor," dated December 18, 2015, is available at https://www.sec.gov/corpfin/reportspubs/special-studies/review-definition-of-accredited-investor-12-18-2015.pdf.

26 The Committee's recommendations regarding the definition of "Accredited Investor," dated March 9, 2015 and July 20, 2016, are available at https://www.sec.gov/info/smallbus/acsec/acsec-accredited-investor-definition-recommendation-030415.pdf and https://www.sec.gov/info/smallbus/acsec/acsec-recommendations-accredited-investor.pdf.

We urge the Commission to carefully consider the ACSEC's recommendations if it decides to move forward with any changes to the definition, and we encourage the future Small Business Capital Formation Advisory Committee to remain engaged on this issue.

2. Reporting Companies

A. Scaled Disclosure

In addition to significant changes in the landscape for exempt offerings, a number of noteworthy developments have taken place in the reporting company space since the Committee's establishment in 2011. The JOBS Act created a new category of company called an "emerging growth company" (EGC), which can avail itself of certain scaled disclosure and other requirements at the time of the company's initial public offering (IPO) and, in many cases, for up to five years thereafter. An EGC is defined as a company that had total annual gross revenue of less than $1,070,000,000 during its most recently completed fiscal year. Since the enactment of the JOBS Act, approximately 87% of the IPOs that have gone effective were for EGCs.[27]

Recent years have also seen a substantial decline in the number of U.S. IPOs and publicly listed companies. The Committee has discussed multiple reasons that may factor into this decline.[28] One often cited reason on which the ACSEC has focused at length during each of our three terms involves the high costs of being a public company. The disclosure requirements place a disproportionate burden on smaller reporting companies in terms of the cost of, and time spent on, compliance.

In recognition of this fact, the SEC has provided for simplified disclosure and reporting for smaller issuers for over 30 years. Under current Commission rules, "smaller reporting companies" (SRCs) are companies that, among other things, have a public float of less than $75 million in common equity, or, if unable to calculate the public float, companies with less than $50 million in annual revenues. Similarly, a company is considered a "non-accelerated filer" if it has a public float of less than $75 million as of the last day of the most recently completed second fiscal quarter.

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27 Ernst & Young LLP, "Update on emerging growth companies and the JOBS Act" (November 2016), http://www.ey.com/Publication/vwLUAssets/ey-update-on-emerging-growth-companies-and-the-jobs-act-november-2016/$FILE/ey-update-on-emerging-growth-companies-and-the-jobs-act-november-2016.pdf, at 6.

28 We note that some reasons may differ for smaller companies that are struggling to find funding than for larger private companies that currently have more access to worldwide private capital and cheaper debt than in the past. The Committee's discussion on "Why are more companies choosing to stay private?" is reflected on pages 110-171 of the transcript of the February 15, 2017, ACSEC meeting, which is available at https://www.sec.gov/info/smallbus/acsec/acsec-transcript-021517.pdf.

EGCs are provided with a number of accommodations with respect to disclosure requirements that we believe would also be beneficial for SRCs, and we have recommended rule revisions to extend those accommodations.[29] Further, we believe that the current threshold for the SRC definition is too low and have recommended increasing the maximum so that more companies qualify.[30] On June 27, 2016, the Commission proposed amendments that would increase the financial thresholds in the SRC definition.[31]

We urge the Commission to move forward with finalizing this rule, and to revise the definition of "accelerated filer" to include companies with a public float of $250 million or more, but less than $700 million. As a result of such revision, the requirements that apply currently to accelerated filers, including the timing of the filing of periodic reports and the requirement that accelerated filers provide an auditor attestation report under Section 404(b) of the Sarbanes Oxley Act, would no longer apply to companies with public float between $75 million and $250 million (companies with public float of less than $75 million are already exempt).

In addition, we note that on April 13, 2016, the Commission issued a disclosure-related concept release.[32] This release contained the following summary:

> The Commission is publishing this concept release to seek public comment on modernizing certain business and financial disclosure requirements in Regulation S-K. These disclosure requirements serve as the foundation for the business and financial disclosure in registrants' periodic reports. This concept release is part of an initiative by the Division of Corporation Finance to review the disclosure requirements applicable to registrants to consider ways to improve the requirements for the benefit of investors and registrants.

As part of this initiative, we recommend that the Commission conduct a study involving investors only to assess what information investors consider important to making investment decisions. Statistical methodology has improved over the years, and such a study would enhance

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29 The Committee's recommendation regarding disclosure and other requirements for smaller public companies, dated March 21, 2013, is available at https://www.sec.gov/info/smallbus/acsec/acsec-recommendation-032113-smaller-public-co-ltr.pdf, and the recommendation regarding expanding simplified disclosure for smaller issuers, dated September 23, 2015, is available at https://www.sec.gov/info/smallbus/acsec/acsec-recommendations-expanding-simplified-disclosure-for-smaller-issuers.pdf.

30 Id.

31 The SEC Proposed Rule: Amendments to Smaller Reporting Company Definition, June 26, 2016, (Rel. No. 33-10107; 34-78168) is available at https://www.sec.gov/rules/proposed/2016/33-10107.pdf.

32 The "Business and Financial Disclosure Required by Regulation S-K," Concept Release, April 13, 2016, (Rel. No. 33-10064; 34-77599) is available at https://www.sec.gov/rules/concept/2016/33-10064.pdf.

the Commission's ability to make disclosure more relevant to investors, help the Commission meet its obligation to conduct economic analysis,[33] and determine materiality.

B. Board Diversity

The ACSEC also has focused on the importance of diversity on companies' boards of directors. Board diversity has been associated with improved competitiveness and talent management, greater access to capital, more sustainable profits, and better relations with stakeholders and therefore plays an important role in capital formation for small and emerging companies.

In 2009, the Commission adopted a rule (Item 407(c)(2)(vi) of Regulation S-K (the Rule)) requiring public companies to disclose in their proxy statements whether a nominating committee considers diversity in identifying nominees for the company's board of directors, and if it is considered, how. The Rule also requires that if the company has a policy with regard to the consideration of diversity in identifying director nominees, it must disclose how that policy is implemented and how its effectiveness is assessed. The Rule does not define diversity. Among companies, definitions differ greatly and are generally vague, covering a broad range of attributes, including business, financial, accounting experience, risk management, legal, government, and other relevant expertise. Also, there may be disclosure about the age of the directors, the length of board tenure, race, gender, and ethnicity. Very few companies have disclosed a formal diversity policy and, as a result, there is very little disclosure on how companies are assessing the effectiveness of their policies.

Because the Rule has failed to generate information useful to stockholders, employees and customers in assessing board diversity, the ACSEC recommended that the Commission amend Item 407(c)(2) of Regulation S-K to require issuers to describe, in addition to their policy with respect to diversity, if any, the extent to which their boards are diverse.[34] The recommendation states that while, generally, the definition of diversity should be up to each issuer, issuers should include disclosure regarding race, gender, and ethnicity of each member/nominee as self-identified by the individual. The Committee urges the Commission to continue moving forward with efforts to amend the Rule in order to generate disclosure more useful to investors.

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[33] *See* Business Roundtable and Chamber of Commerce of the United States of America v. Securities and Exchange Commission 647 F.3d 1144 (D.C. Cir. 2011).

[34] The Committee's recommendation regarding corporate board diversity, dated February 16, 2017, is available at https://www.sec.gov/info/smallbus/acsec/acsec-recommendation-021617-coporate-board-diversity.pdf.

3. Market Structure

The Committee has frequently expressed concern that U.S. equity markets do not always offer a satisfactory trading venue for the securities of small and emerging companies. Among other things, we have discussed that there is insufficient liquidity for those securities and that listing requirements can prove too difficult for smaller companies to meet.

A. Secondary Market Liquidity

The Committee has longstanding concerns about the limited secondary market liquidity with regard to exempt offerings. Small businesses trying to attract capital often struggle because potential investors are reluctant to invest unless they are confident there will be an exit opportunity. Capital is often more expensive or not available for issuers that are not able to provide investors with liquidity opportunities. In 2013, the ACSEC recommended that the Commission facilitate and encourage the creation of a separate U.S. equity market that would facilitate trading by accredited investors in the securities of small and emerging companies.[35]

On June 11, 2015, the Committee recommended that the Commission formalize the "4(1½) exemption," a legal construct that has developed based on case law to allow selling securityholders to sell privately-issued securities.[36] This concept was at least partially enacted into law on December 4, 2015, when Congress added a new Section 4(a)(7) to the Securities Act to exempt certain secondary sales of securities that are purchased by an accredited investor.[37] The Committee notes, however, that new Section 4(a)(7) in some respects is more restrictive than the 4(1½) exemption.

On May 15, 2017, we recommended that the Commission preempt state regulation of secondary trading in securities of Tier 2 Regulation A issuers that are current in their ongoing reports.[38] Regulation A already provides for the preemption of state securities law registration and qualification requirements for securities initially offered or sold in Tier 2 offerings, and the ongoing disclosure requirements of Tier 2 Regulation A issuers mean that current information about an issuer will be available to enable parties on both sides of the trade to make an educated

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35 The Committee's recommendation regarding a separate U.S. equity market for securities of small and emerging companies, dated March 21, 2013, is available at https://www.sec.gov/info/smallbus/acsec/acsec-recommendation-032113-emerg-co-ltr.pdf.

36 The Committee's recommendation regarding the "4(1½) Exemption," dated June 11, 2015, is available at https://www.sec.gov/info/smallbus/acsec/acsesc-4a-one-and-a-half-recommendation.pdf.

37 Section 4(a)(7) was enacted as part of the Fixing American's Surface Transportation Act of 2015, 6 Pub. L. No. 114-94, 129 Stat. 1312 (2015).

38 The Committee's recommendation regarding secondary market liquidity for Regulation A securities, dated May 15, 2017, is available at https://www.sec.gov/info/smallbus/acsec/acsec-recommendation-051517-secondary-liquidity-recommendation.pdf.

investment decision. We urge the Commission to move forward on this recommendation to help reduce friction in the secondary trading of Tier 2 Regulation A securities.

B. Tick Size

On March 13, 2013, the Committee recommended the Commission adopt rules that would allow smaller exchange-listed companies to voluntarily choose trading increments or tick-sizes greater than the current increment of one penny.[39] The recommendation was rooted in the concept that something should be done to encourage market participants to provide more trading support for the equity securities of small and mid-cap companies. Widening spreads from the current one-penny increments could provide economic incentives that would encourage the provision of trading support to the equity securities of small and mid-cap companies. That support, in turn, could increase the liquidity for these securities, which could enhance the attractiveness of the IPO market for small companies and ultimately the ability of small and mid-cap companies to raise capital.

Since then, the Commission has put in place a pilot to help assess the effect of tick-sizes on market quality for smaller companies. We have received various updates on the pilot from Commission staff, most recently during our May 10, 2017 meeting,[40] and we understand that the staff is collecting and studying data from the pilot as it becomes available. Enhancing liquidity for smaller companies is an important matter for the Commission to address, and we encourage the future Small Business Capital Formation Advisory Committee to remain engaged on this issue.

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[39] The Committee's recommendation regarding trading spreads for smaller exchange-listed companies, dated March 13, 2013, is available at https://www.sec.gov/info/smallbus/acsec/acsec-recommendation-032113-spread-tick-size.pdf.

[40] Transcript of the May 10, 2017, ACSEC meeting is available at https://www.sec.gov/info/smallbus/acsec/acsec-transcript-051017.pdf.

Appendix A

Advisory Committee on Small and Emerging Companies Members 2011-2017

2015-2017 Members	2013-2015 Members	2011-2013 Members
Robert Aguilar Stephen M. Graham (Co-Chair) Xavier Gutierrez Brian Hahn Sara Hanks (Co-Chair) Kyle Hauptman Jenny Kassan Catherine V. Mott Jonathan Nelson Patrick Reardon Lisa Shimkat Tisha Tallman Annemarie Tierney J.W. Verret Gregory C. Yadley Laura Yamanaka <u>Non-voting Members:</u> Michael Pieciak Joseph Shepard Mark Walsh	Charles Baltic David A. Bochnowski John J. Borer, III Dan Chace Milton Chang Stephen M. Graham (Co-Chair) Shannon L. Greene M. Christine Jacobs (Co-Chair) Sara Hanks John Hempill Richard L. Leza Sonia Luna Catherine V. Mott David J. Paul Timothy Reese Timothy Walsh Gregory C. Yadley <u>Non-voting Members:</u> A. Heath Absure Michael Pieciak Javier Saade	David A. Bochnowski John J. Borer, III Dan Chace Milton Chang Joseph “Leroy” Dennis Stephen M. Graham (Co-Chair) Shannon L. Greene M. Christine Jacobs (Co-Chair) Kara B. Jenny Steven R. LeBlanc Richard L. Leza Paul Maeder Kathleen A. McGowan Catherine V. Mott Karyn Smith Dan Squiller Charlie Sundling Timothy Walsh Gregory C. Yadley <u>Non-voting Members:</u> A. Heath Abshure Sean Greene Pravina Raghavan

Appendix B:
Charter and Bylaws

UNITED STATES SECURITIES AND EXCHANGE COMMISSION ADVISORY COMMITTEE ON SMALL AND EMERGING COMPANIES

CHARTER

1. Committee's Official Designation. The official designation of the committee is "Securities and Exchange Commission Advisory Committee on Small and Emerging Companies" (the "Committee").

2. Authority. The Committee is established under the authority of the Securities and Exchange Commission (the "Commission") in accordance with Section 9(c) of the Federal Advisory Committee Act, 5 U.S.C.–App. (the "Act").

3. Objective and Scope of Activities. The Committee's objective is to provide the Commission with advice on its rules, regulations, and policies with regard to its mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation, as they relate to the following:

(1) capital raising by emerging privately held small businesses ("emerging companies") and publicly traded companies with less than $250 million in public market capitalization ("smaller public companies") through securities offerings, including private and limited offerings and initial and other public offerings;

(2) trading in the securities of emerging companies and smaller public companies; and

(3) public reporting and corporate governance requirements of emerging companies and smaller public companies.

The Committee's scope does not include, however, any policies, practices, actions or decisions concerning the Commission's enforcement program.

4. Description of Duties. The Committee shall function solely as an advisory body. Its duties shall extend only to providing advice, including advice in the form of recommendations, to the Commission. The Commission shall retain full authority to determine actions to be taken and policies to be expressed with respect to matters within its jurisdiction upon which the Committee may provide advice.

5. Official to Whom the Committee Reports. The Committee shall provide its advice to the Commission through the Chair of the Commission or a designee. The Committee need not reach consensus on every issue, and may choose to provide the Commission with differing views or a range of views.

6. Support. The Commission shall provide any necessary support services for the Committee, primarily through its Office of Small Business Policy in its Division of Corporation Finance, to the extent permitted by law and subject to the availability of resources.

7. Estimated Annual Operating Costs and Staff Years. The estimated annual operating costs of the Committee in dollars and staff-years are as follows:

(1) dollar cost: $59,500 per year, for travel expenses of Committee members and Commission personnel and other miscellaneous expenses; and

(2) staff years: one staff year, per year, of Commission personnel time.

8. Designated Federal Officer. At least one full-time or permanent part-time Commission employee will be appointed to serve as Designated Federal Officer ("DFO") of the Committee. The DFO, or an alternate DFO, will approve or call all meetings of the Committee and any of its subcommittees, approve all meeting agendas, attend all meetings, adjourn any meeting when the DFO or an alternate DFO determines adjournment to be in the public interest, and chair meetings when directed to do so by the Chair of the Commission or her designee.

9. Estimated Number and Frequency of Meetings. The Committee shall meet at such times as are necessary to carry out its duties, currently anticipated to be four times a year.

10. Duration. The Committee shall operate until the earlier of the termination date as set forth in Article 11 below or such earlier date the Commission determines.

11. Termination Date. Unless renewed by appropriate action, the Committee shall terminate two years from the date this charter is filed as set forth in Article 15 below.

12. Membership and Designation. The Committee shall be composed of 13 to 20 members representing a cross-section of those directly affected by, interested in, and/or qualified to provide advice to the Commission on its rules, regulations, and policies as set forth in Article 3. This membership may include officers and directors of emerging companies and smaller public companies, and professional advisors to and investors in such companies, as well as other participants in the markets for the securities of such companies. The Committee's representative membership will be balanced fairly in terms of points of view represented and functions to be performed. In addition, non-voting members of the Committee from the North American Securities Administrators Association and/or the U.S. Small Business Administration may also be named. No special government employees, within the meaning of 18 U.S.C. §202(a), shall be named to the Committee. Members of the Committee are appointed by and serve at the pleasure of the Commission.

13. Subcommittees. The Committee may form subcommittees or subgroups as it deems appropriate with the approval of the DFO. Any such subcommittees and subgroups shall report any recommendations and advice to the Committee for full deliberations and discussion. Subcommittees or subgroups shall have no authority to make decisions on behalf of the Committee, nor may they report directly to the Commission or to any federal officer or employee. It is expected that subgroups or subcommittees will not meet more than four times each year, but may meet more frequently, as necessary.

14. Recordkeeping. The official records generated by or for the Committee shall be handled in accordance with General Records Schedule 6.2, or another approved agency records disposition schedule. These records shall be available for public inspection and copying, subject to the Freedom of Information Act, 5 U.S.C. §552.

15. Filing Date of Charter. The Committee is authorized to meet and take action as of the date of the filing of this Charter on September 24, 2015 with the Chair of the Commission, the Committee on Banking, Housing, and Urban Affairs of the U.S. Senate, the Committee on Financial Services of the U.S. House of Representatives, the Committee Management Secretariat of the General Services Administration, and the Library of Congress.

Date: September 24, 2015

Securities and Exchange Commission
Advisory Committee on Small and Emerging Companies

Bylaws and Operating Procedures
(As adopted on February 25, 2016)

The following Bylaws and Operating Procedures ("Bylaws") will govern the operations of the Securities and Exchange Commission Advisory Committee on Small and Emerging Companies (the "Committee").

Section I: Purpose and Authority

A. **Purpose.** The purpose of the Committee, as set forth in its Charter, is to provide advice to the U.S. Securities and Exchange Commission (the "Commission") on the Commission's rules, regulations, and policies, with regard to the Commission's mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation, as they relate to the following:

   (1) capital raising by emerging privately held small businesses ("emerging companies") and publicly traded companies with less than $250 million in public market capitalization ("smaller public companies") through securities offerings, including private and limited offerings and initial and other public offerings;

   (2) trading in the securities of emerging companies and smaller public companies; and

   (3) public reporting and corporate governance requirements of emerging companies and smaller public companies.

B. **Authority:** The Committee was formed by the Commission under the Federal Advisory Committee Act, 5 U.S.C. –App.1, as amended ("FACA"), by the filing of its Charter on October 4, 2011 with the Committee on Banking, Housing, and Urban Affairs of the United States Senate and the Committee on Financial Services of the United States House or Representatives, after consultation with the Federal Advisory Committee Secretariat of the General Services Administration. Notwithstanding anything to the contrary in these Bylaws, the Committee will operate in accordance with FACA and its implementing regulations, and with its Charter, as the same may be amended from time to time.

Section II: Membership

Members of the Committee are appointed by and serve at the pleasure of the Commission in accordance with the Committee's Charter. Official observer members have all rights of voting members except the right to vote or to make a motion for a vote.

Section III: Committee Officials

A. Co-Chairs. The Committee will have Co-Chairs (or a single Chair) appointed by and serving at the pleasure of the Chairman of the Commission to perform the duties specified in these Bylaws. The Co-Chairs will work with the Sponsor of the Committee and the Designated Federal Officer ("DFO") to identify the issues to be addressed by the Committee, establish the Committee's priorities, and make recommendations to the Chairman on the level and types of staff and financial support required by the Committee.

B. Sponsor of the Committee. The Chairman of the Commission may designate a member of the Commission to serve as Sponsor of the Committee. The Sponsor of the Committee will serve at the pleasure of the Chairman and perform the duties specified by these Bylaws.

C. Designated Federal Officer. The Committee's DFO will be designated by the Chairman of the Commission in accordance with the Committee's Charter and will perform the duties specified in the Charter and these Bylaws. By law, the DFO must, among other things, approve or call all meetings of the Committee, approve agendas, attend all meetings, and adjourn meetings when such adjournment is in the public interest. In addition, the DFO will be responsible for: notifying members of the time and place for each meeting; maintaining records of all meetings; maintaining the roll; preparing any required minutes of meetings; maintaining official Committee records; and preparing and handling all reports, including the annual report as required by FACA. All actions performed or to be performed by the DFO under these Bylaws may be performed by any alternate DFO designated by the DFO in accordance with a designation and delegation of authority provided by the Chairman of the Commission.

Section IV: Meetings

A. In General. The Committee will meet at such intervals as are necessary to carry out its duties. Meetings may be called by the Co-Chairs of the Committee with the approval of the Sponsor of the Committee and the DFO. One of the Co-Chairs of the Committee will preside at all meetings of the Committee, unless the Chairman of the Commission directs the DFO to preside in accordance with FACA. A Co-Chair of the Committee or of the DFO, as the case may be, presiding at a meeting of the Committee (the "Presiding Officer") may specify the use of rules of parliamentary procedure consistent with these Bylaws. Alternates will not be permitted to represent appointed members at meetings of the Committee without the prior agreement of the Presiding Officer, if a Co-Chair, and the DFO. Subject to such reasonable guidelines and procedures as the Presiding Officer or the Committee may adopt, members may participate in a meeting by means of conference telephone or similar communications equipment if all members can hear one another at the same time and members of the public entitled to hear them can do so.

B. Notice. The Committee will publish a notice of each meeting in the *Federal Register* in accordance with the requirements of FACA.

C. Agenda: The Co-Chairs of the Committee, in consultation with the Sponsor of the Committee, will agree on an agenda for each meeting of the Committee, and have the agenda approved by the DFO, sufficiently in advance of the meeting to permit a copy or summary of the agenda to be published with the notice of the meeting published in the *Federal Register*. Proposed items for the agenda may be submitted through Commission's website or other means provided by the DFO by any Committee member or member of the public.

D. Open Meetings. Unless otherwise determined in advance, all meetings of the Committee will be open to the public. Once an open meeting has begun, it may not be closed for any reason. If, during the course of an open meeting, matter inappropriate for public disclosure arises during discussion, the Presiding Officer will order such discussion to cease and will schedule it for closed session. All materials brought before, or presented to, the Committee during an open meeting will be available to the public for review or copying at the time scheduled for the meeting.

E. Closed Meetings. All or parts of meetings of the Committee may be closed in limited circumstances in accordance with applicable law. Requests for closed meetings must be submitted by the DFO to the Chairman of the Commission under FACA, generally at least 30 days in advance of the meeting.

F. Hearings. The Committee may hold hearings to receive testimony or oral comments, recommendations and expressions of concern from the public. The Committee may hold hearings at open meetings or in closed session in accordance with applicable law and the standards for closing meetings to the public in these Bylaws. The Co-Chairs or the Committee may specify reasonable guidelines and procedures for conducting orderly and efficient hearings, such as requirements for submitting requests to testify and written testimony in advance and placing limitations on the number of persons who may testify and the duration of their testimony.

G. Voting. A member must be participating in a meeting, in person or by telephone or similar communication, to cast a vote. When a decision or recommendation of the Committee is required, the Presiding Officer will request a motion for a vote. Any member with a right to vote may make a motion for a vote and vote. No second after a motion will be required to bring any issue or recommendation to a vote. Committee action based on a vote requires a simple majority of the votes cast at a meeting at which there is a quorum.

H. Quorum. A quorum will consist of a simple majority of the members of the Committee with a right to vote.

Section V: Subcommittees

The Co-Chairs of the Committee, with the approval of the DFO, may convene subcommittees to support the Committee's functions and, with the approval of the DFO, may appoint members and official observers to, and Chairs of, any subcommittees so convened. The Co-Chairs will be *ex officio* members of all subcommittees. Only members of the Committee with a right to vote will have the right to vote and make a motion for a vote in a subcommittee. No subcommittee will have any authority to provide advice or recommendations (1) directly to the Commission or (2) to be adopted by the Committee without discussion or consideration at an open meeting of the Committee. All activities of the subcommittees will be in compliance with FACA.

Section VI: Expenses and Reimbursement

Expenses related to the operation of the Committee will be borne by the Commission. Expenditures of any kind must be approved in advance by the DFO.

Section VII: Amendments

These Bylaws may be amended from time to time by a vote of the members of the Committee.

Appendix C:

Committee Recommendations

SECURITIES AND EXCHANGE COMMISSION
ADVISORY COMMITTEE ON SMALL AND EMERGING COMPANIES
Washington, DC 20549-3628

January 6, 2012

The Honorable Mary L. Schapiro
Chairman
U. S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1070

Dear Chairman Schapiro:

As you know, the Securities and Exchange Commission organized the Advisory Committee on Small and Emerging Companies to provide the Commission with advice on the Commission's rules, regulations, and policies with regard to its mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation, as they relate to the following:

(1) capital raising by emerging privately held small businesses and publicly traded companies with less than $250 million in public market capitalization;

(2) trading in the securities of such businesses and companies; and

(3) public reporting and corporate governance requirements to which such businesses and companies are subject.

On behalf of the Advisory Committee, we are pleased to submit the enclosed recommendation to the Commission. This recommendation is the first of what will be an ongoing series of recommendations to be provided by the Advisory Committee in fulfillment of its mandate.

We and the other members of the Advisory Committee are prepared to provide any additional assistance that the Commission or its staff may request.

Respectfully submitted on behalf of the Committee,

Stephen M. Graham
Committee Co-Chair

M. Christine Jacobs
Committee Co-Chair

Members of the Committee:

David A. Bochnowski
John J. Borer, III
Dan Chace
Milton Chang
Joseph "Leroy" Dennis
Stephen M. Graham
Shannon L. Greene
M. Christine Jacobs
Kara B. Jenny
Steven R. LeBlanc
Richard L. Leza
Paul Maeder

Kathleen A. McGowan
Catherine V. Mott
Karyn Smith
Dan Squiller
Charlie Sundling
Timothy Walsh
Gregory C. Yadley

Official Observers:
A. Heath Abshure
Sean Greene

Enclosure

cc: Commissioner Elisse Walter
Commissioner Luis Aguilar
Commissioner Troy A. Paredes
Commissioner Daniel M. Gallagher
Meredith B. Cross
Lona Nallengara
Elizabeth Murphy
Gerald J. Laporte
Jennifer Zepralka

U.S. Securities and Exchange Commission
Advisory Committee on Small and Emerging Companies

Recommendation Regarding Relaxing or Modifying Restrictions on General Solicitation in Certain Private Offerings of Securities

January 6, 2012

AFTER CONSIDERING THAT:

1. The Advisory Committee is of the view that private offerings of securities pursuant to Section 4(2) under the Securities Act of 1933 (the "Securities Act") are a successful instrument for facilitating capital formation by emerging privately held small businesses and smaller public companies;

2. In offerings of securities conducted pursuant to Rule 506 of Regulation D ("Rule 506"), which is a safe harbor for private offerings of securities under Section 4(2) of the Securities Act and the most widely used Regulation D exemption, neither the issuer nor any person acting on the issuer's behalf may offer or sell securities by any form of general solicitation or general advertising and securities sold pursuant to Rule 506 must be sold to "accredited investors" or persons who, either alone or with a representative, have sufficient knowledge and experience in financial and business matters to make them capable of evaluating the merits and risks of a prospective investment;

3. The Advisory Committee is of the view that the restrictions on general solicitation and general advertising prevent many privately held small businesses and smaller public companies from gaining sufficient access to sources of capital and thereby materially limit their ability to raise capital through private offerings of securities; and

4. The Advisory Committee is of the view that the investor protections afforded by the existing restrictions on general solicitation and general advertising are not necessary in private offerings of securities whereby the securities are sold solely to accredited investors.

THEREFORE, the Advisory Committee recommends that the Commission take immediate action to relax or modify the restrictions on general solicitation and general advertising to permit general solicitation and general advertising in private offerings of securities under Rule 506 where securities are sold only to accredited investors.

SECURITIES AND EXCHANGE COMMISSION
ADVISORY COMMITTEE ON SMALL AND EMERGING COMPANIES
Washington, DC 20549-3628

March 9, 2012

The Honorable Mary L. Schapiro
Chairman
U. S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1070

Dear Chairman Schapiro:

As you know, the Securities and Exchange Commission organized the Advisory Committee on Small and Emerging Companies to provide the Commission with advice on the Commission's rules, regulations, and policies with regard to its mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation, as they relate to the following:

(1) capital raising by emerging privately held small businesses and publicly traded companies with less than $250 million in public market capitalization;

(2) trading in the securities of such businesses and companies; and

(3) public reporting and corporate governance requirements to which such businesses and companies are subject.

On behalf of the Advisory Committee, we are pleased to submit the enclosed recommendations to the Commission on registration requirements and reporting obligations under the Securities Exchange Act of 1934. The recommendations were approved by a majority of the members of the Advisory Committee present at a meeting held on February 1, 2012.

We and the other members of the Advisory Committee are prepared to provide any additional assistance that the Commission or its staff may request with respect to these recommendations.

Respectfully submitted on behalf of the Committee,

Stephen M. Graham
Committee Co-Chair

M. Christine Jacobs
Committee Co-Chair

Members of the Committee

David A. Bochnowski
John J. Borer, III
Dan Chace
Milton Chang
Joseph "Leroy" Dennis**
Stephen M. Graham
Shannon L. Greene**
M. Christine Jacobs
Kara B. Jenny *
Steven R. LeBlanc *
Richard L. Leza
Paul Maeder
Kathleen A. McGowan *
Catherine V. Mott
Karyn Smith
Dan Squiller *
Charlie Sundling
Timothy Walsh
Gregory C. Yadley

* Not present at the meeting held on February 1, 2012.

** Present at the meeting held on February 1, 2012, but did not vote in favor of the attached recommendation.

Official Observers
A. Heath Abshure
Sean Greene

Enclosure

cc: Commissioner Elisse Walter
Commissioner Luis Aguilar
Commissioner Troy A. Paredes
Commissioner Daniel M. Gallagher
Meredith B. Cross
Lona Nallengara
Elizabeth Murphy
Gerald J. Laporte
Jennifer Zepralka

U.S. Securities and Exchange Commission
Advisory Committee on Small and Emerging Companies

Recommendations Regarding Registration Requirements and Reporting Obligations under the Securities Exchange Act of 1934

February 1, 2012

AFTER CONSIDERING THAT:

1. Under Section 12(g) of the Securities Exchange Act of 1934 (the "Exchange Act') and the rules of the Securities and Exchange Commission (the "Commission") thereunder, a company is required to register a class of its equity securities and is subject to a reporting obligation under the Exchange Act if, at the end of the company's fiscal year, the securities are held of record by 500 or more persons and the company has total assets exceeding $10 million;

2. A company becomes subject to a reporting obligation, under Section 15(d) of the Exchange Act, upon effectiveness of a registration statement relating to an offering of the company's securities under the Securities Act of 1933;

3. Under Section 12(g)(4) of the Exchange Act and Rule 12g-4 thereunder, a company that has a class of securities registered under Section 12(g) may terminate that registration and suspend its reporting obligation when the number of holders of record of that class falls below 300 or, alternatively, when the number of holders of record of that class falls below 500 and the company's assets have not exceeded $10 million at the end of each of its last three fiscal years;

4. Under Rule 12g5-1 under the Exchange Act and Commission staff interpretations, the definition of "held of record" includes only those persons who are registered as shareholders on the records maintained by a company, which means that a broker-dealer or other securities intermediary that holds securities of a company would be registered on the records of the company as only one holder even if it holds securities of that company on behalf of a large number of clients, each of whom would be a beneficial owner;

5. Section 15(d) of the Exchange Act and Rule 12h-3 of the Commission's Exchange Act rules provide for the suspension of a company's Section 15(d) reporting obligation under the same thresholds as those that apply to suspending a Section 12(g) reporting obligation;

6. The Advisory Committee is concerned that:

   (a) under the current thresholds that trigger Exchange Act registration and reporting, some private companies may be required to register and begin reporting sooner than desired and at a time in their development that is not the most advantageous to the company or its shareholders, or, to avoid registration, companies may be driven to manage their capital raising or employee compensation activities in ways that may not be in their or their security holders' best interests;

(b) public companies have been able to cease reporting under the Exchange Act – referred to as "going dark" – while their securities continue to be actively and widely traded and held by many more than 500 shareholders, leaving such shareholders and possible investors with little or no information, because ownership through securities intermediaries has resulted in fewer than 300 holders of record of the class of securities, even though the number of beneficial owners may be far greater;

(c) small and emerging companies may be discouraged from compensating their employees with stock, which may make it more difficult for such companies to attract and retain employees, because securities held by company employees, even if such employees cannot trade the securities, are counted for purposes of determining whether the company is required to register the class of securities under Section 12(g) of the Exchange Act and become subject to a reporting obligation; and

(d) banks and bank holding companies ("banking institutions"), which, the Committee notes, are subject to extensive regulation by, and financial reporting to, federal and state government agencies, are subject to the same triggers and thresholds for registration and reporting under the Exchange Act as other types of companies, but due to the nature of their shareholders may be disproportionately affected by the current regulatory thresholds;

7. The Advisory Committee believes that the characteristics that are most relevant in connection with a determination of whether a company should be subject to reporting obligations have changed since the enactment of Section 12(g), and that the current triggers and thresholds for registration and reporting under the Exchange Act are no longer the correct triggers and thresholds by which a determination should be made as to whether a company should be required to register and report under the Exchange Act;

8. The Advisory Committee has considered whether the thresholds for Exchange Act registration and reporting, as well as for terminating registration and suspending reporting, should be adjusted, including whether a test based on the number of beneficial holders, rather than a test based on the number of holders of record, should be considered, whether the amount of assets test should be reconsidered, and whether a new standard or standards should be used to determine whether a company shall be required to register and report, or to terminate registration and suspend reporting, under the Exchange Act;

9. The staff of the Commission currently is undertaking a comprehensive study of the registration and reporting requirements under the Exchange Act, which includes, among other things, a consideration of the questions described in paragraph 8, above;

10. The Commission has authority under Section 12(h) of the Exchange Act to exempt companies from the registration requirements of Section 12(g) and reporting obligations under Section 15(d), if the Commission finds that the action is not inconsistent with the public interest and protection of investors; and

11. The Commission also has broad exemptive authority with respect to requirements of the Exchange Act under Section 36 of that statute.

THE ADVISORY COMMITTEE RECOMMENDS THAT:

1. The Commission take action immediately to amend its registration and reporting rules under the Exchange Act to adopt an interim rule, to be effective while the related study is pending, under which:

   - a company's obligation to register and begin public reporting would not be triggered until it had a class of securities held by 1,000 or more holders of record, except that a banking institution's obligation to register and begin public reporting would not be triggered until it had a class of securities held by 2,000 or more holders of record;

   - a company that is currently obligated to file reports with the Commission could cease public reporting if the number of holders of record of the class of securities that subjects the company to reporting is less than 600, except that a banking institution could cease public reporting if the number of holders of record of the class of securities that subjects the banking institution to reporting is less than 1,200; and

   - holders of record who are employees of the company or banking institution and who are appropriately restricted from trading their securities would not be counted in determining whether the company or banking institution has met these thresholds;

2. In addition to the questions described in paragraph 8 above, the Commission staff's study of the registration and reporting requirements under the Exchange Act should include an assessment of the effects of the above-referenced interim rule changes, as well as consideration of possible transition periods for companies impacted by interim rule changes that previously initiated or ceased public reporting in reliance on the current regulations; and

3. After completion of the staff study and an analysis of findings thereunder, the staff of the Commission would be required to evaluate the registration and reporting rules under the Exchange Act and to recommend to the Commission permanent modifications of such rules based on the findings of such staff study.

SECURITIES AND EXCHANGE COMMISSION

ADVISORY COMMITTEE ON SMALL AND EMERGING COMPANIES

Washington, DC 20549-3628

March 9, 2012

The Honorable Mary L. Schapiro
Chairman
U. S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1070

Dear Chairman Schapiro:

As you know, the Securities and Exchange Commission organized the Advisory Committee on Small and Emerging Companies to provide the Commission with advice on the Commission's rules, regulations, and policies with regard to its mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation, as they relate to the following:

(1) capital raising by emerging privately held small businesses and publicly traded companies with less than $250 million in public market capitalization;

(2) trading in the securities of such businesses and companies; and

(3) public reporting and corporate governance requirements to which such businesses and companies are subject.

On behalf of the Advisory Committee, we are pleased to submit the enclosed recommendation to the Commission on improving access to the public markets for small and emerging companies. The recommendation was unanimously approved by the members of the Advisory Committee present at a meeting held on February 1, 2012.

We and the other members of the Advisory Committee are prepared to provide any additional assistance that the Commission or its staff may request with respect to this recommendation.

Respectfully submitted on behalf of the Committee,

Stephen M. Graham
Committee Co-Chair

M. Christine Jacobs
Committee Co-Chair

Members of the Committee
David A. Bochnowski
John J. Borer, III
Dan Chace
Milton Chang
Joseph "Leroy" Dennis
Stephen M. Graham
Shannon L. Greene
M. Christine Jacobs
Kara B. Jenny *
Steven R. LeBlanc *
Richard L. Leza
Paul Maeder
Kathleen A. McGowan *
Catherine V. Mott
Karyn Smith
Dan Squiller *
Charlie Sundling
Timothy Walsh
Gregory C. Yadley

* Not present at the meeting held on February 1, 2012.

Official Observers
A. Heath Abshure
Sean Greene

Enclosure

cc: Commissioner Elisse Walter
Commissioner Luis Aguilar
Commissioner Troy A. Paredes
Commissioner Daniel M. Gallagher
Meredith B. Cross
Lona Nallengara
Elizabeth Murphy
Gerald J. Laporte
Jennifer Zepralka

U.S. Securities and Exchange Commission
Advisory Committee on Small and Emerging Companies

Recommendation Regarding Improving Access to the Public Markets for Small and Emerging Companies

February 1, 2012

AFTER CONSIDERING THAT:

1. Small and emerging companies could significantly benefit from modifications to the rules and regulations of the Securities and Exchange Commission ("Commission") affecting access to the capital markets;

2. Modifications to these rules and regulations could facilitate the development and growth of small and emerging companies, which may help rebuild the initial public offering market in the United States and encourage economic growth and job creation;

3. Any such modifications should be made keeping in mind investor protections afforded by existing rules or regulations or that may be necessary in connection with new rules or regulations;

4. Currently, Regulation A, or the "Conditional Small Issues Exemption," provides an exemption from the registration requirements under the Securities Act of 1933, as amended (the "Securities Act"), for public offerings of up to $5 million in any 12-month period by non-reporting companies pursuant to which securities can be offered publicly and are eligible to trade freely immediately after the offering in the over-the-counter market without any restrictions on the types of investors that can participate in the offering;

5. The volume of Regulation A offerings by small and emerging companies raising capital has been immaterial in recent years, with only 24 and 20 Regulation A offering statements having been filed with the Commission in 2010 and 2011, respectively, and only six of those offering statements having been qualified by the Commission to date;

6. Proponents of regulatory change to facilitate capital formation for small and emerging companies have asserted that the $5 million offering limitation is too low for Regulation A to be a viable tool for capital formation for small and emerging companies, particularly in light of the lack of a state "blue sky" exemption for Regulation A offerings, effectively preventing companies from taking advantage of rapidly changing means to access and communicate with potential investors;

7. The traditional sources of equity capital, which include private equity, venture capital and "angel" capital investors, have been unavailable to many small business owners and entrepreneurs seeking capital to fund a developing business;

8. The Committee has reviewed and considered, in general terms, various proposed modifications to Regulation A designed to increase the utility of Regulation A, but is skeptical that any such modifications would provide substantial benefits to small and emerging companies; and

9. The Commission has limited resources with which to address issues relating to the access to capital for small and emerging companies, and, accordingly, it should address modifications to Regulation A only to the extent it is able to do so without adversely affecting its ability to address issues the resolution of which would likely provide substantial benefits to small and emerging companies, such as rules relating to triggers for public reporting, restrictions on general solicitation and the disclosure requirements and restrictions on communications in initial public offerings.

THE ADVISORY COMMITTEE RECOMMENDS THAT:

1. The Commission develop the terms and conditions of a new exemption for offerings modeled on the terms and conditions of Regulation A, but that provides for public offerings of up to $50 million annually.

2. The new exemption should, as required under Regulation A, require issuers to prepare, file with the Commission and provide to potential investors an offering statement prepared in accordance with requirements established by the Commission, and the Commission, in connection with identifying the requirements for such offering statement shall consider additional disclosure requirements necessary for the protection of investors in light of the increased offering cap, including the requirement for audited financial statements.

3. The Commission should consider additional investor protections for the new exemption, including publicly accessible electronic filings of offering statements, periodic reporting for companies that have completed an offering pursuant to the new exemption and "bad actor" disqualification provisions.

4. In developing the terms and conditions of the new exemption, the Commission should appropriately calibrate such terms and conditions for small and emerging companies, taking into account the relatively smaller size and more limited resources of the companies that will take advantage of the new exemption.

5. The Commission should, in connection with allocation of resources for the review of regulations affecting capital formation, consider the greater importance of other areas of its review, including the review of rules relating to triggers for public reporting, restrictions on general solicitation and the disclosure requirements and restrictions on communications in initial public offerings.

SECURITIES AND EXCHANGE COMMISSION
ADVISORY COMMITTEE ON SMALL AND EMERGING COMPANIES
Washington, DC 20549-3628

March 21, 2013

The Honorable Elisse B. Walter
Chairman
U. S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1070

Dear Chairman Walter:

As you know, the Securities and Exchange Commission organized the Advisory Committee on Small and Emerging Companies to provide the Commission with advice on the Commission's rules, regulations, and policies with regard to its mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation, as they relate to the following:

(1) capital raising by emerging privately held small businesses and publicly traded companies with less than $250 million in public market capitalization;

(2) trading in the securities of such businesses and companies; and

(3) public reporting and corporate governance requirements to which such businesses and companies are subject.

On behalf of the Advisory Committee, we are pleased to submit the enclosed recommendation to the Commission regarding creation of a separate U.S. equity market that would facilitate trading in the securities of small and emerging companies. This recommendation was unanimously approved by the members of the Advisory Committee present and voting at a meeting held on February 1, 2013.

We and the other members of the Advisory Committee are prepared to provide any additional assistance that the Commission or its staff may request with respect to these recommendations.

Respectfully submitted on behalf of the Committee,

Stephen M. Graham
Committee Co-Chair

M. Christine Jacobs
Committee Co-Chair

Members of the Committee

David A. Bochnowski
John J. Borer, III
Dan Chace
Milton Chang
Joseph "Leroy" Dennis *
Stephen M. Graham
Shannon L. Greene
M. Christine Jacobs
Kara B. Jenny
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Richard L. Leza *
Paul Maeder *
Kathleen A. McGowan
Catherine V. Mott *
Karyn Smith
Charlie Sundling *
Timothy Walsh
Gregory C. Yadley

* Not present at the meeting held on February 1, 2013.

Official Observers
A. Heath Abshure
Sean Greene

Enclosure

cc: Commissioner Luis Aguilar
Commissioner Troy A. Paredes
Commissioner Daniel M. Gallagher
Lona Nallengara
Elizabeth Murphy
Gerald J. Laporte

U.S. Securities and Exchange Commission
Advisory Committee on Small and Emerging Companies

Recommendation Regarding Separate U.S. Equity Market for Securities of Small and Emerging Companies

February 1, 2013

AFTER CONSIDERING THAT:

1. The Committee believes that current U.S. equity markets often fail to offer a satisfactory trading venue for the securities of small and emerging companies because they fail to provide sufficient liquidity for such securities and because the listing requirements are too onerous for such companies.

2. The frequent failure of U.S. equity markets to offer a satisfactory trading venue for small and emerging companies has discouraged initial public offerings of the securities of such companies, undermines entrepreneurship, and weakens the broader U.S. economy.

3. Establishing a separate U.S. equity market specifically for the securities of small and emerging companies, where these companies would be subject to a regulatory regime strict enough to protect investors but flexible enough to accommodate innovation and growth, offers promise of providing a satisfactory trading venue for small and emerging companies, which may encourage initial public offerings of their securities.

4. A possible feature of an appropriate regulatory regime for such a market would be limiting investor participation to accredited investors who meet a standard designed to assure that the regulatory protection afforded is appropriate given the characteristics of those investors.

5. The separate U.S. equity market for small and emerging companies could be an exchange established under Section 6 of the Securities Exchange Act of 1934 (the "Exchange Act"), an alternative trading system operated under 17 C.F.R. § 242.301, or some other appropriately regulated trading venue.

6. Other actions by the U.S. Securities and Exchange Commission (the "Commission") with respect to trading venues may also be warranted in order to encourage small business capital formation and facilitate liquidity in the securities of small and emerging companies, including in the context of the Commission's rulemaking to implement Section 3(b)(2) of the Securities Act of 1933.

THE COMMITTEE RECOMMENDS THAT:

The Commission should facilitate and encourage the creation of a separate U.S. equity market or markets that would facilitate trading by accredited investors in the securities of small and emerging companies, and such small and emerging companies would be subject to a regulatory regime strict enough to protect such investors but flexible enough to accommodate innovation and growth by such companies.

SECURITIES AND EXCHANGE COMMISSION
ADVISORY COMMITTEE ON
SMALL AND EMERGING COMPANIES
Washington, DC 20549-3628

March 21, 2013

The Honorable Elisse B. Walter
Chairman
U. S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1070

Dear Chairman Walter:

As you know, the Securities and Exchange Commission organized the Advisory Committee on Small and Emerging Companies to provide the Commission with advice on the Commission's rules, regulations, and policies with regard to its mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation, as they relate to the following:

(1) capital raising by emerging privately held small businesses and publicly traded companies with less than $250 million in public market capitalization;

(2) trading in the securities of such businesses and companies; and

(3) public reporting and corporate governance requirements to which such businesses and companies are subject.

On behalf of the Advisory Committee, we are pleased to submit the enclosed recommendations to the Commission on disclosure and other requirements for smaller public companies under the federal securities laws. The recommendations were unanimously approved by the members of the Advisory Committee present and voting at a meeting held on February 1, 2013.

We and the other members of the Advisory Committee are prepared to provide any additional assistance that the Commission or its staff may request with respect to these recommendations.

Respectfully submitted on behalf of the Committee,

Stephen M. Graham
Committee Co-Chair

M. Christine Jacobs
Committee Co-Chair

Members of the Committee

David A. Bochnowski
John J. Borer, III
Dan Chace
Milton Chang
Joseph "Leroy" Dennis *
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Paul Maeder *
Kathleen A. McGowan
Catherine V. Mott *
Karyn Smith
Charlie Sundling *
Timothy Walsh
Gregory C. Yadley

* Not present at the meeting held on February 1, 2013.

Official Observers
A. Heath Abshure
Sean Greene

Enclosure

cc: Commissioner Luis Aguilar
Commissioner Troy A. Paredes
Commissioner Daniel M. Gallagher
Lona Nallengara
Elizabeth Murphy
Gerald J. Laporte

U.S. Securities and Exchange Commission
Advisory Committee on Small and Emerging Companies

Recommendations Regarding Disclosure and Other Requirements for Smaller Public Companies

February 1, 2013

AFTER CONSIDERING THAT:

1. Small businesses have historically played a significant role as drivers of economic activity, innovation and job creation in the United States.

2. The U.S. Securities and Exchange Commission (Commission) has provided for simplified disclosure and reporting for smaller issuers for over 30 years. Under current Commission rules, "smaller reporting companies" have certain scaled disclosure and reporting requirements available to them. The rules define "smaller reporting company" as a company with less than $75 million in common equity public float, or, if unable to calculate the public float, companies with less than $50 million in annual revenues. Similarly, under current Commission rules, a company is considered a "non-accelerated filer" if it has a public float of less than $75 million as of the last day of the most recently completed second fiscal quarter.

3. The Jumpstart Our Business Startups Act (JOBS Act), enacted on April 5, 2012, created a new category of company called an "emerging growth company," to which certain scaled disclosure and other requirements apply at the time of the company's initial public offering (IPO) and for a specified period thereafter. An emerging growth company is defined as a company with total annual gross revenues of less than $1 billion during its most recently completed fiscal year. The JOBS Act includes a "start date" condition for the emerging growth company category that provides that only a company whose IPO occurred after December 8, 2011 may be considered an emerging growth company. A company retains its status as an emerging growth company until the earliest of the following:

- its total annual gross revenues reach $1 billion or more;
- it is deemed to be a large accelerated filer under Securities Exchange Act of 1934 (Exchange Act) Rule 12b-2;
- it has issued more than $1 billion in non-convertible debt in the previous three years; or
- the last day of issuer's fiscal year following the fifth anniversary of the issuer's first registered sale of common equity securities.

4. The scaled disclosure requirements available to smaller reporting companies overlap with those available to emerging growth companies, but the provisions are not identical. In many cases, the disclosure requirements applicable to smaller reporting companies are less burdensome than those applicable to emerging growth companies, with a few notable exceptions, such as exemptions from the requirement to provide an auditor attestation report under Section 404(b) of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley Act), and exemptions from certain provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) relating to executive compensation.

5. Companies that are considered smaller reporting companies may have revenue that is considerably less than the $1 billion threshold for the emerging growth company category, but because of the "start date" and the five-year anniversary conditions for the emerging growth company category, existing smaller reporting companies are unable to take advantage of the provisions of the JOBS Act.

6. The Committee believes that expanding the scaled and other regulatory relief provided to smaller reporting companies to include some of the regulatory relief provided to emerging growth companies under the JOBS Act would be helpful to facilitate innovation and job creation by smaller companies without adverse effects on investor protection.

7. The Committee also believes that regulatory relief should be provided to smaller reporting companies with respect to the Commission's other disclosure requirements that place a disproportionate burden on smaller reporting companies in terms of the cost of, and time spent on, compliance with such requirements without a corresponding benefit to investors. These include the exhibit filing requirement for all material contracts not made in the ordinary course of business, as well as the requirement that all issuers submit financial information in XBRL format for periodic reports and other public filings.

8. The Committee also believes that the current threshold for the smaller reporting company is too low and the Committee believes that expanding the companies that could qualify as smaller reporting companies would further encourage more robust smaller company participation in the capital markets without adverse effects on investor protection.

9. According to data provided by the Commission's staff, in 2011, there were approximately 8,100 operating companies that filed annual reports on Form 10-K with the Commission, and the staff estimates that approximately 59% had a public float of less than $75 million, approximately 11% had a public float between $75 million and $250 million and approximately 6% had a public float between $250 million and $500 million.

THE COMMITTEE RECOMMENDS THAT:

1. The Commission revise the definition of "smaller reporting company" in Rule 405 under the Securities Act of 1933, Rule 12b-2 under the Exchange Act, and Item 10 of Regulation S-

K to include companies with a public float up to $250 million, or, if unable to calculate the public float, companies with less than $100 million in annual revenues.

2. The Commission revise its disclosure and other rules applicable to smaller reporting companies to incorporate exemptions from the following requirements, which are available to emerging growth companies under the JOBS Act:

- the requirement in Exchange Act Section 14A(a) to conduct shareholder advisory votes on executive compensation and on the frequency of such votes;
- the requirement in Exchange Act Section 14A(b) to provide disclosure about and conduct shareholder advisory votes on golden parachute compensation;
- the requirement in Section 953(b) of the Dodd-Frank Act to provide disclosure of the ratio of the median annual total compensation of all employees of the issuer to the annual total compensation of the chief executive officer (when adopted);
- the requirement in Exchange Act Section 14(i) to provide disclosure of the relationship between executive compensation and issuer financial performance (when adopted);
- in the case of a new or revised financial accounting standard that has different compliance dates for public and private companies, the requirement to comply with any such financial accounting standard until the date that a private company is required to comply; and
- any rules of the Public Company Accounting Oversight Board requiring mandatory audit firm rotation or a supplement to the auditor's report in which the auditor would be required to provide additional information about the audit and the financial statements of the issuer (auditor discussion and analysis).

3. The Commission specify that such scaled disclosure and other provisions shall be available to a smaller reporting company for as long as the company meets the revised smaller reporting company definition.

4. The Commission revise the definition of "accelerated filer" in Rule 12b-2 under the Exchange Act to include companies with a public float of $250 million or more, but less than $700 million, as of the last business day of the company's most recently completed second fiscal quarter. As a result of such revision, the requirement to provide an auditor attestation report under Section 404(b) of the Sarbanes-Oxley Act would no longer apply to companies with public float between $75 million and $250 million.

5. The Commission revise the material contracts exhibit filing requirement in Item 601(b)(10) of Regulation S-K to provide that smaller reporting companies will not be required to file schedules or similar attachments to such exhibits unless such schedules or attachments contain information which is material to an investment decision and which is not otherwise disclosed in the agreement or the disclosure document.

6. The Commission revise its rules to provide an exemption for smaller reporting companies from the requirement to submit financial information in XBRL format for periodic reports and other public filings.

7. When adopting new disclosure rules, the Commission consider whether such rules place a disproportionate burden on smaller reporting companies in terms of the cost of, and time spent on, compliance with such requirements, and if so, provide for exemptions from or phase-in periods for such new rules for smaller reporting companies.

SECURITIES AND EXCHANGE COMMISSION
ADVISORY COMMITTEE ON SMALL AND EMERGING COMPANIES
Washington, DC 20549-3628

March 21, 2013

The Honorable Elisse B. Walter
Chairman
U. S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1070

Dear Chairman Walter:

As you know, the Securities and Exchange Commission organized the Advisory Committee on Small and Emerging Companies to provide the Commission with advice on the Commission's rules, regulations, and policies with regard to its mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation, as they relate to the following:

(1) capital raising by emerging privately held small businesses and publicly traded companies with less than $250 million in public market capitalization;

(2) trading in the securities of such businesses and companies; and

(3) public reporting and corporate governance requirements to which such businesses and companies are subject.

On behalf of the Advisory Committee, we are pleased to submit the enclosed recommendation to the Commission regarding specialized disclosure requirements. The recommendation was unanimously approved by the members of the Advisory Committee present and voting at a meeting held on February 1, 2013.

We and the other members of the Advisory Committee are prepared to provide any additional assistance that the Commission or its staff may request with respect to this recommendation.

Respectfully submitted on behalf of the Committee,

Stephen M. Graham
Committee Co-Chair

M. Christine Jacobs
Committee Co-Chair

Members of the Committee

David A. Bochnowski
John J. Borer, III
Dan Chace
Milton Chang
Joseph "Leroy" Dennis *
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Paul Maeder *
Kathleen A. McGowan
Catherine V. Mott *
Karyn Smith
Charlie Sundling *
Timothy Walsh
Gregory C. Yadley

* Not present at the meeting held on February 1, 2013.

Official Observers
A. Heath Abshure
Sean Greene

Enclosure

cc: Commissioner Luis Aguilar
Commissioner Troy A. Paredes
Commissioner Daniel M. Gallagher
Lona Nallengara
Elizabeth Murphy
Gerald J. Laporte

U.S. Securities and Exchange Commission
Advisory Committee on Small and Emerging Companies

Recommendation Regarding
Specialized Disclosure Requirements

February 1, 2013

AFTER CONSIDERING THAT:

1. The mission of the U.S. Securities and Exchange Commission (the "Commission") is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.

2. The Committee notes that in recent years, legislation has been proposed or enacted that would require or requires or directs the Commission to amend its rules and forms to impose disclosure requirements on issuers relating to matters that the Committee believes is outside of the scope of the mission of the Commission. The Committee believes that the provisions in the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") imposing obligations on reporting issuers to include in Exchange Act reports information about conflict minerals originating in the Democratic Republic of the Congo, mine safety, and payments by resource extraction issuers are examples of such legislative mandates.

3. The Committee believes that these disclosure requirements, particularly those relating to conflict minerals and payments by resource extraction issuers, impose a disproportionate burden on small businesses in terms of cost of, and time spent on, compliance with such requirements without generating information useful for investors to make an informed investment decision, and have a negative effect on capital formation.

4. The Committee acknowledges and recognizes that these types of legislative mandates are responding to important and worthwhile humanitarian, social or foreign policy objectives.

5. The Committee does not believe that confronting these objectives through disclosure provisions in the federal securities laws is an effective way of addressing the underlying issues.

THE COMMITTEE RECOMMENDS THAT:

The Commission, as it deems appropriate, share with the Committee on Banking, Housing and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives this Committee's belief that such disclosure requirements, particularly those relating to conflict minerals and payments by resource extraction issuers, are outside of the scope of the mission of the Commission, impose disproportionate costs on small businesses without generating information useful for investors to make an informed investment decision, and have a negative effect on capital formation.

SECURITIES AND EXCHANGE COMMISSION

ADVISORY COMMITTEE ON SMALL AND EMERGING COMPANIES

Washington, DC 20549-3628

March 21, 2013

The Honorable Elisse B. Walter
Chairman
U. S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1070

Dear Chairman Walter:

As you know, the Securities and Exchange Commission organized the Advisory Committee on Small and Emerging Companies to provide the Commission with advice on the Commission's rules, regulations, and policies with regard to its mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation, as they relate to the following:

(1) capital raising by emerging privately held small businesses and publicly traded companies with less than $250 million in public market capitalization;

(2) trading in the securities of such businesses and companies; and

(3) public reporting and corporate governance requirements to which such businesses and companies are subject.

On behalf of the Advisory Committee, we are pleased to submit the enclosed recommendations to the Commission regarding trading spreads for smaller exchange-listed companies. The recommendations were unanimously approved by the members of the Advisory Committee present and voting at a meeting held on February 1, 2013.

We and the other members of the Advisory Committee are prepared to provide any additional assistance that the Commission or its staff may request with respect to these recommendations.

Respectfully submitted on behalf of the Committee,

Stephen M. Graham
Committee Co-Chair

M. Christine Jacobs
Committee Co-Chair

Members of the Committee

David A. Bochnowski
John J. Borer, III
Dan Chace
Milton Chang
Joseph "Leroy" Dennis *
Stephen M. Graham
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Richard L. Leza *
Paul Maeder *
Kathleen A. McGowan
Catherine V. Mott *
Karyn Smith
Charlie Sundling *
Timothy Walsh
Gregory C. Yadley

* Not present at the meeting held on February 1, 2013.

Official Observers
A. Heath Abshure
Sean Greene

Enclosure

cc: Commissioner Luis Aguilar
Commissioner Troy A. Paredes
Commissioner Daniel M. Gallagher
Lona Nallengara
Elizabeth Murphy
Gerald J. Laporte

U.S. Securities and Exchange Commission
Advisory Committee on Small and Emerging Companies

Recommendations Regarding Trading Spreads for Smaller Exchange-Listed Companies

February 1, 2013

AFTER CONSIDERING THAT:

1. Section 106(b) of the Jumpstart Our Business Startups Act (JOBS Act), enacted on April 5, 2012, directed the U.S. Securities and Exchange Commission (Commission) to conduct a study examining the impact of the transition to trading and quoting securities on U.S. securities exchanges in one penny increments, called "decimalization," on the number of initial public offerings (IPOs), the impact of decimalization on liquidity for securities of small and middle capitalization companies, and whether there is sufficient economic incentive to support trading operations in these securities in one penny increments.

2. In July 2012, the Commission delivered to Congress the report of the staff of the Commission required by Section 106(b), entitled "Report to Congress on Decimalization," which the Committee has reviewed and considered. Based on the review conducted in connection with the preparation of the report, the staff recommended that the Commission not proceed with a specific rulemaking to increase tick sizes at this time, as provided for in Section 106(b) of the JOBS Act, but recommended that the Commission should consider the additional steps that may be needed to determine whether such rulemaking should be undertaken in the future.

3. This Committee considered the issue of tick sizes for equity securities of smaller exchange-listed companies at public meetings on June 8, 2012, September 7, 2012 and February 1, 2013.

4. The Committee believes that providing economic incentives to market participants that would encourage the provision of trading support to the equity securities of small and middle capitalization companies, which includes market making and providing research analyst support, could serve to increase the liquidity for the equity securities of small and middle capitalization companies, which would enhance the attractiveness of the IPO market for small companies and the ability of small and middle-capitalization companies to raise capital.

5. This Committee has concluded that a change in the method for determining tick sizes for equity securities of smaller exchange-listed companies is the type of economic incentive market participants may require to provide the trading support for the equity securities of small and middle capitalization companies that is necessary to increase their liquidity and facilitate IPOs and capital formation.

6. The Committee is of the view that a permanent change to the method for determining tick sizes, not a temporary or pilot program, would be the most effective way to encourage market participants to make the required commitments and to invest in the necessary infrastructure.

THE COMMITTEE RECOMMENDS THAT:

1. The Commission adopt rules to increase tick size for smaller exchange-listed companies in the United States that will allow such companies, on a voluntary basis, to choose their own tick size within a limited range designated by the Commission.

2. In order to allow sufficient time for the effects of such rule changes to be evaluated, they should not be adopted on a temporary or pilot basis, although the Commission should commit to reviewing the effects of the changes in the future and making such adjustments as needed.

SECURITIES AND EXCHANGE COMMISSION
ADVISORY COMMITTEE ON SMALL AND EMERGING COMPANIES
Washington, DC 20549-3628

September 20, 2013

The Honorable Mary Jo White
Chair
U. S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1070

Dear Chair White:

As you know, the Securities and Exchange Commission organized the Advisory Committee on Small and Emerging Companies to provide the Commission with advice on the Commission's rules, regulations, and policies with regard to its mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation, as they relate to the following:

(1) capital raising by emerging privately held small businesses and publicly traded companies with less than $250 million in public market capitalization;

(2) trading in the securities of such businesses and companies; and

(3) public reporting and corporate governance requirements to which such businesses and companies are subject.

On behalf of the Advisory Committee, we are pleased to submit the enclosed recommendation to extend the comment period for the Commission's rule proposal to amend Regulation D, Form D, and Rule 156 under the Securities Act. This recommendation was unanimously approved by the members of the Advisory Committee present and voting at a meeting held on September 17, 2013.

We and the other members of the Advisory Committee are prepared to provide any additional assistance that the Commission or its staff may request with respect to these recommendations.

Respectfully submitted on behalf of the Committee,

Stephen M. Graham
Committee Co-Chair

M. Christine Jacobs
Committee Co-Chair

Members of the Committee

David A. Bochnowski
John J. Borer, III
Dan Chace
Milton Chang
Joseph "Leroy" Dennis
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Kathleen A. McGowan
Catherine V. Mott
Karyn Smith*
Charlie Sundling *
Timothy Walsh
Gregory C. Yadley

* Not present at the meeting held on September 17, 2013.

Official Observers
A. Heath Abshure
Pravina Raghavan

Enclosure

cc: Commissioner Luis Aguilar
Commissioner Daniel M. Gallagher
Commissioner Kara M. Stein
Commissioner Michael S. Piwowar
Keith Higgins
Elizabeth Murphy
Mauri Osheroff
Ted Yu
Johanna V. Losert

U.S. Securities and Exchange Commission
Advisory Committee on Small and Emerging Companies

Recommendation on the Proposed Amendments to Regulation D, Form D, and Rule 156 under the Securities Act

September 20, 2013

AFTER CONSIDERING THAT:

1. Section 201(a)(1) of the JOBS Act directs the Commission to amend Rule 506 of Regulation D under the Securities Act of 1933 to permit general solicitation or general advertising in offerings made under Rule 506, provided that all purchasers of securities are accredited investors.

2. On July 10, 2013, the Commission adopted the final amendments to Rule 506 of Regulation D to implement Section 201(a) of the JOBS Act.

3. On the same date, the Commission also proposed additional amendments to Regulation D, Form D, and Securities Act Rule 156 that, if implemented, would significantly modify the filing and other requirements associated with Rule 506 offerings.

4. The proposed rules are intended to enhance the Commission's ability to evaluate the development of market practices in Rule 506 offerings and to address concerns that may arise in connection with permitting issuers to engage in general solicitation or general advertising under the amended Rule 506.

5. While the Committee recognizes the importance of increasing the amount of information available to the Commission to enable the Commission to evaluate market practices and address concerns related to Rule 506 offerings, the Committee is concerned that the proposed amendments, if adopted, could have a significant negative impact on the 506 market by discouraging some investors from participating in Rule 506 offerings, adversely affecting capital raising and job creation.

6. Among other things, the Committee believes that the following merit additional consideration: –

a. Whether the advance filing requirement for Form D for Rule 506(c) offerings should be eliminated;

b. If the advance filing requirement for Form D for Rule 506(c) offerings is not eliminated, then the due date for filing should be designed so as not to generate inadvertent violations of Regulation D;

c. Whether there should be a requirement for a closing Form D amendment for Rule 506 offerings;

d. Whether the additional burden and cost of generating additional information is merited;

e. Whether the penalty for failing to file a Form D for a Rule 506 offering, and the resulting risk of being unable to raise capital under Rule 506 for one year after the required Form D filings are made, is appropriate; and

f. The implications of submitting written general solicitation materials used in Rule 506(c) offerings to the Commission.

7. Accordingly, the Committee believes that the time for commenting on the proposed amendments should be extended to allow for additional thought and comment in an effort to ensure that the final amendments do not have a chilling effect on investor participation in Rule 506 offerings.

8. The comment period for this rule proposal is scheduled to end on September 23, 2013.

THE COMMITTEE RECOMMENDS THAT:

The Commission extend the comment period for the Commission's rule proposal to amend Regulation D, Form D, and Rule 156 under the Securities Act (Release No. 33-9416) for an additional period of time, such as forty-five (45) days, to provide interested persons more time to analyze the issues and prepare their comments.

SECURITIES AND EXCHANGE COMMISSION
ADVISORY COMMITTEE ON
SMALL AND EMERGING COMPANIES
Washington, DC 20549-3628

March 9, 2015

The Honorable Mary Jo White
Chair
U. S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1070

Dear Chair White:

As you know, the Securities and Exchange Commission organized the Advisory Committee on Small and Emerging Companies to provide the Commission with advice on the Commission's rules, regulations, and policies with regard to its mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation, as they relate to the following:

(1) capital raising by emerging privately held small businesses and publicly traded companies with less than $250 million in public market capitalization;

(2) trading in the securities of such businesses and companies; and

(3) public reporting and corporate governance requirements to which such businesses and companies are subject.

On behalf of the Advisory Committee, we are pleased to submit the enclosed recommendations regarding the definition of "accredited investor." These recommendations were discussed at a meeting held on December 17, 2014 and unanimously approved by the members of the Advisory Committee present and voting at a meeting held on March 4, 2015.

We and the other members of the Advisory Committee are prepared to provide any additional assistance that the Commission or its staff may request with respect to these recommendations.

Respectfully submitted on behalf of the Committee,

Stephen M. Graham
Committee Co-Chair

M. Christine Jacobs
Committee Co-Chair

Members of the Committee
Charles Baltic
David A. Bochnowski*
John J. Borer, III
Dan Chace
Milton Chang*
Stephen M. Graham
Shannon L. Greene
Sara Hanks
John Hempill
M. Christine Jacobs
Richard L. Leza**
Sonia Luna
Catherine V. Mott
David J. Paul
Timothy Reese
Timothy Walsh**
Gregory C. Yadley

Official Observers
Michael Pieciak*
Javier Saade

* Not present at the meeting held on December 17, 2014.
**Not present at the meeting held on March 4, 2015.

Enclosure

cc:	Commissioner Luis Aguilar
	Commissioner Daniel M. Gallagher
	Commissioner Kara M. Stein
	Commissioner Michael S. Piwowar
	Keith Higgins
	Elizabeth Murphy
	Sebastian Gomez
	Julie Davis

U.S. Securities and Exchange Commission
Advisory Committee on Small and Emerging Companies

Recommendations Regarding the Accredited Investor Definition

From the December 17, 2014 and March 4, 2015 Meetings

AFTER CONSIDERING THAT:

1. The Committee's objective is to provide the U.S. Securities and Exchange Commission (the "Commission") with advice on its rules, regulations and policies with regard to its mission of protecting investors, maintaining fair, orderly and efficient markets, and facilitating capital formation, as they relate to, among other things, capital raising by emerging privately held small businesses ("emerging companies") and publicly traded companies with less than $250 million in public market capitalization ("smaller public companies").

2. Smaller public companies and emerging companies play a significant role as drivers of U.S. economic activity, innovation and job creation. The majority of net new jobs in the United States are from companies less than five years old, with these companies continuing to add jobs as they mature. Their ability to raise capital in the private markets is critical to the economic well-being of the United States.

3. The most widely used private offering exemption is Rule 506 of the Commission's Regulation D. In 2013, issuers utilizing Rule 506 raised over $1 trillion, comparing favorably to the $1.3 trillion raised in public offerings in 2013.

4. Most early-stage companies utilize Rule 506 when offering their securities. In 2013, angel investors alone invested approximately $25 billion in 71,000 companies in Rule 506 offerings.

5. With the exception that in Rule 506(b) offerings up to 35 persons who are not "accredited investors" may participate, all investors in Rule 506 offerings must be "accredited investors." Under Rule 501, a natural person is accredited if that person:

   - earned income that exceeded $200,000 (or $300,000 together with a spouse) in each of the prior two years, and reasonably expects the same for the current year, or

   - has a net worth over $1 million, either alone or together with a spouse (excluding the value of the person's primary residence).

6. The Dodd-Frank Act requires the Commission to undertake a review of the accredited investor definition to determine whether the thresholds "should be adjusted or modified for the protection of investors, in the public interest, and in light of the economy."

7. In connection with this review, some commentators have urged that the accredited investor thresholds be increased in order to prevent fraud against investors who may be unable to fend for themselves. The Committee is not aware of any substantial evidence suggesting that the current definition of accredited investor has contributed to the ability of fraudsters to commit fraud or has resulted in greater exposure for potential victims. The connection between fraud and the current accredited investor thresholds seems tenuous at best.

8. Certain commentators have taken the view that when calculating net worth for accredited investor purposes, retirement assets should be excluded. While the underlying premise of this idea is understandable, it fails to take into consideration the following realities:

    - The concept of "retirement assets" does not refer to a specific asset class, but rather usually refers to the tax treatment of many different asset classes.

    - This tax treatment can be applied to many types of assets, from conservative to speculative. For example, a self-directed IRA may include racehorses, gold, bitcoin and equity in start-ups. Tax-protected accounts are not by definition a "safe nest-egg" that an investor will always be able to fall back on.

    - Many experienced investors put assets that are most likely to appreciate into tax-protected accounts. Some very wealthy accredited investors would not be accredited if their holdings in tax-protected accounts were to be excluded from the accredited definition. To change the definition to exclude such assets would likely distort the tax planning of those investors for a non-tax related reason.

    - Alternatively, if tax treatment is ignored, then as an investor gets closer to retirement everything he or she owns is "retirement savings" and it would be very difficult, if not impossible, for a regulator to say what assets should belong in that category.

9. While there is little or no evidence to suggest that the existing definition of accredited investor has led to widespread fraud or other harm to investors, there is substantial evidence to suggest that the current system works and is critical to the support of smaller public companies and emerging companies.

10. If the income and net worth requirements underlying the definition of accredited investor are raised significantly, it will materially decrease the pool of capital available for smaller businesses. This decrease would have a disparate impact on those areas having a lower cost of living, which areas often coincide with regions of lower venture capital activity. The Committee also is concerned that a decrease in the accredited investor pool would have a disproportionate effect on women and minority entrepreneurs.

THE COMMITTEE RECOMMENDS THAT:

1. As the Commission reviews the definition of “accredited investor” in Rule 501 under the Securities Act of 1933, the primary goal should be to “do no harm” to the private offering ecosystem. Accordingly, any modifications to the definition should have the effect of expanding, not contracting, the pool of accredited investors. For example, we would recommend including within the definition of accredited investor those investors who meet a sophistication test, regardless of income or net worth. As a further example, the tax treatment of assets included in the calculation of net worth should be disregarded.

2. To take into account the effect of future inflation, on a going forward basis the Commission should adjust the accredited investor thresholds according to the consumer price index.

3. Rather than attempting to protect investors by raising the accredited investor thresholds or excluding certain asset classes from the calculation to determine accredited investor (which we believe are measures of dubious utility), the Commission should focus on enhanced enforcement efforts and increased investor education.

4. The Commission should continue to gather data on this subject for ongoing analysis.

SECURITIES AND EXCHANGE COMMISSION
ADVISORY COMMITTEE ON
SMALL AND EMERGING COMPANIES
Washington, DC 20549-3628

June 11, 2015

The Honorable Mary Jo White
Chair
U. S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1070

Dear Chair White:

As you know, the Securities and Exchange Commission organized the Advisory Committee on Small and Emerging Companies to provide the Commission with advice on the Commission's rules, regulations, and policies with regard to its mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation, as they relate to the following:

(1) capital raising by emerging privately held small businesses and publicly traded companies with less than $250 million in public market capitalization;

(2) trading in the securities of such businesses and companies; and

(3) public reporting and corporate governance requirements to which such businesses and companies are subject.

On behalf of the Advisory Committee, we are pleased to submit the enclosed recommendation regarding formalizing the exemption commonly known as "Section 4(1½)." This recommendation was discussed at a meeting held on March 4, 2015 and unanimously approved by the members of the Advisory Committee present and voting at a meeting held on June 3, 2015.

We and the other members of the Advisory Committee are prepared to provide any additional assistance that the Commission or its staff may request with respect to this recommendation.

Respectfully submitted on behalf of the Committee,

Stephen M. Graham
Committee Co-Chair

M. Christine Jacobs
Committee Co-Chair

Members of the Committee
Charles Baltic
David A. Bochnowski
John J. Borer, III
Dan Chace
Milton Chang
Stephen M. Graham
Shannon L. Greene
Sara Hanks
John Hempill
M. Christine Jacobs
Richard L. Leza*
Sonia Luna
Catherine V. Mott
David J. Paul
Timothy Reese**
Timothy Walsh*
Gregory C. Yadley

Official Observers
Michael Pieciak
Javier Saade

* Not present at the meeting held on March 4, 2015.
** Not present at the meeting held on June 3, 2015.

Enclosure
cc: Commissioner Luis Aguilar
Commissioner Daniel M. Gallagher
Commissioner Kara M. Stein
Commissioner Michael S. Piwowar
Keith Higgins
Elizabeth Murphy
Sebastian Gomez
Julie Davis

U.S. Securities and Exchange Commission
Advisory Committee on Small and Emerging Companies

Recommendation Regarding the "4(1½) Exemption"

From the March 4, 2015 and June 3, 2015 Meetings

AFTER CONSIDERING THAT:

1. The Committee's objective is to provide the U.S. Securities and Exchange Commission (the "Commission" or "SEC") with advice on its rules, regulations and policies with regard to its mission of protecting investors, maintaining fair, orderly and efficient markets, and facilitating capital formation, as they relate to, among other things, capital raising by emerging privately held small businesses ("emerging companies") and publicly traded companies with less than $250 million in public market capitalization ("smaller public companies").

2. Smaller public companies and emerging companies play a significant role as drivers of U.S. economic activity, innovation, and job creation. Their ability to raise capital in the private markets is critical to the economic well-being of the United States.

3. Private companies are better able to attract and retain talented employees when those employees are able to monetize at least part of their equity compensation. Making equity compensation more attractive to prospective employees will facilitate job creation and start-up growth.

4. With the enactment of the Jumpstart Our Business Startups (JOBS) Act of 2012, private companies have greater flexibility to defer an initial public offering, and many are choosing to remain private longer than in the past. As a result, shareholders and employees of these companies can face a longer wait time for public liquidity, a fact that negatively impacts private company capital formation and job creation.

5. Securities Act Rule 144 is a commonly-used safe harbor that allows selling securityholders to sell privately-issued securities subject to the conditions of the rule. However, there are situations under which employees and affiliates of the issuer may not be able to meet the conditions of Rule 144. One common example is an option holder seeking a "cashless" exercise of employee options. In this case, the holding period requirements in Rule 144 often prevent the holder from being able to resell shares immediately upon exercise in order to pay the exercise price and other costs of acquiring the shares underlying the options.

6. When the conditions of Rule 144 are not met, selling securityholders often rely on the so-called "4(1½) exemption," a legal construct that has developed based on case law. The "4(1½) exemption" incorporates elements of exemptions available under Securities Act

Section 4(a)(1) for persons other than an issuer, underwriter or dealer, and Section 4(a)(2) for transactions by an issuer not involving a public offering.

7. The expenses involved in a “4(1½)” transaction can be significant. Generally, the selling securityholder engages legal counsel to provide a legal opinion confirming that the shares were sold pursuant to a valid exemption from registration. Current opinion practice with respect to “4(1½)” transfers requires that the transferee certify that he/she/it is an accredited investor. In addition, the parties to the transfer need to certify that they have otherwise complied with the requirements of a valid private placement, including that there was no general solicitation, and the new certificates are legended as “restricted securities”.

8. Each transaction must satisfy the blue sky laws of the state of residence of the potential buyer. State regulations relating to these transactions generally vary, which often adds significantly to the complexity and cost.

9. There have been bills introduced in Congress to formalize the “4(1½)” legal construct. While a statutory change would be effective, the SEC also has the authority to formalize the exemption through rulemaking.

THE COMMITTEE RECOMMENDS THAT:

The Commission formalize the “4(1½) exemption” to mimic existing opinion practice for resales of privately-issued securities by shareholders who are not able to rely on Securities Act Rule 144.

SECURITIES AND EXCHANGE COMMISSION
ADVISORY COMMITTEE ON
SMALL AND EMERGING COMPANIES
Washington, DC 20549-3628

September 23, 2015

The Honorable Mary Jo White
Chair
U. S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1070

Dear Chair White:

As you know, the Securities and Exchange Commission organized the Advisory Committee on Small and Emerging Companies to provide the Commission with advice on the Commission's rules, regulations, and policies with regard to its mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation, as they relate to the following:

(1) capital raising by emerging privately held small businesses and publicly traded companies with less than $250 million in public market capitalization;

(2) trading in the securities of such businesses and companies; and

(3) public reporting and corporate governance requirements to which such businesses and companies are subject.

On behalf of the Advisory Committee, we are pleased to submit the enclosed recommendation to modernize Rule 147 to facilitate recently enacted and future state-based crowdfunding initiatives. This recommendation was discussed at a meeting held on June 3, 2015, and the general concept of the recommendation was unanimously approved by the members of the Advisory Committee present and voting at that meeting. The specific recommendation, as enclosed, was voted upon and unanimously approved on September 23, 2015.

We and the other members of the Advisory Committee are prepared to provide any additional assistance that the Commission or its staff may request with respect to this recommendation.

Respectfully submitted on behalf of the Committee,

Stephen M. Graham
Committee Co-Chair

M. Christine Jacobs
Committee Co-Chair

<u>Members of the Committee</u>
Charles Baltic
David A. Bochnowski
John J. Borer, III
Dan Chace
Milton Chang
Stephen M. Graham
Shannon L. Greene**
Sara Hanks
John Hempill
M. Christine Jacobs
Richard L. Leza**
Sonia Luna
Catherine V. Mott**
David J. Paul
Timothy Reese*
Timothy Walsh
Gregory C. Yadley

<u>Official Observers</u>
Michael Pieciak
Javier Saade**

* Not present at the meeting held on June 3, 2015.
** Not present at the meeting held on September 23, 2015.

Enclosure

cc: Commissioner Luis Aguilar
Commissioner Daniel M. Gallagher
Commissioner Kara M. Stein
Commissioner Michael S. Piwowar
Keith Higgins
Elizabeth Murphy
Sebastian Gomez
Julie Davis

U.S. Securities and Exchange Commission
Advisory Committee on Small and Emerging Companies

Recommendation to Modernize Rule 147 under the Securities Act of 1933

AFTER CONSIDERING THAT:

1. The ability of emerging companies to raise capital in the private markets is critical.

2. In the near future, a majority of states will have adopted some form of state-based crowdfunding. According to the North American Securities Administrators Association ("NASAA"), as of June 3, 2015:
   - 16 states and the District of Columbia have fully enacted some form of state-based crowdfunding pursuant to which 91 offerings have been undertaken within the last twelve months since the adoption of these provisions;
   - 9 states have passed crowdfunding legislation and are engaging in rulemaking to finalize these state-based crowdfunding provisions;
   - 12 states have crowdfunding legislation pending; and
   - 3 states are investigating whether to adopt state-based crowdfunding provisions.

3. Section 3(a)(11) of the Securities Act of 1933 provides an exemption from federal registration for intrastate offers and sales of securities. Securities Act Rule 147 provides a "safe harbor" for companies seeking to meet the requirements for the Section 3(a)(11) exemption. The Commission adopted Rule 147 in 1974 but has not since updated the rule. State regulators and practitioners have indicated that current requirements in Rule 147 make it difficult for issuers to take advantage of the new state-based crowdfunding provisions.

4. There are three identified areas that currently make it difficult for issuers to use Rule 147:
   - The rule does not allow offers to out-of-state residents; therefore, an offering placed on a publicly-available website or actively promoted on social media and viewable by out-of-state residents is impermissible under the rule. This is an impediment in the age of the Internet and social media.
   - The rule requires three 80% tests for an issuer to be deemed "doing business" within a state: that the issuer generates at least 80% of its revenues in-state, holds at least 80% of its assets in-state, and uses at least 80% of the gross proceeds of the offering in-state. These tests are difficult to satisfy and render many contemporary small businesses seeking local financing ineligible to rely upon the rule.
   - Issuers must be incorporated or organized in the state where the intrastate offering would be conducted.

THE COMMITTEE RECOMMENDS THAT:

The Commission modernize Securities Act Rule 147 through the use of its exemptive authority to facilitate recently enacted and future state-based crowdfunding initiatives. The Commission should consider the following:

1) Allowing offers made in reliance on Rule 147 to be viewed by out-of-state residents, but require that all sales be made only to residents of the state in which the issuer has its main offices;

2) Removing the need to use percentage thresholds for any type of issuer eligibility requirement, and evaluating whether alternative criteria should be used for determining the necessary nexus between the issuer and the state where all sales occur; and

3) Eliminating the requirement that the issuer be incorporated or organized in the same state where all sales occur.

SECURITIES AND EXCHANGE COMMISSION
ADVISORY COMMITTEE ON
SMALL AND EMERGING COMPANIES
Washington, DC 20549-3628

September 23, 2015

The Honorable Mary Jo White
Chair
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1070

Dear Chair White:

As you know, the Securities and Exchange Commission organized the Advisory Committee on Small and Emerging Companies to provide the Commission with advice on the Commission's rules, regulations, and policies with regard to its mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation, as they relate to the following:

(1) capital raising by emerging privately held small businesses and publicly traded companies with less than $250 million in public market capitalization;

(2) trading in the securities of such businesses and companies; and

(3) public reporting and corporate governance requirements to which such businesses and companies are subject.

On behalf of the Advisory Committee, we are pleased to submit the enclosed recommendations regarding disclosure by smaller publicly traded companies. This topic was discussed at our meetings held on June 3, 2015 and July 15, 2015, and the specific recommendations, as enclosed, were voted upon and approved unanimously on September 23, 2015.

We and the other members of the Advisory Committee are prepared to provide any additional assistance that the Commission or its staff may request with respect to this recommendation.

Respectfully submitted on behalf of the Committee,

Stephen M. Graham
Committee Co-Chair

M. Christine Jacobs
Committee Co-Chair

Members of the Committee
Charles Baltic
David A. Bochnowski
John J. Borer, III
Dan Chace
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John Hempill
M. Christine Jacobs
Richard L. Leza**
Sonia Luna
Catherine V. Mott**
David J. Paul
Timothy Reese*
Timothy Walsh
Gregory C. Yadley

Official Observers
Michael Pieciak
Javier Saade**

* Not present at the meeting held on June 3, 2015.
** Not present at the meeting held on September 23, 2015

Enclosure

cc: Commissioner Luis Aguilar
Commissioner Daniel M. Gallagher
Commissioner Kara M. Stein
Commissioner Michael S. Piwowar
Keith Higgins
Karen Garnett
Elizabeth Murphy
Sebastian Gomez
Julie Davis

U.S. Securities and Exchange Commission
Advisory Committee on Small and Emerging Companies

Recommendations about Expanding Simplified Disclosure for Smaller Issuers

AFTER CONSIDERING THAT:

1. Small businesses have historically played a significant role as drivers of economic activity, innovation and job creation in the United States.

2. The U.S. Securities and Exchange Commission (Commission) has provided for simplified disclosure and reporting for smaller issuers for over 30 years. Under current Commission rules, "smaller reporting companies" are companies that, among other things, have a public float of less than $75 million in common equity, or, if unable to calculate the public float, companies with less than $50 million in annual revenues. Similarly, a company is considered a "non-accelerated filer" if it has a public float of less than $75 million as of the last day of the most recently completed second fiscal quarter.

3. The Jumpstart Our Business Startups Act (JOBS Act), enacted on April 5, 2012, created a new category of company called an "emerging growth company," to which certain scaled disclosure and other requirements apply at the time of the company's initial public offering for up to five years. An emerging growth company is defined as a company with total annual gross revenues of less than $1 billion during its most recently completed fiscal year.

4. Emerging growth companies are provided with a number of accommodations with respect to disclosure requirements that would also be beneficial for smaller reporting companies, as these requirements place a disproportionate burden on smaller reporting companies in terms of cost of, and time spent on, compliance.

THE COMMITTEE RECOMMENDS THAT:

1. The Commission revise the definition of "smaller reporting company" to include companies with a public float of up to $250 million. This will afford the following accommodations to a broader range of smaller public companies:

    a. exemption from pay ratio rule;
    b. exemption from auditor attestation requirement; and
    c. exemption from providing a Compensation Discussion & Analysis.

2. The Commission revise its rules to provide smaller reporting companies with the same disclosure accommodations that are available to emerging growth companies. These include:

    a. exemption from the requirement to conduct shareholder advisory votes on executive compensation and on the frequency of such votes;

b. exemption from rules requiring mandatory audit firm rotation;
c. exemption from pay versus performance disclosure; and
d. allowing compliance with new accounting standards on the date that private companies are required to comply.

3. The Commission revise the definition of "accelerated filer" to include companies with a public float of $250 million or more, but less than $700 million. As a result of such revision, the requirement to provide an auditor attestation report under Section 404(b) of the Sarbanes-Oxley Act would no longer apply to companies with public float between $75 million and $250 million.

4. The Commission exempt smaller reporting companies from XBRL tagging.

5. The Commission exempt smaller reporting companies from filing immaterial attachments to material contracts.

SECURITIES AND EXCHANGE COMMISSION
ADVISORY COMMITTEE ON
SMALL AND EMERGING COMPANIES
Washington, DC 20549-3628

September 23, 2015

The Honorable Mary Jo White
Chair
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1070

Dear Chair White:

As you know, the Securities and Exchange Commission organized the Advisory Committee on Small and Emerging Companies to provide the Commission with advice on the Commission's rules, regulations, and policies with regard to its mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation, as they relate to the following:

(1) capital raising by emerging privately held small businesses and publicly traded companies with less than $250 million in public market capitalization;

(2) trading in the securities of such businesses and companies; and

(3) public reporting and corporate governance requirements to which such businesses and companies are subject.

On behalf of the Advisory Committee, we are pleased to submit the enclosed recommendations regarding the regulation of finders and other intermediaries in small business capital formation transactions. This topic was discussed at our meetings held on June 3, 2015 and July 15, 2015, and the specific recommendations, as enclosed, were voted upon and unanimously approved on September 23, 2015.

We and the other members of the Advisory Committee are prepared to provide any additional assistance that the Commission or its staff may request with respect to this recommendation.

Respectfully submitted on behalf of the Committee,

Stephen M. Graham
Committee Co-Chair

M. Christine Jacobs
Committee Co-Chair

Members of the Committee
Charles Baltic
David A. Bochnowski
John J. Borer, III
Dan Chace
Milton Chang
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John Hempill
M. Christine Jacobs
Richard L. Leza**
Sonia Luna
Catherine V. Mott**
David J. Paul
Timothy Reese*
Timothy Walsh
Gregory C. Yadley

Official Observers
Michael Pieciak
Javier Saade**

* Not present at the meeting held on June 3, 2015.
** Not present at the meeting held on September 23, 2015

Enclosure

cc: Commissioner Luis Aguilar
Commissioner Daniel M. Gallagher
Commissioner Kara M. Stein
Commissioner Michael S. Piwowar
Steve Luparello
Heather Seidel
Joe Furey
Joanne Rutkowski
Keith Higgins
Elizabeth Murphy
Sebastian Gomez
Julie Davis

U.S. Securities and Exchange Commission
<u>Advisory Committee on Small and Emerging Companies</u>

Recommendations Regarding the Regulation of Finders and Other Intermediaries in Small Business Capital Formation Transactions

AFTER CONSIDERING THAT:

1. Small businesses account for the creation of two-thirds of all new jobs, and are the incubators of innovation, with the majority of new jobs in the United States created by companies less than five years old. Early stage capital for these small businesses is raised principally through offerings that qualify for exemption under the registration provisions of the Securities Act of 1933 and the "blue sky" laws of the various states.

2. Capital raised in private offerings using SEC Regulation D is large when compared to other exempt offerings and registered offerings. However, only 13% of Regulation D offerings reported using a financial intermediary, such as a broker-dealer or finder, between 2009 and 2012. This is due, in part, to lack of interest from registered broker-dealers given the legal costs and risks involved in undertaking a small transaction and ambiguities in the definition of "broker." This void means that a number of smaller market participants rely on unregistered parties to identify and solicit potential investors.

3. As documented in the findings of an American Bar Association Business Law Section Task Force in 2005, recognized by the SEC Advisory Committee on Smaller Public Companies in 2006, and endorsed in the Final Reports of the Congressionally-mandated annual SEC Government-Business Forum on Small Business Capital Formation since 2006:

    a. Failure to address the regulatory issues surrounding finders and other private placement intermediaries impedes capital formation for smaller companies,

    b. The current broker-dealer registration system and FINRA membership process is a deterrent to meaningful oversight,

    c. Appropriate regulation would enhance economic growth and job creation, and

    d. Solutions are achievable through Commission leadership and coordination with FINRA and the states.

4. The Committee is of the view that imposing only limited regulatory requirements, including appropriate investor protection safeguards, on private placement intermediaries that limit their activities to specified parameters, do not hold customer funds or securities and deal only with accredited investors would enhance capital formation and promote job creation.

THE COMMITTEE RECOMMENDS THAT:

1. The Commission take steps to clarify the current ambiguity in broker-dealer regulation by determining that persons that receive transaction-based compensation solely for providing names of or introductions to prospective investors are not subject to registration as a broker under the Securities Exchange Act.

2. The Commission exempt intermediaries that are actively involved in the discussions, negotiations and structuring, as well as the solicitation of prospective investors, for private financings on a regular basis from broker registration at the federal level, conditioned upon registration as a broker under State law.

3. The Commission spearhead a joint effort with the North American Securities Administrators Association and the Financial Industry Regulatory Authority to ensure coordinated State regulation and adoption of measured regulation that is transparent, responsive to the needs of small businesses for capital, proportional to the risks to which investors in such offerings are exposed, and capable of early implementation and ongoing enforcement.

4. The Commission should take immediate intermediary steps to begin to address issues regarding the regulation of intermediaries in small business capital formation transactions incrementally instead of waiting until development of a comprehensive solution.

SECURITIES AND EXCHANGE COMMISSION
ADVISORY COMMITTEE ON
SMALL AND EMERGING COMPANIES
Washington, DC 20549-3628

July 20, 2016

The Honorable Mary Jo White
Chair
U. S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1070

Dear Chair White:

As you know, the Securities and Exchange Commission organized the Advisory Committee on Small and Emerging Companies to provide the Commission with advice on the Commission's rules, regulations, and policies with regard to its mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation, as they relate to the following:

(1) capital raising by emerging privately held small businesses and publicly traded companies with less than $250 million in public market capitalization;

(2) trading in the securities of such businesses and companies; and

(3) public reporting and corporate governance requirements to which such businesses and companies are subject.

On behalf of the Advisory Committee, we are pleased to submit the enclosed recommendations regarding the definition of "accredited investor." These recommendations were discussed at an Advisory Committee meeting held on May 18, 2016 and approved by the members of the Advisory Committee present and voting at a meeting held on July 19, 2016.

We and the other members of the Advisory Committee are prepared to provide any additional assistance that the Commission or its staff may request with respect to these recommendations.

Respectfully submitted on behalf of the Advisory Committee,

Stephen M. Graham
Committee Co-Chair

Sara Hanks
Committee Co-Chair

Members of the Advisory Committee
Robert Aguilar
Xavier Gutierrez
Brian Hahn
Kyle Hauptman
Jenny Kassan**
Catherine V. Mott
Jonathan Nelson*
Patrick Reardon
Lisa Shimkat
Tisha R. Tallman*
Annemarie Tierney
Gregory C. Yadley
Laura Yamanaka

Non-voting members
Michael Pieciak
Mark Walsh

* Not present at the meeting held on May 18, 2016.
**Not present at the meeting held on July 19, 2016.

Enclosure

cc:	Commissioner Kara M. Stein
	Commissioner Michael S. Piwowar
	Keith Higgins
	Elizabeth Murphy
	Sebastian Gomez
	Julie Davis

U.S. Securities and Exchange Commission
Advisory Committee on Small and Emerging Companies

Recommendations Regarding the Accredited Investor Definition

From the May 18, 2016 and July 19, 2016 Meetings

AFTER CONSIDERING THAT:

1. The Advisory Committee's objective is to provide the U.S. Securities and Exchange Commission (the "Commission") with advice on its rules, regulations and policies with regard to its mission of protecting investors, maintaining fair, orderly and efficient markets, and facilitating capital formation, as they relate to, among other things, capital raising by emerging privately held small businesses ("emerging companies").

2. Emerging companies play a significant role as drivers of U.S. economic activity, innovation and job creation. Their ability to raise capital in the unregistered securities markets is critical to the economic well-being of the United States.

3. The exemptions from registration available in Regulation D under the Securities Act of 1933 are the most widely used transactional exemptions for securities offerings by issuers. In 2015, issuers utilizing Regulation D raised over $1.35 trillion, an amount comparable to what was raised in registered offerings.

4. The "accredited investor" definition is a centerpiece of Regulation D. It is intended to encompass those persons whose financial sophistication and ability to sustain the risk of loss of investment or ability to fend for themselves render the protections of the Securities Act's registration process unnecessary. Under Securities Act Rule 501(a), a natural person is accredited if that person:

    - earned income that exceeded $200,000 (or $300,000 together with a spouse) in each of the prior two years, and reasonably expects the same for the current year, or

    - has a net worth over $1 million, either alone or together with a spouse (excluding the value of the person's primary residence).

5. In March 2015, the Advisory Committee made recommendations to the Commission as the Commission staff reviewed the definition of accredited investor. At the core of those recommendations was the statement that "the primary goal should be to 'do no harm' to the private offering ecosystem."

6. If the individual income and net worth thresholds underlying the definition of accredited investor were raised significantly, it would considerably decrease the number of households that qualify as accredited investors. This decrease would have a disparate impact on those areas having a lower cost of living, and those areas already often coincide with regions of

lower venture capital activity. The Committee also is concerned that a decrease in the accredited investor pool would have a disproportionate effect on women and minority entrepreneurs.

7. Some commentators have urged that the accredited investor thresholds be increased in order to prevent fraud against investors who may be unable to fend for themselves. The Committee is not aware of any evidence suggesting that fraud in the private markets is driven or affected by the levels at which the accredited investor definition is set.

THE COMMITTEE RECOMMENDS THAT:

1. The core of the Advisory Committee's 2015 recommendation regarding the definition of "accredited investor" in Rule 501 remains the same: the overarching goal of any changes the Commission might consider should be to "do no harm" to the private offering ecosystem.

2. The Commission should not change the current financial thresholds in the definition except to adjust on a going–forward basis to reflect inflation.

3. The Commission should expand the pool of accredited investors to include individuals who have passed examinations that test their knowledge and understanding in the areas of securities and investing, including the Series 7, Series 65, Series 82 and CFA Examinations and equivalent examinations. The Commission also should explore ways to allow participation by potential investors with specific industry or issuer knowledge or expertise who would not otherwise be considered accredited investors.

4. The Committee would support expanding the definition to take into account measures of non-financial sophistication, regardless of income or net worth, thereby expanding rather than contracting the pool of accredited investors.

5. Simplicity and certainty are vital to the utility of any expanded definition of accredited investor. Accordingly, any non-financial criteria should be able to be ascertained with certainty.

6. The Commission should continue to gather data on this subject for ongoing analysis of what attributes best encompass those persons whose financial sophistication and ability to sustain the risk of loss of investment or ability to fend for themselves render the protections of the Securities Act's registration process unnecessary.

SECURITIES AND EXCHANGE COMMISSION
ADVISORY COMMITTEE ON SMALL AND EMERGING COMPANIES
Washington, DC 20549-3628

February 16, 2017

The Honorable Michael S. Piwowar
Acting Chairman
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1070

Dear Acting Chairman Piwowar:

As you know, the Securities and Exchange Commission organized the Advisory Committee on Small and Emerging Companies to provide the Commission with advice on the Commission's rules, regulations, and policies with regard to its mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation, as they relate to the following:

(1) capital raising by emerging privately held small businesses and publicly traded companies with less than $250 million in public market capitalization;

(2) trading in the securities of such businesses and companies; and

(3) public reporting and corporate governance requirements to which such businesses and companies are subject.

On behalf of the Advisory Committee, we are pleased to submit the enclosed recommendation regarding corporate board diversity. This recommendation was discussed at Advisory Committee meetings held on October 5 and December 7, 2016, and approved by the members of the Advisory Committee present and voting at a meeting held February 15, 2017.

We and the other members of the Advisory Committee are prepared to provide any additional assistance that the Commission or its staff may request with respect to these recommendations.

Respectfully submitted on behalf of the Advisory Committee,

Stephen M. Graham
Committee Co-Chair

Sara Hanks
Committee Co-Chair

<u>Members of the Advisory Committee</u>
Robert Aguilar
Xavier Gutierrez**
Brian Hahn**
Jenny Kassan
Catherine V. Mott*
Jonathan Nelson
Patrick Reardon
Lisa Shimkat*
Annemarie Tierney
Gregory C. Yadley**
Laura Yamanaka

<u>Non-voting members</u>
Michael Pieciak
Michele Schimpp*

* These members were not present at the meeting held on October 5, 2016.
** These members, as well as Stephen Graham, were not present for the Advisory Committee discussion and vote held on February 15, 2017.

Enclosure
cc: Acting Chairman Michael S. Piwowar
Commissioner Kara M. Stein
Shelley E. Parratt
Elizabeth Murphy
Sebastian Gomez Abero
Julie Z. Davis

U.S. Securities and Exchange Commission
Advisory Committee on Small and Emerging Companies

Recommendation Regarding Disclosure of Board Diversity

AFTER CONSIDERING THAT:

1. The Advisory Committee's objective is to provide the U.S. Securities and Exchange Commission (the "Commission") with advice on its rules, regulations and policies with regard to its mission of protecting investors, maintaining fair, orderly and efficient markets, and facilitating capital formation, as they relate to, among other things, capital raising by emerging privately held small businesses and publicly traded companies with less than $250 million in public market capitalization.

2. Board diversity has been associated with improved competitiveness and talent management, greater access to capital, more sustainable profits, and better relations with stakeholders and therefore plays an important role in capital formation for small and emerging companies.

3. Accordingly, information regarding board diversity is important to stockholders, employees and customers.

4. In 2009, the Commission adopted a rule (Item 407(c)(2)(vi) of Regulation S-K (the "Rule")) requiring companies to disclose in their proxy statements whether a nominating committee considers diversity in identifying nominees for the company's board of directors, and if it is considered, how. The Rule also requires that if the company has a policy with regard to the consideration of diversity in identifying director nominees, how that policy is implemented and how its effectiveness is assessed.

5. The Rule has failed to generate information useful to stockholders, employees and customers in assessing board diversity.

THE COMMITTEE RECOMMENDS THAT:

The Commission amend Item 407(c)(2) of Regulation S-K to require issuers to describe, in addition to their policy with respect to diversity, if any, the extent to which their boards are diverse. While, generally, the definition of diversity should be up to each issuer, issuers should include disclosure regarding race, gender, and ethnicity of each member/nominee as self-identified by the individual.

SECURITIES AND EXCHANGE COMMISSION
ADVISORY COMMITTEE ON SMALL AND EMERGING COMPANIES
Washington, DC 20549-3628

May 15, 2017

The Honorable Jay Clayton
Chairman
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1070

Dear Chairman Clayton:

As you know, the Securities and Exchange Commission organized the Advisory Committee on Small and Emerging Companies to provide the Commission with advice on the Commission's rules, regulations, and policies with regard to its mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation, as they relate to the following:

(1) capital raising by emerging privately held small businesses and publicly traded companies with less than $250 million in public market capitalization;

(2) trading in the securities of such businesses and companies; and

(3) public reporting and corporate governance requirements to which such businesses and companies are subject.

On behalf of the Advisory Committee, we are pleased to submit the enclosed recommendation regarding secondary market liquidity for Regulation A securities. This recommendation was discussed at the Advisory Committee meeting held on February 15, 2017, and approved by the members of the Advisory Committee present and voting at a meeting held May 10, 2017.

We and the other members of the Advisory Committee are prepared to provide any additional assistance that the Commission or its staff may request with respect to these recommendations.

Respectfully submitted on behalf of the Advisory Committee,

Stephen M. Graham
Committee Co-Chair

Sara Hanks
Committee Co-Chair

Members of the Advisory Committee
Robert Aguilar
Xavier Gutierrez* **
Brian Hahn
Jenny Kassan**
Catherine V. Mott
Jonathan Nelson**
Patrick Reardon
Lisa Shimkat
Annemarie Tierney
Gregory C. Yadley*
Laura Yamanaka

Non-voting members
Michael Pieciak
Joseph Shepard*

* These members plus Co-Chair Stephen Graham were not present at the meeting held on February 15, 2017.

** These members were not present for the Advisory Committee discussion and vote held on May 10, 2017.

Enclosure

cc: Commissioner Michael S. Piwowar
Commissioner Kara M. Stein
Shelley E. Parratt
Elizabeth Murphy
Sebastian Gomez Abero
Julie Z. Davis

U.S. Securities and Exchange Commission
Advisory Committee on Small and Emerging Companies

Recommendation Regarding Secondary Market Liquidity for Regulation A, Tier 2 Securities

AFTER CONSIDERING THAT:

1) The Advisory Committee's objective is to provide the U.S. Securities and Exchange Commission (the "Commission") with advice on its rules, regulations and policies with regard to its mission of protecting investors, maintaining fair, orderly and efficient markets, and facilitating capital formation, as they relate to, among other things, capital raising by emerging privately held small businesses and publicly traded companies with less than $250 million in public market capitalization.

2) Secondary market liquidity is integral to capital formation. Small businesses trying to attract capital often struggle because potential backers are reluctant to invest unless they are confident there will be an exit opportunity. Capital is often more expensive or not available for issuers that are not able to provide investors with secondary market liquidity. Also, securities lacking an available market generally bear an illiquidity discount on value.

3) Limited possibilities for liquidity means investors' capital may be locked up longer than they would like, hindering their ability to build portfolios with multiple, diverse investments. Liquidity limitations also prevent capital from being put to use in the next investment.

4) Regulation A provides for the preemption of state securities law registration and qualification requirements for securities initially offered or sold in Tier 2 offerings; however, secondary sales of these same Tier 2 Regulation A securities require compliance with disparate state law requirements. This means willing sellers and buyers in the secondary trading market must find exemptions on a state by state basis.

5) There are substantive differences in the various state exemptions. This lack of uniformity inhibits the development of a national secondary trading market.

6) One popular exemption for secondary trading is the "manual exemption," which is currently available in 39 of the 54 U.S. jurisdictions. These provide an exemption for secondary trading by non-issuers through a broker dealer, if the issuing company has financial and other information published in a designated securities manual. The exemption is based on the availability in the manual of current information about an issuer that enables parties on both sides of the trade to make an educated investment decision.

7) While there used to be more, there is currently only one remaining designated securities manual (published by Mergent, formerly known as Moody's). However, company information available on certain OTC Markets marketplaces is now recognized for purposes of the state blue sky manual exemption in 21 jurisdictions.

8) Complying with the manual exemption can be costly for companies, since issuers must pay to have their information disseminated. Additionally, there is not currently a centralized information portal accepted by all jurisdictions where investors can find that information.

9) Tier 2 Regulation A issuers are subject to initial and ongoing disclosure requirements that are greater than the information that is included in a manual.

10) The information in Tier 2 Regulation A ongoing reports is easily available to the public on EDGAR.

THE COMMITTEE RECOMMENDS THAT:

1. The Commission take steps to help reduce friction in secondary trading by holders of Tier 2 Regulation A securities where the issuer is current in its ongoing reports.

2. The Commission collaborate with NASAA in this endeavor.

3. The Commission use its authority under Section 18 of the Securities Act to preempt from state regulation the secondary trading in securities of Tier 2 Regulation A issuers that are current in their ongoing reports.[1]

[1] This approach would replicate what is the equivalent of a uniform manual exemption across all 54 jurisdictions, with EDGAR serving as the central repository.

SECURITIES AND EXCHANGE COMMISSION
ADVISORY COMMITTEE ON SMALL AND EMERGING COMPANIES
Washington, DC 20549-3628

May 15, 2017

The Honorable Jay Clayton
Chairman
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1070

Dear Chairman Clayton:

As you know, the Securities and Exchange Commission organized the Advisory Committee on Small and Emerging Companies to provide the Commission with advice on the Commission's rules, regulations, and policies with regard to its mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation, as they relate to the following:

(1) capital raising by emerging privately held small businesses and publicly traded companies with less than $250 million in public market capitalization;

(2) trading in the securities of such businesses and companies; and

(3) public reporting and corporate governance requirements to which such businesses and companies are subject.

On behalf of the Advisory Committee, we are pleased to submit the enclosed recommendation regarding the regulation of finders and other intermediaries in small business capital formation transactions. This topic has been discussed at multiple Advisory Committee meetings, most recently on October 5, 2016 and February 15, 2017, and the recommendation was approved by the members of the Advisory Committee present and voting at a meeting held May 10, 2017.

We and the other members of the Advisory Committee are prepared to provide any additional assistance that the Commission or its staff may request with respect to these recommendations.

Respectfully submitted on behalf of the Advisory Committee,

Stephen M. Graham
Committee Co-Chair

Sara Hanks
Committee Co-Chair

Members of the Advisory Committee
Robert Aguilar
Xavier Gutierrez* **
Brian Hahn
Jenny Kassan**
Catherine V. Mott
Jonathan Nelson**
Patrick Reardon
Lisa Shimkat
Annemarie Tierney
Gregory C. Yadley*
Laura Yamanaka

Non-voting members
Michael Pieciak
Joseph Shepard*

* These members plus Co-Chair Stephen Graham were not present at the meeting held on February 15, 2017.

** These members were not present for the Advisory Committee discussion and vote held on May 10, 2017.

Enclosure

cc: Commissioner Michael S. Piwowar
Commissioner Kara M. Stein
Heather Seidel
Joanne Rutkowski
Shelley E. Parratt
Elizabeth Murphy
Sebastian Gomez Abero
Julie Z. Davis

U.S. Securities and Exchange Commission
Advisory Committee on Small and Emerging Companies

Recommendation Regarding Finders, Private Placement Brokers, and Investment Platforms Not Registered as Broker-Dealers

AFTER CONSIDERING THAT:

1) Identifying potential investors is one of the most difficult challenges for small businesses trying to raise capital.

2) There is significant uncertainty in the marketplace about what activities require broker-dealer registration under Section 15 of the Securities Exchange Act of 1934. Companies that want to play by the rules struggle to know in what circumstances they can engage a "finder" or platform that is not registered as a broker-dealer.

3) As evidenced in the Report and Recommendations of an American Bar Association Business Law Section Task Force in 2005, a recommendation from this Committee in 2015, as well as in numerous other prior and subsequent communications to the Commission, for years many interested parties have urged the Commission and its staff to take steps to address this ambiguity.

4) The inadequate actions that have been taken have been limited to staff interpretations, such as no-action letters. Because these interpretations do not have the weight of Commission action, they have limited utility. Also, the staff interpretations are very limited in their scope.

5) The Committee is disappointed the Commission has not taken actions to help to address these concerns despite repeated and longstanding requests.

THE COMMITTEE RECOMMENDS THAT:

The Commission adopt rules in the near future to provide regulatory certainty for finders, private placement brokers, and platforms not registered as broker-dealers involved in primary and secondary transactions of unregistered securities. Pending adoption of any new rules, staff in the Division of Trading and Markets should with all deliberate speed bring clarity and certainty in this area by promulgating appropriate guidance.

SECURITIES AND EXCHANGE COMMISSION
ADVISORY COMMITTEE ON
SMALL AND EMERGING COMPANIES
Washington, DC 20549-3628

September 21, 2017

The Honorable Jay Clayton
Chairman
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1070

Dear Chairman Clayton:

As you know, the Securities and Exchange Commission organized the Advisory Committee on Small and Emerging Companies to provide the Commission with advice on the Commission's rules, regulations, and policies with regard to its mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation, as they relate to the following:

(1) capital raising by emerging privately held small businesses and publicly traded companies with less than $250 million in public market capitalization;

(2) trading in the securities of such businesses and companies; and

(3) public reporting and corporate governance requirements to which such businesses and companies are subject.

On behalf of the Advisory Committee, we are pleased to submit the enclosed recommendation to amend Securities Act Rule 701. This recommendation was discussed and approved by the members of the Advisory Committee present and voting at a meeting held September 13, 2017.

We and the other members of the Advisory Committee are prepared to provide any additional assistance that the Commission or its staff may request with respect to these recommendations.

Respectfully submitted on behalf of the Advisory Committee,

Stephen M. Graham
Committee Co-Chair

Sara Hanks
Committee Co-Chair

Members of the Advisory Committee
Robert Aguilar
Xavier Gutierrez
Brian Hahn
Jenny Kassan*
Catherine V. Mott
Jonathan Nelson*
Patrick Reardon
Lisa Shimkat
Annemarie Tierney
J.W. Verret
Gregory C. Yadley
Laura Yamanaka

Non-voting members
Michael Pieciak
Joseph Shepard

* These members were not present for the Advisory Committee discussion and vote.

Enclosure

cc: Commissioner Michael S. Piwowar
Commissioner Kara M. Stein
William H. Hinman
Robert Evans
Elizabeth Murphy
Sebastian Gomez Abero
Julie Z. Davis

U.S. Securities and Exchange Commission
Advisory Committee on Small and Emerging Companies

Recommendation Regarding Securities Act Rule 701

AFTER CONSIDERING THAT:

1) The Advisory Committee's objective is to provide the U.S. Securities and Exchange Commission (the "Commission") with advice on its rules, regulations and policies with regard to its mission of protecting investors, maintaining fair, orderly and efficient markets, and facilitating capital formation, as they relate to, among other things, capital raising by emerging privately held small businesses and publicly traded companies with less than $250 million in public market capitalization.

2) The ability to compensate employees and consultants with equity is critical for emerging businesses. Many companies compete for talent by granting compensatory stock options or other awards.

3) Securities Act Rule 701 provides an exemption from registration for securities issued by non-reporting companies pursuant to a compensatory benefit plan to employees, directors, general partners, trustees, officers, or certain consultants. Issuers that sell more than $5 million worth of securities in a 12-month period in reliance on Rule 701 are required to provide investors with recurring specified disclosure, including detailed financial statements (the "disclosure threshold").

4) Companies are staying private longer and growing to higher valuations than they were when the Commission last substantively amended Rule 701 in 1999, and many companies bump up against the $5 million disclosure threshold.

5) In addition to the disclosure threshold, other aspects of Rule 701 are hindering companies' ability to hire and compensate service providers. These include the application of the rule to restricted stock units, the requirement that consultants be "natural persons," and the requirement that disclosure be provided retroactively during the 12-month period when the disclosure threshold is exceeded.

6) The time is ripe for changes to modernize Rule 701. At our September 13, 2017 meeting, a number of proposed changes were presented to the Committee that, based on our own experience, we believe warrant further consideration.

THE COMMITTEE RECOMMENDS THAT:

The Commission modernize Rule 701, giving careful consideration to the proposed changes presented to the Advisory Committee during its September 13, 2017 meeting (attached in Appendix A).

Appendix A to Recommendation Regarding Securities Act Rule 701

Awards Pursuant to
Written Compensatory Benefit Plans –

Should Securities Act Rule 701 be Updated?

September 13, 2017

WARBY PARKER

orrick

Securities Act Rule 701

Overview of Rule 701

What is Rule 701?

- Rule 701 exempts from the registration requirements of Section 5 of the Securities Act, offers and sales of securities issued to certain individuals pursuant to compensatory benefit plans or contracts established by the issuer, its parents, its majority-owned subsidiaries or the majority-owned subsidiaries of the issuer’s parent.

Who can use Rule 701?

- Rule 701 may be used by any issuer that is not subject to the reporting requirements of Section 13 or 15(d) of the Securities Exchange Act (i.e., private companies) that is not an investment company required to be registered under the Investment Company Act of 1940.

Overview of Rule 701

Who can Rule 701 be used for?

- Current employees, consultants, advisors, officers, directors, general partners and trustees (where the issuer is a business trust) of the issuer, its parents, its majority-owned subsidiaries or the majority-owned subsidiaries of the issuer's parent (referred to herein as "Service Providers").

- Former Service Providers if such persons were employed by, or providing services to, the issuer at the time the securities were offered.

- Family members of the above Service Providers who acquire securities from the Service Providers by gift or domestic relations orders.

Overview of Rule 701

What is not permitted under Rule 701?

- Rule 701 is not available for resales.
- Rule 701 is not available for plans or schemes established to circumvent the compensatory purpose of Rule 701, such as to raise capital.
- Rule 701 is not available for any offer or sale that technically complies with Rule 701 but is part of a plan or scheme to evade the registration requirements of the Securities Act.

Overview of Rule 701

Limitations on Securities Sold in Reliance on Rule 701 – "Hard Cap Limit"

- In any consecutive 12-month period, the issuer may only sell an amount of securities in reliance on Rule 701 equal to the greater of:
  - $1 million in value;
  - 15% of the issuer's total assets based on its most recent balance sheet dated no earlier than its most recent fiscal year end (or those of its parent if the parent guarantees the securities and the issuer is a wholly owned subsidiary); and
  - 15% of the outstanding class of offered securities based on the issuer's most recent balance sheet dated no earlier than its most recent fiscal year end.

- Rule 701 sales or offerings are ***<u>not integrated</u>*** with any other types of offerings made by the issuer (i.e., we only count against the limit, securities sold in reliance on Rule 701).

Overview of Rule 701

Disclosure Required for All

– All recipients of securities under Rule 701 must receive a copy of the compensatory benefit plan or contract.

Additional Disclosure Required for Some – "Soft Cap Limit"

– If the issuer sells securities that is more than $5 million in value in reliance on Rule 701 in any consecutive 12-month period, the issuer must provide the following disclosure "a reasonable period of time" prior to sale:
  – if the plan is subject to the Employee Retirement Income Security Act of 1974 ("ERISA"), a copy of the summary plan description and, if not, a summary of the material terms of the plan;
  – risk factors; and
  – financial statements required to be furnished by Part F/S of Form 1/A (Regulation A Offering Statement), dated no earlier than 180 days before the sale.

Proposed Changes to Rule 701

The Role of Equity Compensation in Private Company Growth & Development

Compensating employees and consultants with equity has become an <u>invaluable tool</u> for private companies to <u>hire</u> service providers necessary for the <u>growth and development</u> of the company.

- At the earliest stages, equity compensation is often the <u>only real form of compensation available</u> to private companies to hire service providers necessary for the development of the company.
  - We recognize that minimum cash compensation is required under Federal and state law, however, it is often a challenge to pay even this minimum compensation at the earliest stages.
- At later stages, equity compensation is <u>critical to recruit talent</u> necessary to continue the growth and development of a company.
  - Competition for talent is intense and equity compensation is generally a necessity.

Challenges with Compliance under the Current Framework

Many private companies, particularly those at the earliest stages, do <u>not have the internal resources or funds</u> to support compliance with rules like Rule 701.

This lack of resources and available expertise can lead to <u>inadvertent compliance issues</u> where there is complexity or substantial cost required to comply with the rules.

Given the importance of equity compensation to the growth and development of private companies, it is critical that the rules related to the issuance of such equity compensation are <u>rational</u> and <u>not unduly complicated</u> and/or <u>difficult to comply with</u>.

Proposed Change: Remove Requirement that Consultants be "Natural Persons"

Revise Definition of Consultants and Advisors to Remove Natural Person Requirement

- Rule 701 is available for consultants and advisors only if:
  - They are "natural persons;"
  - They provide bona fide services to the issuer, its parents, its majority-owned subsidiaries or majority owned subsidiaries of the issuer's parent; and
  - The services are not in connection with the offer or sale of securities in a capital-raising transaction, and do not directly or indirectly promote or maintain a market for the issuer's securities.

Proposed Change: Remove Requirement that Consultants be “Natural Persons”

Background on Private Company use of Consultants and Advisors

- Private companies routinely hire consultants to perform services traditionally performed by employees. This is particularly true for early stage private companies who often cannot afford to engage certain types of service providers full time (e.g., controllers, chief financial officers, human resources support, etc.).
- Most consultants, even individual consultants, will provide their services via an entity created for such purpose. This is often done for tax and liability purposes.
- Under the current rules, companies must jump through hoops in order to compensate these consultants with equity.
  - Sometimes this involves engaging both the individual and the entity as consultants.
  - Alternatively, securities may be sold directly to the entity pursuant to an accredited investor exemption, if available.

Proposed Change: Remove Requirement that Consultants be "Natural Persons"

In the preamble to the 1988 release pursuant to which Rule 701 was first adopted, the Staff noted that there was <u>concern</u> that <u>including consultants would lead to abuse</u> and the use of the rule for non-compensatory purposes.

However, the <u>staff agreed</u> that this concern was <u>not warranted</u> and was adequately addressed by the rules.

"Although the Commission originally believed that broadening the rule to include consultants could go beyond the compensatory purposes of the provision, commenters have repeatedly stated that this limitation is unnecessary because securities issuances to such parties also can be for compensatory and not capital raising purposes and thus there is <u>no meaningful basis for distinguishing between issuances to them and to employees</u>. The Commission has been persuaded by the commenters on this issue. In addition, <u>the concern expressed</u> by the Commission in the July release about use of the rule for non-compensatory purposes is <u>addressed by new Preliminary Note 5</u> and the conditions in the exemption requiring a written plan or contract. Consequently, the rules has been modified to extend to consultants and advisors who provide bona fide services to a company, its parent or majority-owned subsidiaries." Release No. 33-6768 (April 14, 1988) [53FR 12918]

Proposed Change: Remove Requirement that Consultants be "Natural Persons"

In the preamble to the 1999 release pursuant to which Rule 701 was amended, the Staff expressed concern that Rule 701 was being <u>misused for non-compensatory purposes</u> and, in an effort to curb this abuse, aligned the definition of consultant under Rule 701 with the rules set forth for Form S-8 and, in the process, added a requirement that the consultant recipient be a "natural person."

<u>We recommend</u> reverting to the original rule by deleting the requirement that consultants be "natural persons."

- There was <u>no clear rationale</u> expressed for adding the requirement that eligible consultants be "natural persons" and this change <u>does not address the stated concern</u>.
- <u>Enforcement of the rules</u> that prohibit the use of Rule 701 for non-compensatory purposes and services related to capital raising and market-making would be a <u>more appropriate response to curbing abuse of these rules than creating barriers to private companies that are properly using Rule 701 for compensatory purposes</u> by restricting grants to "natural purposes" and increasing the cost and complexity associated with the administration of compensatory benefit plans.

Proposed Change: Eliminate "Hard Cap Limit"

History of "Hard Cap Limit"

- Rule 701 was first adopted pursuant to Section 3(b) of the Securities Act which granted the SEC authority to adopt special exemptions from the registration requirements of the Securities Act for issuances of securities in which the aggregate amount offered does not exceed $5 million.
  - In 1988, the SEC adopted Rule 701 pursuant to this authority

- In October 1996, Congress enacted the National Securities Markets Improvement Act of 1996 ("NSMIA"), which gave the SEC authority to provide exemptive relief in excess of $5 million for transactions such as offers to employees.
  - The legislative history of NSMIA stated specifically that the SEC should use this new authority to lift the $5 million ceiling on Rule 701.
  - Rule 701 was amended to its current form in April 1999.

Proposed Change: Eliminate "Hard Cap Limit"

In the preamble to the 1999 release pursuant to which Rule 701 was amended, the Staff stated that the increase in the "Hard Cap Limit" was being made to provide issuers with the flexibility they need, without creating opportunities for abuse.

We recommend eliminating the "Hard Cap Limit."

- Compliance with the "Hard Cap Limit" requires ongoing analysis with no clear benefit.
- NSMIA removed the requirement to have any limit on compensatory sales made under Rule 701.
- "Hard Cap Limit" on compensatory sales do not address or otherwise curb abuse related to non-compensatory sales.
- Enforcement of the rules that prohibit the use of Rule 701 for non-compensatory purposes and services related to capital raising and market-making would be a more appropriate response to curbing abuse of these rules than creating barriers to, and additional work for, private companies that are properly using Rule 701 for compensatory purposes.

Proposed Change: Adopt Rule Excluding Material Amendments from Calculation of Limit

Rule 701 <u>does not address the implications of amendments</u> of securities previously issued under Rule 701.

However, C&DI 271.10 requires issuers to count stock options that are <u>repriced</u> as <u>new grants/sales</u> under Rule 701 as of the date of the repricing.

<u>We recommend</u> adopting a rule that clarifies that material amendments to any security previously issued under Rule 701 does not result in a new grant or sale for purposes of Rule 701.

- The “repricing rule” can cause companies to exceed the “Hard Cap Limit” and the “Soft Cap Limit” at a time when no additional securities are issued (there is simply a “re-setting” of the original arrangement to ensure the equity is meeting is compensatory objective.
- Clarification would be welcome that other material amendments that do not result in the issuance of additional securities would also not result in a new grant or sale for purposes of Rule 701.

Proposed Change: Clarify Application of Rule 701 to Restricted Stock Units

Rule 701 has <u>no rules</u> specifically <u>addressing restricted stock units</u> (RSUs).

- At the time Rule 701 was adopted, and at the time Rule 701 was later amended, private companies generally did not grant RSUs due to tax issues associated with doing so.

<u>We recommend</u> clarifying the rules as they relate to RSUs.

- Clarify that RSUs are considered “sales” on the date of grant, similar to options.
  - RSUs are derivative securities, like options, where no shares are issued unless and until the RSUs settle (typically upon or after vesting).
- Clarify that RSUs should be valued for purposes of any Rule 701 limits based on the value of the underlying shares on the date of grant.

Proposed Change: Rationalize Timing of Expanded Disclosure Obligation and Measurement Period Applicable to "Soft Cap Limit"

Expanded disclosure must be provided to <u>any person who receives securities under Rule 701 during any 12 month period</u> in which the company <u>sells more than $5 million</u> in value under Rule 701.

- Since the $5 million limit could be <u>exceeded at the end of a 12 month period</u>, but the rule requires disclosure to be provided for any sales under Rule 701 <u>during the 12 month period</u> (or, for options, anyone who exercises options during this time), <u>companies must generally</u> "<u>guess</u>" as to whether the $5 million limit will be exceeded and begin providing disclosure before the disclosure threshold is exceeded in order to ensure compliance.

<u>We recommend</u> changing the rules to provide that expanded disclosure is only required to be provided for sales that occur after the threshold is exceeded.

- The current rule is <u>impractical</u> in its application, with <u>no clear rationale</u> for the structure of the rule.
- <u>Consideration should be given</u> to whether additional time should be given to enable companies to prepare and distribute the disclosure (i.e., a short, buffer period after the threshold is exceeded).

Proposed Change: Clarify Timing and Delivery Requirements of Expanded Disclosure

Rule 701 requires expanded disclosure to be <u>delivered</u> a "<u>reasonable period of time prior to the sale</u>" (or, for options and other derivative securities, exercise or conversion).

<u>We recommend</u> revising the rule to provide that any disclosure delivered at <u>any time prior to sale</u> such that the recipient has an <u>opportunity to review</u> the disclosure satisfies the obligation to deliver disclosure.

<u>We recommend</u> revising the rule to provide that making the disclosure <u>available</u> in a manner consistent with the SEC's electronic disclosure rules (e.g., on an online data site that is accessible to the individual) satisfies the obligation to deliver disclosure and there is <u>no requirement</u> for the issuer to <u>confirm actual receipt or review</u> of such disclosure.

<u>We recommend</u> revising the rule to provide that making the disclosure available in a <u>physical location accessible to the individual</u> satisfies the obligation to provide disclosure.

Proposed Change: Conform Timing of Disclosure Obligation for Options and Restricted Stock Units

Rule 701 requires expanded disclosure to be delivered to option holders a reasonable period of time prior to exercise, and to holders of derivative securities, a reasonable period of time prior to conversion.

However, C&DI 271.24 requires expanded disclosure to be delivered to RSU recipients a reasonable period of time prior to grant.

- In adopting the above C&DI, the SEC distinguished between options and other derivative securities that are exercised or converted, and RSUs, which the SEC acknowledged are derivative securities, that are not exercised or converted.

We recommend adopting a rule that provides that expanded disclosure must only be provided to RSU recipients a reasonable period of time prior to settlement.

- RSUs are derivative securities and should be treated like other derivative securities.
- Although an RSU is not exercised or, technically, converted, it is settled. Prior to settlement, the holder of an RSU holds only a contractual right to receive shares in the future (for no purchase price paid).

Proposed Change: De-Couple Expanded Disclosure from Regulation A and Simplify Required Disclosure

The expanded disclosure required under Rule 701 includes financial statements required to be furnished by Part F/S of Form 1-A (i.e., Regulation A).

- Regulation A was recently revised creating a significant amount of complexity and confusion with regard to its application under Rule 701.
- Some of this complexity was relieved by C&DI 271.21 which allows issuers to choose to follow the requirements of Tier 1 or Tier 2 Regulation A offerings. However, substantial complexity remains.

<u>We recommend</u> <u>simplifying</u> the financial disclosure required under the expanded disclosure requirement by de-coupling it from Regulation A and requiring instead a current balance sheet and income statement.

- In the legislative history to the 1999 release, the SEC stated that Regulation A financial disclosure is something private companies "may be very familiar with" suggesting compliance would not be burdensome. This is generally not true, particularly for companies first subject to the expanded disclosure rules. These companies often <u>struggle and incur significant expense complying</u> with this rule.
- Although audited financials are not required, many companies feel that the equivalent of audited financials must be provided to comply with the rules.
- Consider clarifying whether, and the extent to which, footnotes are required.

Proposed Change: Change the Frequency in which Financial Disclosure must be Updated

Rule 701 requires financial disclosure provided under the expanded disclosure rules to be dated as of a date no more than 180 days before the sale.

We believe the expectation of this rule was that financial disclosure would only need to be updated and provided every six months.

However, it takes time to prepare the financial disclosure that must be provided. As a result, financial disclosure must generally be updated and provided quarterly.

We recommend revising the rules to require financial disclosure to be updated and provided once a year unless a material event results in a material change to the enterprise value of the company or the value of the securities to be issued.

- The current rule is unduly burdensome and costly for private companies.
- The proposed rule generally conforms to the IRS rule that requires companies to value private company stock for purposes of pricing stock option grants, which strikes a reasonable balance between ensuring disclosure is appropriate and the cost and burden imposed on the company to prepare such disclosure.

Proposed Change: Conform Consequence of Expanded Disclosure Violation to "Hard Cap Limit" Violation

A violation of the "Hard Cap Limit" results in the loss of the Rule 701 exemption <u>only for securities sold in excess</u> of the Hard Cap Limit.

A violation of the expanded disclosure obligation results in the loss of the Rule 701 exemption for <u>all securities sold in the applicable 12-month period</u>.

<u>We recommend</u> conforming the consequence of violating the expanded disclosure obligation, with the consequence of violating the "Hard Cap Limit" such that only those sales pursuant to which expanded disclosure was not provided lose the Rule 701 exemption.

- Often times, a failure to provided expanded disclosure, is an <u>inadvertent</u> result of an administrative error.
- There is <u>no clear rationale</u> for the <u>punitive result</u> of the current rules.
- Under the proposed rules, if there is a broad-based failure to provide expanded disclosure, there will be a broad-based loss of the Rule 701 exemption.

Proposed Change: Increase the “Soft Cap Limit”

Many commentators have called for an increase to the $5 million “Soft Cap Limit.”

<u>We recommend</u> increasing the $5 million “Soft Cap Limit” to at least $10 million.

- The current $5 million “Soft Cap” limit has been a surprise to many smaller companies that generally do not expect to be subject to a burdensome disclosure obligation in connection with the issuance of equity compensation to their employees and consultants.
- This “surprise,” combined with the look-back nature of the current rule and the “repricing rule,” has resulted in inadvertent compliance issues for some companies.
- The hire of a key employee can result in an equity grant that results in exceeding the $5 million “Soft Cap Limit” at a time when the “Soft Cap Limit” would not otherwise be exceeded.
  - These grants can be 5-10% of the fully diluted outstanding shares of a company and represent a grant date value in excess of $5 million.

orrick

WARBY PARKER