

U.S. Securities and Exchange Commission

T W E N T Y - E I G H T H A N N U A L

SEC Government-Business
Forum on
Small Business
Capital Formation



FINAL REPORT

November 19, 2009
Washington, DC

2009 Annual SEC Government-Business Forum
on Small Business Capital Formation

FINAL REPORT

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The SEC hosts the annual Government-Business Forum on Small Business Capital Formation, but does not seek to endorse or modify any of the forum's recommendations. The recommendations are solely the responsibility of the forum participants from outside the SEC, who were responsible for developing them. The recommendations do not necessarily reflect the views of the SEC, its Commissioners or any of the SEC's staff members.

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SUMMARY OF PROCEEDINGS

Background

As mandated by the Small Business Investment Incentive Act of 1980, the U.S. Securities and Exchange Commission hosts an annual forum that focuses on the capital formation concerns of small business.* Called the “SEC Government-Business Forum on Small Business Capital Formation,” this gathering has assembled every year since 1982. A major purpose of the forum is to provide a platform for small business to highlight perceived unnecessary impediments in the capital-raising process and address whether they can be eliminated or reduced. Each forum seeks to develop recommendations for government and private action to improve the environment for small business capital formation, consistent with other public policy goals, including investor protection. Prior forums have published numerous recommendations in the areas of securities and financial services regulation, taxation and state and federal assistance, many of which have been implemented.

The 2009 forum, the 28th, convened at the SEC’s headquarters at 100 F Street, N.E., Washington, D.C., on Thursday, November 19, 2009. This year, for the first time, all forum panel discussions and breakout groups were accessible both to those who attended the sessions in person in Washington, D.C. and to those who chose to participate through the Internet and telephone conference calls. This enabled participation in the forum by a broad and diverse group of individuals.

Planning and Organization

Consistent with the SEC’s statutory mandate in the Small Business Investment Incentive Act of 1980, the SEC’s Office of Small Business Policy (in the Division of Corporation Finance), invited other federal and state government agencies and leading small business and professional organizations concerned with capital formation to participate in planning the 2009 forum. The individuals who participated in planning the forum, and their professional affiliations, are listed on pages 4 and 5.

The planning group recommended that this year’s forum again be held in Washington, D.C. and that it remain focused on securities regulation and taxation, as has been the case in recent years. The members of the planning group also assisted in preparing the agenda and in recruiting speakers and moderators.

Participants

The SEC’s Office of Small Business Policy worked with members of the planning group to identify potential participants in the 2009 forum. Invitations were sent to participants in previous forums and to members of various business and professional organizations concerned with small business capital formation to advertise the forum on

* The SEC is required to conduct the forum annually and to prepare this report under [15 U.S.C. 80c-1](#) (codifying section 503 of Pub. L. No. 96-477, 94 Stat. 2275).

their web sites and in their electronic and paper newsletters. The SEC issued two press releases to inform the public about the time, date and location of the forum. The press releases publicized the fact that the forum would be webcast live over the Internet and accessible to those who chose to participate through the Internet and telephone conference calls.

The morning roundtable discussions were webcast live on the SEC's web site. Panelists responded to questions not only from participants in attendance, but also from webcast viewers using the Twitter online networking and micro-blogging system. The afternoon breakout group sessions were not webcast, but anyone who pre-registered for the forum could choose to participate through a telephone conference call.

Approximately 100 participants attended this year's forum in person, including 27 roundtable panelists, moderators and SEC staff. The video webcast of the forum received approximately 1,057 hits during the forum, indicating that many individuals participated by watching over the Internet. The program materials for the forum were posted on November 18, the day before the forum took place, and received approximately 2,859 hits during the month of November. The archived video webcast of the forum received an additional approximate 891 hits through February 28, 2010.

Proceedings

The agenda for the 2009 forum is reprinted starting at page 7. The forum began with opening remarks from SEC Chairman Mary L. Schapiro, which are reproduced starting on page 10. Chairman Schapiro's remarks were followed by a morning roundtable discussion on the state of small business capital formation. Commissioner Troy A. Paredes then gave additional remarks, which are reproduced starting on page 12. Commissioner Paredes' remarks were followed by a second morning roundtable discussion on academic perspectives on the SEC's "accredited investor" definition in Regulation D.

The afternoon proceedings included breakout group meetings open to all pre-registered participants, taking part either in person or by telephone conference call. Four breakout groups met, one on securities offerings by private companies, another on securities regulation of smaller public companies, a third on private placement and M&A brokers, and the last on tax issues affecting small businesses.

The discussions of the four breakout groups resulted in draft recommendations on securities regulation and tax law topics. The moderators of the four breakout groups presented their draft recommendations at a final assembly of all the forum participants as the last matter of business on November 19. The assembly discussed and approved all the draft recommendations.

After the forum, the moderators of the four breakout groups continued to work further with their group participants to compile and edit each group's recommendations. A final list of 26 securities law recommendations was circulated by e-mail to all

participants in the securities law breakout groups asking them to specify whether, in their view, the SEC should give high, lower or no priority to each recommendation. This poll resulted in the prioritized list of 26 securities law recommendations presented starting at page 14. The tax law recommendations, as compiled by the tax law breakout group, are presented starting on page 19.

Records of Proceedings and Previous Forum Materials

Video recordings of the remarks of Chairman Schapiro and Commissioner Paredes at the 2009 forum and of the forum roundtable sessions are available for viewing on the SEC's web site at <http://www.connectlive.com/events/sec111909/>. A written transcript of these sessions is also available in the official Record of Proceedings of the forum, which can be found on the SEC's web site at <http://www.sec.gov/info/smallbus/sbforumtrans-111909.pdf>.

The forum program, including the biographies of the forum roundtable panelists, is available on the SEC's web site at <http://www.sec.gov/info/smallbus/2009gbforumprogram.pdf>.

The final reports and other materials relating to previous forums since June 1993 may be found on the SEC's web site at <http://www.sec.gov/info/smallbus/sbforumreps.htm>.

PLANNING GROUP

Moderator

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U.S. Securities and Exchange Commission
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AGENDA

2009 SEC Government-Business Forum
on Small Business Capital Formation
Washington, D.C.
November 19, 2009

9:00 a.m. Call to Order
Gerald J. Laporte, Chief, Office of Small Business Policy,
SEC Division of Corporation Finance

Introduction of Chairman
Meredith B. Cross, Director
SEC Division of Corporation Finance

Opening Remarks
SEC Chairman Mary L. Schapiro

9:15 a.m. Panel Discussion: The State of Small Business Capital Formation

Moderators:

Gerald J. Laporte, Chief, Office of Small Business Policy,
SEC Division of Corporation Finance

Chad Moutray, Ph.D., Chief Economist & Director of Economic Research,
Office of Advocacy, U.S. Small Business Administration

Panelists:

Todd Flemming, President and Chief Executive Officer, Infracore,
Orlando, Florida, and Member of Executive Advisory Board,
Small Business and Entrepreneurship Council, Oakton, Virginia

Anna T. Pinedo, Partner, Morrison & Foerster, New York, New York

Andrew J. Sherman, Partner, M&A and Corporate, Jones Day,
Washington, D.C., and Adjunct Professor of Business and Capital
Formation Strategy, Smith School of Business, University of Maryland

Barry E. Silbert, Founder and Chief Executive Officer, SecondMarket,
New York, New York

Eric R. Zarnikow, Associate Administrator, Office of Capital Access,
U.S. Small Business Administration, Washington, D.C.

- 10:45 a.m. Break**
- 11:00 a.m. Introduction of Commissioner**
Meredith B. Cross, Director
SEC Division of Corporation Finance
- Remarks by SEC Commissioner Troy A. Paredes**
- 11:15 a.m. Panel Discussion: Academic Perspectives on the SEC’s “Accredited Investor” Definition**
- Moderators:**
- Meredith B. Cross, Director, SEC Division of Corporation Finance
- Gerald J. Laporte, Chief, Office of Small Business Policy,
SEC Division of Corporation Finance
- Panelists:**
- Prof. Rutheford B. Campbell, Jr., University of Kentucky College of Law
- Prof. Jill E. Fisch, University of Pennsylvania Law School
- Prof. Donald C. Langevoort, Georgetown University Law Center
- Prof. William K. Sjostrom, James E. Rogers College of Law,
University of Arizona
- 12:45 p.m. Lunch Break**
- 2:00 p.m. Reassembly to Divide into Breakout Groups to Develop Recommendations**
- ▶ **Private Placement and M&A Brokers Breakout Group**
 - ▶ **Private Securities Offerings Breakout Group**
 - ▶ **Securities Regulation of Smaller Public Companies Breakout Group**
 - ▶ **Tax Breakout Group**
- 3:30 p.m. Break**
- 3:45 p.m. Continuation of Breakout Group Discussions**

4:45 p.m. Plenary Session to Develop Next Steps

Moderator:

Gregory C. Yadley, Partner, Shumaker, Loop & Kendrick, LLP,
Tampa, Florida

5:30 p.m. Networking Reception

OPENING REMARKS OF CHAIRMAN MARY L. SCHAPIRO

SEC Government-Business Forum on Small Business Capital Formation

November 19, 2009

Good morning everyone. Let me add my welcome to the others. It's wonderful to have you all at the SEC today. We appreciate that so many of you are participating in today's meeting, and I hope that you will learn as much as I know we will learn during the course of the day.

As you all know, the SEC's mission is three pronged, to protect investors, to maintain fair and orderly markets and efficient markets, and to facilitate capital formation. Today we are focusing primarily on the third, facilitating capital formation. But, I think it's important that we don't think of these three prongs as distinct or separate goals. They are in fact intertwined and interdependent. We cannot have fair and efficient markets without the ability of companies to effectively raise capital, and companies cannot raise capital unless investors believe that the markets are fair and orderly. Without access to capital, business slows. Without investor confidence, capital disappears. That is something the business community knows all too well, and it is something that I, as the daughter of a small business operator who recently retired at the age of 88, understand as well. Today's forum specifically addresses small business capital formation. This is particularly appropriate, because as President Obama recently said, small businesses fuel our prosperity and have to be at the forefront of any recovery.

The first panel of today's forum will take a closer look at the capital formation needs of small businesses in today's economic environment. During this discussion, you might consider the project we are currently undertaking to reassess all the things we ask companies to disclose in their SEC filings. Currently, we require, among many other things, disclosures about a company's business, its properties, locations of all its operations, and the business experience and education of each director and officer. But, is all this necessary? If so, is there a better way to impart that information to investors? This effort will not only identify what more should be disclosed, but also what no longer needs to be disclosed, as we firmly believe that more isn't always better. So, we are very much interested in your views and having you help inform us on this major review of disclosure.

The focus of the second panel will relate to private securities markets, markets that small businesses often turn to for their capital needs, and this is a market whose efficiency is included within our mission. During the second panel, participants will discuss, as Meredith [Cross] said, the SEC's definition of the term "accredited investor," which figures prominently in our regulatory scheme for the private securities markets. It clearly is very important to get this definition right, so that investors are protected and companies continue to have adequate access to capital. We will be interested in what the

panelists have to say and continuing the conversation to make sure our private market regulatory scheme is consistent with the needs of today's investors and markets.

Breakout groups this afternoon will develop recommendations in four areas, private securities offerings, securities regulation of smaller public companies, taxation, and private placement and M&A brokers. We look forward to receiving recommendations in each of these areas.

Before closing, I'd like to acknowledge the presence here today of a number of state regulators. We recognize the important role that state securities regulators traditionally have played in protecting investors in local and smaller companies, and look forward to continuing to work with them closely in this area.

I'd also like to acknowledge the many congressional and administration offices that are represented here today as well. I think this further indicates that the issues affecting the small business community are critical to a broad range of public policy makers, and we are all interested in hearing what you have to say.

Again, thank you for your support of the SEC, your energy, and most importantly, your participation today. We look forward to benefitting from your views and expertise.

Thank you.

REMARKS OF COMMISSIONER TROY A. PAREDES

SEC Government-Business Forum on Small Business Capital Formation

November 19, 2009

Thank you, Meredith [Cross], for your kind introduction.* It is a pleasure to be here today at this important gathering to discuss capital formation for small business. I, too, would like to welcome today's attendees, both here in Washington and those participating by Webcast. I also would like to thank our distinguished panelists for making time in their busy schedules to participate today. Your input is invaluable. And, of course, "thank you" to the many members of the Commission staff who have made today's forum possible, with a special "thank you" to Gerry Laporte.

Although attention often seems to focus on larger enterprises, we need to appreciate that small and emerging businesses offer unique opportunities for investors, entrepreneurs, employees, and consumers. Smaller companies, however, also face distinct challenges and hurdles. Today's discussions will highlight some of the difficulties facing small business, particularly given the current economic climate.

The observations and insights that flow from forums like this one help us craft an appropriate regulatory framework over time. In practice, the regulatory regime may need further tailoring to ensure that it is appropriate for companies of different sizes. A small firm should not necessarily be subject to the same regulatory demands that a Fortune 500 company is required to shoulder. Among other things, one needs to consider the disproportionate burden that a given regulatory requirement can impose on a small business and the costs we all bear if, as a result, businesses struggle to get off the ground or expand. When a small business can't secure funding at a reasonable cost, for example, the economy is deprived of the firm's full participation in the marketplace.

There is a longstanding tradition of scaling federal securities regulation in important respects to provide small enterprises relief from select burdens that may be especially challenging for them. Consider section 3(b) of the '33 Act authorizing the Commission to adopt rules exempting certain small offerings from the demanding and time-consuming registration requirements of section 5. Under section 3(b), the Commission has adopted Rules 504 and 505 of Regulation D. By allowing an issuer to forego a statutory prospectus and registration statement, these rules facilitate capital formation for startups and other small companies long before they even consider going public. Rule 506 also has encouraged small business capital formation by providing certainty and predictability in the form of a safe harbor under section 4(2) of the '33 Act.

* The views I express here today are my own and do not necessarily reflect those of the Securities and Exchange Commission or my fellow Commissioners.

As recently as 2007, the Commission adopted a host of reforms designed to ease the regulatory burden smaller public companies face and otherwise to achieve regulatory simplification for such firms.* The Commission also expanded the number of companies that can avail themselves of the more streamlined and efficient regulatory regime. These reforms further evidence that federal securities regulation—and SEC rulemaking in particular—can be fashioned in order to accommodate the unique features of small business while continuing to ensure that investors are protected.

In my view, the Commission should actively consider other ideas for refining securities regulation so as to encourage small business capital formation. Startups and other small businesses drive innovation, spur job creation, and provide opportunities for investors to earn higher returns. New and smaller enterprises deliver cutting-edge goods and services to our economy and pressure more established companies to compete more aggressively. When properly tailored, the securities law regime can avoid unduly impeding small business as an essential source of economic growth and wealth creation.

The next panel—academics' perspectives on the Commission's accredited investor definition—is sure to be a source of ideas that will shed light on today's important topic. As a law professor myself, I look forward to the discussion.

With that, I'll turn things back over to Meredith [Cross] and Gerry [Laporte] to begin the next panel.

Thank you.

* <http://www.sec.gov/rules/final/2007/33-8876.pdf>.

RECOMMENDATIONS OF FORUM PARTICIPANTS*

Set forth below are the recommendations of the 2009 Government-Business Forum on Small Business Capital Formation. The recommendations of the three securities regulation breakout groups are followed by the recommendations of the tax issues breakout group. These recommendations were developed initially in the breakout groups on the afternoon of November 19, 2009. After that date, the moderators of the breakout groups continued to work with their group participants to compile and edit further each group's recommendations.

Securities Regulation Recommendations

The final list of 26 securities law recommendations set forth below is presented in the order of priority established as the result of a poll of all participants in the securities law breakout groups[†]. The priority ranking is intended to provide guidance to the SEC as to the importance and urgency the forum participants assign to the recommendation. The number of points secured by each recommendation in the poll is given in brackets at the end of the recommendation in the list.[‡]

Priority Rank	Recommendation
1	The SEC should not oppose the provision in legislation introduced as the "Investor Protection Act of 2009" that would permanently exempt smaller reporting companies from Section 404(b) of the Sarbanes-Oxley Act. [49 points]
2	The Commission should adopt a new private offering exemption from the registration requirements of the Securities Act that does not prohibit general solicitation and advertising for transactions with purchasers who do not need all the protections of the Securities Act's registration requirements. [45 points]

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† In the poll, each of the 72 forum participants who attended the securities law breakout groups (not including SEC staff) was sent an e-mail message asking the participant to respond whether the SEC should give "high," "lower" or "no" priority to each of the 26 recommendations. We received 32 responses, a 44% response rate. Each "high priority" response was awarded two points, each "lower priority" response was given one point, and each "no priority" or blank response was not awarded any points, to arrive at the number of points following each recommendation in the list.

‡ Footnotes 1-16 below were written by the forum participants who drafted the recommendations and are an integral part of the recommendations.

- 3 The SEC should allow "private placement brokers" to raise capital through private placements of issuers' securities offered solely to "accredited investors" in amounts per issuer of up to 10% of the investor's net worth (excluding his or her primary residence), with full written disclosure of the broker's compensation and any relationship that would require disclosure under Item 404 of Regulation S-K, in aggregate amounts of up to \$20 million per issuer.¹ [44 points]
- 4 The Commission should adopt rules, in coordination with state securities regulators, assigning to the states primary regulatory supervision over merger and acquisition intermediaries and business brokers involving the purchase and sale of privately-owned businesses by creating a limited federal registration exemption from broker registration under Section 15 of the Securities Exchange Act.² [42 points]
- 5 The Commission should adopt rules as recommended by the American Bar Association in its Report and Recommendations of the Task Force on Private Placement Broker-Dealers, dated June 20, 2005.³ [41 points]
- 6(1) The SEC should relax the prohibitions against general solicitation and advertising found in Rule 502(c) of Regulation D under the Securities Act to parallel the "test the waters" provision of Rule 254 of Regulation A under the Act.⁴ [40 points]
- 6(2) The SEC should increase the public equity float threshold for being a smaller reporting company from having a public float of less than \$75 million to less than \$250 million.⁵ [40 points]

¹ This recommendation is specifically highlighted from those found in the [ABA Report and Recommendations of the Task Force on Private Placement Broker-Dealers, dated June 20, 2005](#).

² This recommendation is also specifically highlighted from those found in the [ABA Report and Recommendations of the Task Force on Private Placement Broker-Dealers, dated June 20, 2005](#).

³ This recommendation first appeared in the [April 2006 Final Report of the SEC Advisory Committee on Smaller Public Companies](#), and was subsequently recommended by the SEC Government-Business Forum Final Reports issued in [2006](#), [2007](#) and [2008](#). The recommendations are intended to promote the Commission's twin missions of enhancing small business capital formation and protecting investors. These objectives can be met by bringing more unregulated or ineffectively-regulated activity into an appropriate regulatory environment that emphasizes disclosure and education in the area of private placement broker involvement. Action may be accelerated by the appointment of an advisory committee or designation of a working group involving SEC staff of the Office of Chief Counsel of the Division of Trading and Markets and the Office of Small Business Policy of the Division of Corporation Finance.

⁴ This recommendation appeared as No. 6 of the [Securities Law Recommendations of the 2008 SEC Small Business Forum](#). It first appeared as Recommendation No. IV.P.5 of the [Final Report of the Commission's Advisory Committee on Smaller Public Companies, dated April 23, 2006](#).

⁵ This recommendation is based on the experiences of certain "still emerging" public companies with public floats of just more than \$75 million. Although \$250 million is the better threshold, lesser amounts

- 8(1) The SEC should amend the definition of "smaller reporting company" to add a less than \$100 million annual revenue threshold to the public float measurement to be classified as a "smaller reporting company."⁶ [39 points]
- 8(2) The SEC should codify the staff's no-action letter to Country Business, Inc. (Nov. 8, 2006), allowing for a "small business sale" exemption from federal broker-dealer registration. [39 points]
- 10 The SEC should amend Section 12(g)(1)(B) to increase the total assets test for requiring public company registration to an amount exceeding \$100 million, from the current \$10 million level.⁷ [38 points]
- 11 The SEC should be prepared to postpone the June 15, 2011 implementation of XBRL for smaller reporting companies if and to the extent technological difficulties persist.⁸ [37 points]
- 12 Eliminate the one-third of market capitalization limit for primary offerings by smaller public companies in General Instruction I.B.6(a) of Form S-3 and General Instruction I.B.5(a) of Form F-3.⁹ [35 points]
- 13(1) The SEC's Divisions of Corporation Finance and Trading and Markets should immediately require from The Depository Trust Company (DTC) understandable rules and standards with strict timeframes for applications for trading eligibility with DTC. Similar rules and standards should be adopted by DTC with respect to providing electronic book-entry transfer services for smaller public companies.¹⁰ [34 points]

above \$125 million would be acceptable. Smaller reporting companies under these new thresholds would receive the benefit of potentially not being subject to Section 404(b) of the Sarbanes-Oxley Act.

⁶ This would take into consideration highly capital-intensive, innovative industries (such as biotechnology) which, by their nature, have public floats similar to accelerated filers but no or nominal product revenue.

⁷ This recommendation appeared as No. 14 of the [Securities Law Recommendations of the 2008 SEC Small Business Forum](#).

⁸ Through media reports, smaller public company representatives are led to believe that the first wave of large accelerated filers using XBRL data tagging are experiencing certain technical difficulties with the implementation of this interactive data format.

⁹ This recommendation was one of 12 involving smaller public companies included in the [2008 SEC Small Business Forum](#). It is included separately to emphasize its importance.

¹⁰ As a result of apparent policy changes at The Depository Trust Company (DTC) in 2009, numerous smaller public companies have experienced significant unexplained delays and, in some cases, denials of applications for their securities to become eligible for deposit at DTC. Due to this, potential investors are unable to purchase shares through electronic exchanges over the Internet using their chosen broker.

- 13(2) The Commission should not change the current financial standards in the accredited investor definition. [34 points]
- 15(1) The Regulation A \$5 million ceiling should be increased along with the 500 shareholders of record threshold in Section 12(g) of the Securities Exchange Act of 1934 in order to allow issuers to engage in general solicitation for larger aggregate amounts of capital without registration under either the Securities Act of 1933 or Securities Exchange Act of 1934. [31 points]
- 15(2) The SEC should exclude accredited investors, large accredited investors and qualified institutional buyers from the 500 shareholders of record calculation in Section 12(g) under the Securities Exchange Act for purposes of becoming a public company.¹¹ [31 points]
- 15(3) The SEC should establish a publicly available data bank that identifies persons who have been held liable for securities fraud within a certain time period (e.g., five years) in legal proceedings at the state or federal level, including issuers, officers, directors and broker-dealers. [31 points]
- 18(1) The SEC should shorten the integration safe harbor in Regulation D from six months to 90 days, and further consider shortening such period to 30 days, as recommended by the April 2006 Final Report of the SEC Advisory Committee on Smaller Public Companies.¹² [30 points]
- 18(2) The SEC should reduce the "notice and access" advance mailing requirement for smaller reporting company proxy statements to 30 days (from 40 days) to enable maximum small public company participation and cost savings by such companies.¹³ [30 points]
- 18(3) To provide liquidity for privately placed securities, the SEC should consider extending the Rule 144A exemption beyond qualified institutional buyers. For example, the SEC should establish a new Rule

¹¹ The term "accredited investor" is defined in [17 CFR 230.501\(a\) of Regulation D](#); the term "large accredited investor" was proposed in [SEC Release No. 33-8828 \(Aug. 3 2007\)](#), but never adopted; and the term "qualified institutional buyer" is defined in [17 CFR 230.144A\(a\)\(1\)](#). Investors already determined not to require the protections of registration under the Securities Act should not be included in determining the Section 12(g) threshold necessary for triggering periodic reporting and other obligations under the Securities Exchange Act, particularly in light of the increasing time period required before a company can achieve a public offering in today's environment.

¹² This recommendation appeared as No. 9 of the [Securities Law Recommendations of the 2008 SEC Small Business Forum](#).

¹³ Smaller reporting companies may need longer preparation times than those required in other reporting and filing contexts.

144A-type exemption limited to trading among purchasers who do not need the protections of Securities Act registration.¹⁴ [30 points]

- 21 NASAA or the SEC should identify on its Web site states that participate in coordinated review programs for registration statements, as well as coordinated exemptions from registration and qualification requirements. [26 points]
- 22 Implement the rulemaking proposal on Rule 144(i) requested in the petition for rulemaking letter of David N. Feldman, dated Oct. 1, 2008.¹⁵ [25 points]
- 23(1) Permit forward incorporation by reference in all Form S-1 registration statements. Also, consider limited application to true secondary offerings on behalf of selling shareholders but exclude primary offerings.¹⁶ [24 points]
- 23(2) The SEC should adopt new accreditation standards that are not limited to serving as proxies for an investor's financial sophistication or that are limited by the guidelines set forth by the Supreme Court in the Ralston Purina case. [24 points]
- 25 The SEC should revisit the "penny stock" rules as being too restrictive on some smaller reporting companies and harming their growth prospects by limiting their trading. [23 points]
- 26 Given the increasing use of convertible preferred stock this year, in part, to structure "down round" protection for investors, the SEC should consider including within "public float" calculations, both common and convertible preferred equity of a company, in which the number of shares of convertible preferred stock would be included on an as-if-converted-to-common-stock basis for purposes of registration limitation calculations under General Instructions I.B.1 and I.B.6 of Form S-3 and the guidelines for Rule 415. [20 points]

¹⁴ This recommendation appeared as No. 8 of the [Securities Law Recommendations of the 2008 SEC Small Business Forum](#).

¹⁵ The petition proposes an amendment that would remove the prohibition in Rule 144(i) on shareholders who acquired shares when an issuer was a "shell company" or former "shell company" from relying on Rule 144 if the issuer is not current in its SEC filings at the time of sale. The petition is available on the SEC Web site at <http://www.sec.gov/rules/petitions/2008/petn4-572.pdf>.

¹⁶ This recommendation includes a new proposal to limit application of forward incorporation by reference by excluding primary offerings.

Tax Recommendations

The tax issues breakout group developed the following 12 recommendations, which are not set forth in any particular order.

1. The forum planning process should be expanded to increase and maximize attendance and to improve the quality of recommendations at future SEC forums on small business capital formation. We recommend the following changes:
 - A. Require the participation in the planning process by representatives of at least the six following groups:
 - Department of the Treasury;
 - Small Business Administration;
 - former participants of the forum;
 - Financial Industry Regulatory Authority;
 - Congress; and
 - Executive Branch.
 - B. The forum planning group should meet on a regular basis throughout the year to nominate, discuss and deliberate content for the forum. Minutes should be kept of the group's meetings and sent to all of its members and the group should approve the forum final agenda. Specifically, the group should make decisions on the following aspects of the forum:
 - format,
 - content,
 - speakers,
 - location, and
 - length of time.
 - C. Two weeks advance notice should be given before each meeting of the forum planning group, and attendees should be permitted to participate in person or via telephone conference call.

- D. The full agenda with invited speakers, as approved by the forum planning group, should be provided to all prospective forum attendees at least one month before the forum to allow adequate time for their travel arrangements.
2. Make the research and development tax credit permanent.
 3. In the broader context of research and development, in an effort to facilitate jobs creation, the process for importing and exporting small business technology should be expedited and made more small business friendly.
 4. Simplify the qualified home office deduction by providing a limited, optional standard home office business deduction. Fifty-three percent of America's small businesses are home-based. The requirements to qualify for and calculate the deduction are confusing for taxpayers and do not account for changes in technology that affect the way business is conducted. Consequently, many at-home workers do not take advantage of the home office business deduction. The Internal Revenue Service National Taxpayer Advocate supports simplification of the home office business deduction.¹
 5. Modernize the "use rules" for a "qualified home office" to permit 20 percent *de minimis* personal activity in a home office, similar to the personal use that normally occurs in other business and governmental office environments.
 6. Modernize Internal Revenue Code Section 280F(a)(1) concerning the depreciation limitation on "luxury" automobiles and light trucks to reflect the current average cost of vehicles necessary for normal business use. The inflation adjustment formula specified in the original legislation was flawed by its limitation to basic automobiles like those that existed in the 1980s, without allowance for the safety and fuel economy features mandated on current vehicles. This resulted in only a 20% increase in the limit since 1986 even though the general inflation increase during that period was over 90%. The current law limits the cost recovery for a new vehicle over the normal 5-year depreciation period to only \$15,000. The average new car price in 2006 was \$28,450.
 7. Equalize the alternative minimum tax ("AMT") exemption on business income for businesses that report income on a personal income tax return with the \$7.5 million, 3-year average gross income exemption that is now given to C corporation business entities, provided that the reporting individual materially participates in the business. The reporting of business income by S corporations and other entities that report "pass-through" income on the personal return, even when it has to be re-invested back into the business, results in a phase-out of the personal AMT exemption, which causes the AMT to be assessed at much lower income levels. This results in an inequitable AMT tax impact on the business

¹ See "Legislative Recommendations," Vol. 1, Section Two, National Taxpayer Advocate 2007 Annual Report to Congress, available at http://www.irs.gov/pub/irs-utl/arc_2007_vol_1_legislativerec.pdf.

- income that would not apply to a small C corporation business under the same circumstances.
8. Increase the deductible percentage for business meal expenses to 80 percent for small businesses. Small businesses usually do not have tax deductible onsite conference rooms and client entertainment facilities that are often available to larger businesses. Personal meetings with existing or potential customers at a restaurant are one of the primary methods of client development for small businesses. Limitations could be put on the gross income size of a business and the maximum per person amount that would qualify for the 80 percent deduction.
 9. Permanently reform the estate tax, effective as of its scheduled demise on January 1, 2010, to provide a unified gift and estate tax exemption of \$5 million per person, indexed for inflation, with a re-valuation of the tax basis of non-cash assets at the time of death and the portability of any remaining tax credit to a spouse. The variation in exemption levels resulting from prior legislation has made estate planning difficult for businesses and individuals. A failure to re-value inherited assets at the time of death, as will occur as of January 1, 2010 under current law, can create a major capital gains tax burden for descendants and significant tax determination problems for tax preparers and the IRS. Also, limit the top rate to 35%.
 10. Make permanent the current \$250,000 IRC Section 179 small business expensing provisions to stimulate business investment in new equipment and technologies. Small businesses often pay high interest rates to purchase new equipment in order to grow their businesses and create new jobs. The ability to recover the cost of a limited amount of new investment in the year of purchase, rather than over a long depreciation period, can be a critical factor in helping a small business survive and grow.
 11. Congress should set reasonable and equitable standards for state taxation of non-resident businesses. As state governments have experienced revenue shortages, state legislatures have created expanded non-resident business activity taxes that they are trying to impose on national Internet or mail-order businesses with no physical nexus in their state. If this is allowed to continue, small businesses could potentially have to calculate and pay one or more taxes in all 50 states. Because many of these state taxes allow credits for taxes paid in other states, they do not create significant net new revenue for all the states combined, but would create a major accounting and tax preparation impediment, as well as potential tax penalty cost, for small businesses which are not prepared to deal with this level of complexity.
 12. Congress should enact a tax credit option for direct investment in a qualified small business to encourage investment in small businesses. IRC Section 1202 provides a reduction in the capital gain recognized on the sale of stock in a successful qualified small business, but the current lower capital gains rates and

AMT impacts have greatly reduced its incentive value. IRC Section 1244 also allows taking an ordinary loss on an investment in stock of an unsuccessful small business, but neither Section 1202 or 1244 provides any immediate tax incentive at the time of the investment to offset the much higher risk of loss and lack of market liquidity on an investment in stock of a small business.

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