

37TH ANNUAL

Government-Business Forum on Small Business Capital Formation



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FINAL REPORT



2018 SEC Government-Business Forum on
Small Business Capital Formation

FINAL REPORT

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The SEC conducts the Government-Business Forum on Small Business Capital Formation annually. The recommendations contained in this report are solely the responsibility of Forum participants from outside the SEC, who were responsible for developing them. The recommendations are not endorsed or modified by the SEC and 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 conducts an annual forum that focuses on small business capital formation.¹ This gathering, called the “SEC Government-Business Forum on Small Business Capital Formation,” has assembled every year since 1982. A major purpose of the Forum is to provide a platform to highlight measures that would stimulate small business capital formation and address perceived impediments in that area. Each Forum seeks to develop recommendations with respect to these matters, consistent with other public policy goals, including investor protection.

The SEC partnered with the National Center for the Middle Market at The Ohio State University Max M. Fisher College of Business to plan, organize and host the 2018 Forum. The event was held at the Fawcett Center on the campus of The Ohio State University in Columbus, Ohio on December 12, 2018. The program included opening remarks, two panel discussions and two breakout groups.

Planning and Organization

The SEC’s Office of Small Business Policy in the Division of Corporation Finance invited other federal government agencies, the North American Securities Administrators Association (“NASAA,” the organization representing state securities regulators), and small business and professional organizations concerned with small business capital formation to participate in planning the 2018 Forum (the “Forum Planning Group”). These individuals and their professional affiliations are listed on pages 4 through 6.

The members of the Forum Planning Group also assisted in preparing the agenda and in recruiting speakers.

Participants

Invitations to attend the Forum were sent to previous participants and to members of business and professional organizations concerned with small business capital formation based locally in Ohio, regionally in the Midwest, as well as nationally. The SEC issued two press releases to inform the public about the time, date and location of the Forum.

Opening remarks and the two morning panel discussions were accessible through a live webcast on the SEC’s website. A written transcript of the opening remarks, as well

¹ 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 (1980)).

as the morning panel discussions, has been posted on the SEC website. Links to the webcast and written transcript are set forth below under the section “Records of Proceedings and Previous Forum Materials.” The breakout group sessions were not webcast, but were accessible by telephone conference call to pre-registered participants.

Approximately 75 attendees were physically present for the Forum proceedings in Columbus, Ohio, plus 23 panelists and moderators, including SEC staff.

Proceedings

The agenda for the 2018 Forum is reprinted starting on page 8. Dean Anil K. Makhija of The Ohio State University Max M. Fisher College of Business and the SEC Commissioners delivered opening remarks at the Forum’s morning proceedings. The Commissioners’ remarks are reproduced starting on page 10. After these remarks, a panel discussion was conducted on how capital formation options are working for small businesses, including small businesses in the Midwest. The panel was moderated by William H. Hinman, Director of the SEC’s Division of Corporation Finance, and Jennifer A. Zepralka, Chief of the Office of Small Business Policy. A second panel followed on capital formation and diversity. The panel was moderated by John Moses, Deputy Director of the SEC’s Office of Minority and Women Inclusion.

The remainder of the 2018 Forum was devoted to two breakout group meetings: one on exempt securities offerings, which was moderated by Catherine V. Mott and Gregory C. Yadley; and another on smaller registered and Regulation A securities offerings, which was moderated by Mark Elenowitz, Aaron Seamon and Thomas A. Stewart. The breakout groups were open to all pre-registered participants, who took part either in person or by telephone conference call.

Each breakout group was asked to formulate no more than five recommendations, in no specific order of priority. At the final plenary session of the Forum, each breakout group then submitted a final draft of their five recommendations to the SEC staff, resulting in a list of 10 recommendations. After the Forum, these 10 recommendations were circulated by e-mail to all participants in the two breakout groups in the form of an electronic ballot, asking them to specify whether, in their view, the SEC should give high, medium, low or no priority to each recommendation. This poll resulted in the prioritized list of 10 recommendations starting on page 17.

Records of Proceedings and Previous Forum Materials

A video recording of the Forum’s morning proceedings, including the opening remarks and first panel discussion on “How Capital Formation Options Are Working for Small Businesses, Including Small Businesses in the Midwest,” is available on the SEC’s website at https://www.sec.gov/video/webcast-archive-player.shtml?document_id=sbforum1212181. The second morning panel discussion on “Capital Formation and Diversity” is available on the SEC’s website at https://www.sec.gov/video/webcast-archive-player.shtml?document_id=sbforum1212182.

A transcript of these morning proceedings is available on the SEC's website at <https://www.sec.gov/file/2018-Forum-transcript.pdf>.

The Forum program, including the biographies of the Forum panelists and moderators, is available on the SEC's website at <https://www.sec.gov/info/smallbus/sbforum121218-program.pdf>.

The final reports and other materials relating to previous Forums, dating back to 1993, are available on the SEC's website at <https://www.sec.gov/info/smallbus/sbforumreps.htm>.

PLANNING GROUP

Moderator

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SEC OFFICE OF MINORITY AND WOMEN INCLUSION

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Director

John Moses
Deputy Director

AGENDA

2018 SEC Government-Business Forum on Small Business Capital Formation
In coordination with the
National Center for the Middle Market
The Ohio State University Max M. Fisher College of Business
December 12, 2018

9:00 a.m. Call to Order

Jennifer A. Zepralka, Chief, Office of Small Business Policy, SEC Division of Corporation Finance

Opening Remarks

Anil K. Makhija, Dean of The Ohio State University Max M. Fisher College of Business

Introductions of Chairman and Commissioners

William H. Hinman, Director, SEC Division of Corporation Finance

Remarks

SEC Chairman Jay Clayton

SEC Commissioner Robert J. Jackson, Jr.

SEC Commissioner Hester M. Peirce

SEC Commissioner Elad L. Roisman

9:30 a.m. How Capital Formation Options Are Working for Small Businesses, Including Small Businesses in the Midwest

Moderators:

William H. Hinman, Director, SEC Division of Corporation Finance

Jennifer A. Zepralka, Chief, Office of Small Business Policy, SEC Division of Corporation Finance

Panelists:

Wayne Embree, Executive Vice President, Investments & Venture Acceleration, Rev1 Ventures, Columbus, Ohio

Peter Harten, Operations Manager, GoSun, Inc., Cincinnati, Ohio

Catherine V. Mott, CEO, BlueTree Capital Group, Wexford, Pennsylvania

Eve Picker, Founder & CEO, SmallChange, Pittsburgh, Pennsylvania

Michael S. Pieciak, President of the North American Securities Administrators Association and Commissioner, Vermont Department of Financial Regulation, Montpelier, Vermont

Jason Plourde, Partner, Grant Thornton, Chicago, Illinois

Aaron Seamon, Partner, Squire Patton Boggs, Columbus, Ohio

Scott Shane, Mixon Professor of Entrepreneurial Studies at Case Western Reserve University and Managing Director of Comeback Capital, Cleveland, Ohio

11:15 a.m. Break

- 11:25 a.m. Capital Formation and Diversity**
- Moderator:**
John Moses, Deputy Director, SEC Office of Minority and Women Inclusion
- Panelists:**
Brandon Andrews, Co-Founder, Gauge, Washington, DC
Falon Donahue, CEO, VentureOhio, Columbus, Ohio
Candice Matthews, CEO, Hillman Accelerator, Cincinnati, Ohio
Kim Tapia, Founder, Polanko Group, Columbus, Ohio
- 12:30 p.m. Break**
- 12:40 p.m. Working Lunch in Breakout Groups**
- Two Breakout Groups Assemble to Develop Recommendations**
- ▶ **Exempt Securities Offerings**
- Moderators:**
Catherine V. Mott, CEO, BlueTree Capital Group, Wexford, Pennsylvania
Gregory C. Yadley, Partner, Shumaker, Loop & Kendrick, L.L.P.
Tampa, Florida
- ▶ **Smaller Registered and Regulation A Securities Offerings**
- Moderators:**
Mark Elenowitz, Founder and CEO, TriPoint Global Equities, New York, New York
Aaron Seamon, Partner, Squire Patton Boggs, Columbus, Ohio
Thomas A. Stewart, Executive Director, National Center for the Middle Market, The Ohio State University Max M. Fisher College of Business
- 2:00 p.m. Break**
- 2:10 p.m. Breakout Groups Reassemble to Develop Recommendations**
- 3:30 p.m. Break**
- 3:45 p.m. Plenary Session to Develop Next Steps**
- Moderators:**
Mark Elenowitz, Founder and CEO, TriPoint Global Equities, New York, New York
Catherine V. Mott, CEO, BlueTree Capital Group, Wexford, Pennsylvania
Aaron Seamon, Partner, Squire Patton Boggs, Columbus, Ohio
Thomas A. Stewart, Executive Director, National Center for the Middle Market, The Ohio State University Max M. Fisher College of Business
Gregory C. Yadley, Partner, Shumaker, Loop & Kendrick, L.L.P.
Tampa, Florida
- 4:30 p.m. Networking Reception at the Fawcett Center**

OPENING REMARKS OF SEC CHAIRMAN JAY CLAYTON

SEC Government-Business Forum on Small Business Capital Formation
December 12, 2018

Thank you, Bill [Hinman].²

Every year the SEC staff does a tremendous job identifying topics, selecting speakers and coordinating the behind the scenes work necessary to organize this all-day event focused on small business capital formation. Thank you Bill, Jennifer [Zepralka] and the staff in the Division of Corporation Finance and the Office of Minority and Women Inclusion for coordinating this year's forum. This year I also want to extend a special thank you to our co-hosts—Dean Makhija and the rest of the staff at The Ohio State University Fisher College of Business—for opening your doors to us. It is nice to know that a team from the “SEC” can get such a warm welcome at the home of the Big Ten Champions. Finally, I want to thank the panelists and moderators who are taking time out of their busy schedules to share their insights with us.

To those in the audience, or watching online, welcome to the 37th annual Government-Business Forum on Small Business Capital Formation. This is the second year in a row that we are having the Small Business Forum outside of Washington, D.C. I hope it becomes a trend in years to come.

Small business access to capital is at top of mind for me. As such, I have made it a priority to reach out to small businesses nationwide. In my first few months at the SEC, I hosted a group of small businesses from across the country, including Arkansas, Idaho, Michigan, Montana, and North Carolina. Bill [Hinman] and I also attended a high-tech jobs summit in Montana to discuss job creation and capital formation. Last November, we held the Small Business Forum in Austin, Texas. And earlier this year, we continued the conversation about small business capital formation in Nashville, Tennessee.

As I have said before, there are many good, talented people, and many promising companies, between the coasts. Austin, Nashville and Columbus all share something in common. They stand out for their ability to help small businesses grow outside of the traditional areas along the coasts. Earlier this year, Columbus was ranked as one of the top five cities for entrepreneurs and startups out of more than 300 cities across the United States.³ And this past October, another publication ranked Columbus first out of the top 10 rising cities for startups.⁴

² My words are my own and do not necessarily reflect the views of my fellow Commissioners or the SEC staff.

³ Bill Frost, *The Top 10 US Cities for Entrepreneurs and Start-Ups in 2018*, Business.org (June 21, 2018), at <https://www.business.org/business/startup/top-cities-for-entrepreneurs-and-startups/>.

⁴ Kurt Badenhausen, *The Top 10 Rising Cities for Startups*, Forbes (Oct. 1, 2018), at <https://www.forbes.com/sites/kurtbadenhausen/2018/10/01/the-top-10-rising-cities-for-startups/#2e239a046b37>.

The panels this morning will provide us with an opportunity to hear directly from small businesses and their investors about the options to raise capital as a small business. We also will hear about the particular challenges faced by minority entrepreneurs to access capital. Following the morning panels, you will work on recommendations on how we can improve the regulatory landscape for small businesses.

The Small Business Forum has been a source of ideas for, and feedback on, our rulemaking initiatives at the SEC. For example, in 2018 the Commission expanded the definition of “smaller reporting company.”⁵ The amended definition will allow nearly 1,000 additional companies to take advantage of scaled disclosure requirements, reflecting the principle that a one-size regulatory structure does not fit all public companies. The Commission also expanded a key registration exemption used by non-reporting companies to issue securities pursuant to compensatory arrangements and sought comment on other ways to modernize that exemption. These initiatives had been recommendations in prior Small Business Forums.

For 2019, we have a number of initiatives in the near-term agenda that I expect will be of interest to the audience. For example, for our smaller public companies, we will be taking a fresh look at the “accelerated filer” definition and the thresholds that trigger Section 404(b) of the Sarbanes-Oxley Act of 2002, which requires certain registrants to provide an auditor attestation report on internal control over financial reporting. We also will consider expanding testing-the-waters accommodations that enable companies to engage in communications with certain potential investors prior to or following the filing of a registration statement. I also believe it is important to consider ways to encourage long-term investment in our country, so we will be studying the adequacy and appropriateness of mandated quarterly reporting and the prevalence of optional quarterly guidance, and whether our reporting system more generally drives an overly short-term focus.

For exempt offerings, we will be exploring the private offering framework. Our “patchwork” private offering system is complex and it is time to take a critical look to see how it can be improved, harmonized and streamlined. The staff is working on a concept release to solicit input about key topics, including whether our accredited investor definition—a principal regulatory threshold for participation in private offerings—is appropriately tailored to address both investment opportunity and investor protection concerns.

Several of these upcoming initiatives have been discussed at prior Small Business Forums. I hope you spend time this afternoon talking about these topics and share with us recommendations on how to improve our rules in those areas.

Thank you.

⁵ “[*Amendments to Smaller Reporting Company Definition*](#),” SEC Release No. 33-10513 (Jun. 28, 2018) [83 Fed. Reg. 31,992 (July 10, 2018)].

**REMARKS OF
SEC COMMISSIONER ROBERT J. JACKSON, JR.**

SEC Government-Business Forum on Small Business Capital Formation
December 12, 2018

Well, thank you very much, Mr. Chairman. I'm delighted to be here. I want to start by joining my colleagues in thanking Director Hinman, the staff and all the panelists for the time you're sharing with us this morning.

I want to also start by emphasizing how delighted I am to be back here at the Middle Market Institute. I came out to The Ohio State University earlier in the spring to talk about some of the capital formation and issues that small and medium-sized businesses face when they seek to go public, and I'm very much looking forward to learning more from you all today.

I also want to be among the first to welcome my friend and colleague Commissioner Peirce back to her home state, here in Ohio. And I'll be brief; my colleagues, may have more to say, but really, we're all here to hear from you today about the experience you're having raising capital in the economy we face.

I want to make just two very quick points about that. The first is I want to express my gratitude to the folks at the Middle Market Institute whose research has informed my thinking a great deal about the importance of these firms to the growth of our economy. It's very easy in the world in which we live to get caught in headlines about big, public companies, but what the Middle Market Institute research shows is that the driving engine, the force behind our economy, is made up of firms that are small, growing companies throughout the United States, and as the Chairman pointed out, are very much between the coasts.

You have a Commission, a Division of Corporation Finance and a group of folks from the SEC today who understand that very much, and we are very keen to hear from all of you today as to how we can help you create the jobs and continue to be the engine that you've been for so long for the growth of our economy.

For a second, Director Hinman's remarks pointed up to the fact that all of us in our own way come to this table and this conversation understanding how hard it is to start something new in this country, to put capital together, persuade customers and employees of the value proposition that you have, to sketch out a vision, even for a company that's existed for some time, to get people around you to buy into that vision. We understand how hard that is, and how important it is, not only to the economy, but also to the communities across America, and that's why we're here.

That's why you have a Commission so interested in hearing from all of you today. That's why we're so engaged, not just because we think it's important to capital formation in our economy. We think that, but because we know how important it is to the community and the individuals in this room to make sure that you feel that your government and the folks who work

for it care about how hard it is, understand how challenging it can be to grow a company in this economy.

So we're here to hear from you. I'll defer to my colleagues on further introductory remarks, but I want to say how much I appreciate the opportunity to hear from all of you about how we can help you do the important work you do to grow this economy in this country. Thank you.

**REMARKS OF
SEC COMMISSIONER HESTER M. PEIRCE**

SEC Government-Business Forum on Small Business Capital Formation
December 12, 2018

Good morning. Thank you to the staff for organizing this forum. I know an event like this requires considerable work and coordination, and I want to tell you how much I appreciate the work that you have put into making today happen. I want to especially thank you for making it happen here in my home state of Ohio.

Anyone who has heard me speak knows that there are two things that are especially dear to my heart: capital formation and the Midwest, in particular, the Buckeye State. It is therefore an especially happy occasion to be able to combine both today at this forum.

My concern for the Midwest is not mere parochialism, however. When it comes to capital formation, I worry that often the focus is too narrow. Capital formation, and small business capital formation in particular, concerns a broad array of companies across every state in our country. But oftentimes, policy discussions proceed as though the only market participants are tech start-ups based in a few hubs on the coasts, and their early stage investors, also based in a few large cities. These companies indeed need access to capital, but one of the defining features of small businesses, is their lack of defining features—in a word, their diversity. The category of “small business” includes companies with one employee and companies with 50 or more. It includes companies with big, public company aspirations, and companies that will always be small and prefer it that way. It includes brand new start-ups that combine the talents and dreams of college friends and companies passed down through multiple generations of a family. It also includes companies in Silicon Valley and companies here in Columbus, Ohio. These companies are all providing valuable goods and services, creating jobs, and building our communities and our economy.

We at the SEC have the challenge of ensuring that our capital markets are free to provide the funding small companies need, in ways that make that funding accessible to companies without fancy lawyers and a network of rich friends. I look forward to hearing what our panelists and participants have to say on these issues. I am especially interested in hearing how we can make our regulatory framework more easily navigable for smaller companies. Our offering exemptions, which are what most smaller companies use when raising capital, are a haphazard patchwork of regulations. What can we do to rationalize this web to make a clearer path for companies to follow with fewer traps for the well-intentioned entrepreneur?

What are the particular challenges that companies here in Ohio face? What parts of our regulations reinforce the concentration of start-ups and capital in a few coastal hubs? I do not doubt that there are smart, inventive people in Silicon Valley. But I also know that there are lots of smart, inventive people right here in Ohio, and in Kansas, South Dakota, and other areas throughout our country. Indeed, in the late 1800s and early 1900s, Ohio was home to the Silicon

Valley of its time as successful Cleveland businesses made the city an innovation hub or accelerator.⁶ That entrepreneurial spirit lives on in many great businesses and communities in this state, but I want to make sure that the money can flow to those businesses without requiring them to move out of Ohio. Our capital markets should be a resource for people in every corner of this country.

For companies that are already public, or are considering an IPO, which parts of our regulatory framework give you the most headaches? Which parts, especially, make you question the wisdom of going or staying public? There has been discussion about the impact of Section 404(b) of Sarbanes-Oxley, which requires an external auditor attestation of internal controls. Is this a stumbling block for you? Which other parts of our disclosure regime and requirements present serious difficulties for smaller filers? What role do concerns about litigation or pressure to focus on short-term performance or an inapt market structure play in making the public markets seem a perilous place to venture?

Since the purpose of this forum is to provide a listening opportunity for the Commission, I will not take up any more of your time with talking, except to again say thank you to our staff and all our participants. These events are so valuable to us, and I appreciate you taking time out of your day to help us better understand the needs of smaller companies.

⁶ Naomi R. Lamoreaux, Margaret Levenstein, Kenneth L. Sokoloff, Financing Invention During the Second Industrial Revolution: Cleveland, Ohio, 1870-1920, NBER Working Paper 10923 (Nov. 2004).

**REMARKS OF
SEC COMMISSIONER ELAD L. ROISMAN**

SEC Government-Business Forum on Small Business Capital Formation
December 12, 2018

Good morning. I am excited to attend my first Government-Business Forum on Small Business Capital Formation as a Commissioner. I am even more excited that we are holding the Forum outside of D.C. I must say, I am surprised a Big 10 school agreed to host so many people from the SEC. I kid, but events like these are important to inform people about the role of the Securities and Exchange Commission and how seriously all of us who work there take our mission. A critical component of this mission is capital formation. Small business is the life-blood of America, so it is only fitting that we are here today in America's heartland to discuss how we can improve capital formation for small businesses.

My wife and several friends of mine have started their own businesses — pouring time, energy, and passion into this work. I have seen them all struggle, and I have seen them both fail and succeed. Their experiences have always inspired me and made me appreciate the incredible investments entrepreneurs put into their work every day. They also remind me of how unique this country is in offering such opportunities.

It is the SEC's responsibility to constantly engage with those who participate in, or want to participate in, our markets and to help facilitate capital formation. I think of the entrepreneurs wondering how to raise money to grow their businesses. I want those people to know that we are doing our best to ensure that the capital markets are accessible to them. I also want investors to have the opportunity to invest in small businesses at an early stage of growth. Investor protection isn't only the notion of keeping things away from investors but ensuring they have an array of investment choices as well as material information available for them to consider in decision-making.

Both panels today on capital formation are important and I look forward to learning more from our speakers. I hope the discussions today will address the full scope of the public markets as well as the private markets for small business securities. I believe a fully robust capital markets ecosystem for small businesses requires both.

I don't want to take any more time away from what I am confident will be a great discussion. But I do want to make sure that I thank Bill Hinman, Jennifer Zepralka, and the staff of the Division of Corporation Finance and the Office of Minority and Women Inclusion for all of your hard work in organizing this event. Most importantly, thank you to the National Center for the Middle Market at The Ohio State University Max M. Fisher College of Business, our panelists, the people of Ohio, and those who have traveled to be here today. I look forward to hearing your thoughts on the important topics on today's agenda.

CONSOLIDATED FORUM RECOMMENDATIONS⁷

Set forth below are the 10 recommendations of the 2018 SEC Government-Business Forum on Small Business Capital Formation, consolidated from the two breakout groups of the Forum held on December 12, 2018. The two breakout groups covered the following topics: Exempt Securities Offerings; and Smaller Registered and Regulation A Securities Offerings. At the final Plenary Session of the Forum, the moderators of the two breakout groups presented the five recommendations of their respective breakout group.

The recommendations are presented below in the order of priority established as the result of a poll of all participants in the breakout groups.⁸ The priority ranking is intended to provide guidance to the SEC as to the importance and urgency the poll respondents assigned to each recommendation.

Priority

<u>Rank</u>	<u>Consolidated Forum Recommendations</u>
1	Accredited Investor Definition

Consistent with the recommendations of the SEC Advisory Committee on Small and Emerging Companies, the SEC should:

- a. Maintain the monetary thresholds for accredited investors; and
- b. Expand the categories of qualification for accredited investor status based on various types of sophistication, such as education, experience and training, including without limitation persons holding FINRA licenses or CPA or CFA designations, passing a test that demonstrates sophistication, or status as managerial or key employees affiliated with the issuer. [86; 3.18]

⁷ The SEC conducts the SEC Government-Business Forum on Small Business Capital Formation, but does not endorse or modify any of the recommendations of the Forum. The recommendations are solely the responsibility of the Forum participants, 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.

⁸ In the poll, the participants were asked to respond whether the SEC should give "high," "medium," "low" or "no" priority to each of the 10 recommendations. Of the 51 participants, 27 responded, a 53% response rate. Each "high priority" response was assigned five points, each "medium priority" was assigned three points, each "low priority" response was assigned one point and each "no priority" or blank response was assigned zero points. The total number of points assigned to each recommendation is shown in brackets after the text of the recommendation, as is the average assignment of points for the recommendation. The average assignment of points was determined for each recommendation by dividing the total number of points for a recommendation by the number of responses received (27).

Priority

Rank

2

Consolidated Forum Recommendations

Reporting, Disclosure and Registration Simplification and Modernization

We recommend reporting, disclosure and registration simplification and modernization, including:

- a. Aligning the definition of non-accelerated filers with the required definition of smaller reporting companies, to include issuers with a public float of less than \$250 million or with annual revenues of less than \$100 million (and either no public float, or a public float of less than \$700 million);
- b. Making it easier for issuers to use Form S-3 registration statements, including increasing the cap on the use of Form S-3 for smaller issuers under the baby shelf rule;
- c. Increasing the companies that can take advantage of Form S-3—whether listed on a national exchange or not;
- d. Modernizing and simplifying the rules related to compensatory securities offerings by eliminating Form S-8 and allowing issuers to rely upon a modified Rule 701; and
- e. Allowing incorporation by reference in Form S-4 for smaller reporting companies. [82; 3.04]

3A

Harmonization of Exempt Offerings

The current regulatory framework for exempt offerings is complex, and we recommend that the Commission rationalize, harmonize, simplify, consolidate and prioritize the regulatory regime for exempt offerings, including communications restrictions, issuer eligibility, size of the offering, type of investors, disclosure and other conditions of exemption. [81; 3.00]

Priority

Rank

3B

Consolidated Forum Recommendations

Finders and Special Purpose Brokers

- a. Finders should be exempt from registration as a broker-dealer. Define permissible activities in which finders can engage without being deemed as engaged in activities that require them to register as a broker-dealer under the Securities Exchange Act of 1934.
- b. In the event Congress fails to enact HR 477, cited as the “Small Business Mergers, Acquisitions, Sales, and Brokerage Simplification Act of 2017,” during the final days of the 115th Congress, or in the first year of the 116th Congress, the SEC should promulgate a rule codifying the relief in the *M&A Brokers* no-action letter (Jan. 31, 2014) issued by the SEC Division of Trading and Markets.
- c. Clarify the ability of funding portals to participate in Regulation A and Rule 506 offerings. [81; 3.00]

5

General Solicitation

The SEC should clarify the relationship between exempt offerings in which general solicitation is not permitted—such as in Section 4(a)(2) and Rule 506(b) offerings—and exempt offerings in which general solicitation is permitted—such as in, for example, Rule 506(c) offerings, as follows:

- a. A facts and circumstances integration analysis similar to that used in the 2007 Regulation D proposing release, Rel. No. 33-9497 [79 FR 3925] (Dec. 18, 2013) (concerning the integration of a concurrent private placement with the filing of a registration statement under the Securities Act of 1933) should be available to determine whether investors in a concurrent Section 4(a)(2)/Rule 506(b) private placement in which general solicitation is prohibited were solicited by means of the general solicitation used in connection with a Rule 506(c) offering or through some other means that would otherwise not foreclose the availability of the Section 4(a)(2)/Rule 506(b) exemption, regardless of whether the Rule 506(c) offering has been completed, abandoned or is ongoing;
- b. Rule 152 applies to a Rule 506(c) offering so that an issuer using Rule 506(c) may subsequently engage in a registered public offering without adversely affecting the Rule 506(c) offering exemption; and
- c. Review of the pre-existing relationship requirement should be made at the time of purchase rather than at the time of offer. [70; 2.59]

Priority

Rank

6

Consolidated Forum Recommendations

Proxy Advisory Firms

The SEC should promulgate a rule (and/or staff guidance) that provides for effective oversight of proxy advisory firms, with a focus on conflicts of interest, accuracy, transparency and issuer-specific decision making. Such a rule (and/or guidance) should emphasize the fiduciary duty that investment advisers owe to their clients, including when investment advisers rely on proxy advisory firms for vote recommendations. [69; 2.55]

7

Regulation Crowdfunding

- a. Accredited investors should be permitted to invest any amount they want in Regulation Crowdfunding offerings, provided they are verified. Removing the individual accredited investor limits would make Regulation Crowdfunding offerings a more attractive investment vehicle to accredited investors, and make it easier for offerings to reach their maximum offering goals.
- b. The limits for *all* investors should be raised. Non-accredited investors want to invest more in offerings and should be free to do so. This will only help the market grow as it allows more individual investments into the marketplace.
- c. The advertising rules and restrictions should be loosened to allow issuers more effectively to market their projects. It is very difficult for issuers to understand the burden of the advertising rules, and the rules run counter to the intent of the law: to promote the democratization of investing. The issuers should be allowed to speak more directly to the terms of the offering.
- d. Allow portals to receive securities of the issuer as compensation having different terms than the securities of the issuer received by investors in the offering (e.g., allow portals to receive warrants as compensation with different terms than the warrants sold to investors in the offering) and also allow portals to co-invest in the offerings they list.
- e. The SEC should lead a joint effort with FINRA to provide clear guidance to participants in Regulation Crowdfunding offerings.
- f. Rationalize Regulation Crowdfunding requirements for debt offerings and small offerings under \$250,000, for example, by:
 - i. Limiting the ongoing reporting obligations to actual noteholders (not to the general public); and
 - ii. Scaling regulation to reduce accounting, legal and other costs that now are relatively inelastic, regardless of the size of the offering. [60; 2.22]

Priority

Rank

8A

Consolidated Forum Recommendations

Regulation A

The SEC should issue guidance for broker/dealers, transfer agents, and clearing firms, regarding Regulation A securities and OTC securities. The SEC should revise Regulation A, as follows:

- a. Mandate blue sky preemption for secondary trading of Regulation A Tier 2 securities;
- b. Allow at-the-market offerings;
- c. Implement rules allowing all reporting companies to use Regulation A;
- d. Increase the maximum offering amount in any twelve month period from \$50 million to \$75 million for Regulation A Tier 2 offerings;
- e. Consider overriding advance notice requirements of state regulators in Regulation A offerings and limiting state filing fees for these offerings;
- f. Require any portal that is in the business of facilitating Regulation A offerings to register as a broker-dealer and comply with requirements similar to the requirements for intermediaries under Regulation Crowdfunding, and adhere to disclosure requirements including required disclosure of compensation and the amount thereof;
- g. The SEC should recognize use of quick response (“QR”) codes in lieu of a hyperlink to a prospectus or offering circular after the offering has gone effective or been qualified;
- h. Platforms that offer Regulation A securities offerings should be regulated like other portals, including adhering to FINRA guidelines; and
- i. The SEC should enforce Regulation SHO and Regulation T for all IPOs, including Regulation A offerings. [55; 2.04]

Priority

Rank

8B

Consolidated Forum Recommendations

Secondary Trading of OTC Securities

The SEC should review key rules and policies impacting secondary trading of OTC securities, including:

- a. Evaluation of FINRA Rule 6432 to make sure that there is no undue burden on applicants and issuers (e.g. the Form 211 should be processed within 3 days on a non-merit basis). An alternative trading system should be permitted to file a Form 211 with FINRA and FINRA Rule 5250 should be amended to allow payments for market making activities involving the FINRA Form 211 process.
- b. The provision of an SEC/FINRA safe harbor for clearing firms with respect to certain qualified low priced securities that meet certain best practices or minimum requirements, including re-evaluating FINRA Notice to Members 09-05.
- c. Allow broker-dealers and clearing firms to rely on information from transfer agents to properly trace securities in registered offerings or Regulation A offerings. [55; 2.04]

10

Business Development Companies

Registered investment companies that invest in other funds are required to disclose the fees and expenses they incur indirectly from investing in those underlying funds. Underlying funds whose expenses must be disclosed under this “acquired fund fees and expenses” (“AFFE”) rule include business development companies (“BDCs”). The SEC should accelerate its review of the required disclosure of indirect underlying fund expenses and remedy the “double counting” in its AFFE rule by exempting the disclosure of BDC expenses from the rule. [40; 1.48]

Commission’s Response to Recommendations of the 2018 SEC Government-Business Forum on Small Business Capital Formation

The Commission’s responses to the Forum recommendations, as required by the Small Business Investment Incentive Act of 1980, as amended by the Economic Growth, Regulatory Relief and Consumer Protection Act of 2018, appear below.⁹ As a general matter, where a Forum recommendation relates to an initiative as to which the Commission has solicited or expects to solicit public comment, the recommendation will be considered as part of that initiative, along with other comments received.

Below is a list of the 2018 Forum recommendations and any corresponding initiatives to which the recommendations relate. Instead of repeating each Forum recommendation, reference to the title of each recommendation is set forth below in the order appearing starting on page 17. The Commission also may be pursuing initiatives that are responsive to Forum recommendations but that have not yet been made public. Therefore, any such initiatives are not reflected in the list below.

Forum recommendations for which there is no corresponding initiative will be referred to the appropriate division or office at the Commission for consideration and recommendation.

1. Forum Recommendation on the Accredited Investor Definition

As indicated on the Spring 2019 Unified Agenda of Federal Regulatory and Deregulatory Long-term Actions (“Spring 2019 Unified Agenda Long-term Actions”),¹⁰ the Division of Corporation Finance is considering recommending that the Commission propose amendments to expand the definition of accredited investor under Regulation D of the Securities Act of 1933 (“Securities Act”).

As indicated on the Spring 2019 Unified Agenda of Federal Regulatory and Deregulatory Active Actions (“Spring 2019 Unified Agenda”),¹¹ the Division of Corporation Finance is considering

⁹ 15 U.S.C. 80c-1. Section 503 of the Economic Growth, Regulatory Relief and Consumer Protection Act of 2018 [Pub. L. 115-174, 132 Stat. 1296 (2018)] amended Section 503 of the Small Business Investment Incentive Act of 1980 to add this requirement in new paragraph (e).

¹⁰ See Office of Information and Regulatory Affairs, Office of Management and Budget, “Spring 2019 Unified Agenda of Federal Regulatory and Deregulatory Long-term Actions by the Securities and Exchange Commission,” available at: https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPubId=201904&showStage=longterm&agencyCd=3235&Image58.x=33&Image58.y=11. Long-term Actions are items under development but for which regulatory action is not expected within 12 months after publication of the Spring 2019 Unified Agenda.

¹¹ See Office of Information and Regulatory Affairs, Office of Management and Budget, “Spring 2019 Unified Agenda of Regulatory and Deregulatory Active Actions in Prerule, Proposed Rule and Final Rule Stages by the Securities and Exchange Commission,” available at: https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPub=true&agencyCode=&showStage=active&agencyCd=3235&Image58.x=44&Image58.y=11. Active regulatory actions are likely to occur in the next 12 months after publication of the Spring 2019 Unified Agenda.

recommending that the Commission seek public comment on ways to harmonize and streamline the Commission's rules for exempt offerings under the Securities Act in order to enhance their clarity and ease of use. Part of this initiative is expected to include seeking public comment on whether current rules that limit who can invest in certain offerings should be expanded to focus on criteria other than the wealth of the investor.¹²

Section 413(b)(2)(A) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") 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 for the protection of investors, in the public interest and in light of the economy. The next review is scheduled to take place this year.

Staff in the Division of Corporation Finance will consider this Forum recommendation in connection with these initiatives.

2. Forum Recommendation on Reporting, Disclosure and Registration Simplification and Modernization

The Commission recently has taken steps to simplify and modernize reporting, disclosure and registration requirements, for example, by:

- Adopting amendments to Rule 701 to increase from \$5 million to \$10 million the aggregate sales price or amount of securities sold during any consecutive 12-month period in excess of which the issuer is required to deliver additional disclosures to investors;¹³
- Adopting amendments, consistent with the Commission's mandate under the 2015 Fixing America's Surface Transportation Act (the "FAST Act"),¹⁴ to certain disclosure requirements in Regulation S-K, and related rules and forms;¹⁵
- Adopting amendments to certain disclosure requirements that have become redundant, duplicative, overlapping, outdated, or superseded, in light of other Commission disclosure requirements, U.S. Generally Accepted Accounting Principles, or changes in the information environment;¹⁶ and

¹² See SEC Chairman Jay Clayton "Remarks on Capital Formation at the Nashville 36/86 Entrepreneurship Festival," (Aug. 29, 2018). See also SEC Chairman Jay Clayton "SEC Rulemaking Over the Past Year, the Road Ahead and Challenges Posed by Brexit, LIBOR Transition and Cybersecurity Risks," (Dec. 6, 2018) ("The staff is working on a concept release to solicit input about key topics, including whether our accredited investor definition—a principal regulatory threshold for participation in private offerings—is appropriately tailored to address both investment opportunity and investor protection concerns.").

¹³ See "Exempt Offerings Pursuant to Compensatory Arrangements," SEC Release No. 33-10520 (July 18, 2018).

¹⁴ See "Report on Modernization and Simplification of Regulation S-K" (Nov. 23, 2016) (as required by Section 72003 of the FAST Act).

¹⁵ See "FAST Act Modernization and Simplification of Regulation S-K," SEC Release No. 33-10618 (Mar. 20, 2019) (adopting release).

¹⁶ See "Disclosure Update and Simplification," SEC Release No. 33-10532 (Aug. 17, 2018).

- Proposing rule changes to extend “testing the waters” provisions as currently available only to emerging growth companies to all issuers.¹⁷

On May 9, 2019, the Commission proposed amendments to the “accelerated filer” definition in Rule 12b-2 of the Securities Exchange Act of 1934 (the “Exchange Act”) that would have the effect of reducing the number of registrants that are subject to the Sarbanes-Oxley Act Section 404(b) attestation requirement.¹⁸

The Commission issued a concept release on July 18, 2018, in which it solicited comment on securities issued by non-reporting companies pursuant to compensatory arrangements in reliance on Rule 701 and reporting companies registering compensatory offerings on the Form S-8 Securities Act registration statement.¹⁹ In the concept release, the Commission sought comment on possible ways to modernize the Rule 701 exemption and the relationship between it and Form S-8, consistent with investor protection, including the advantages and disadvantages of allowing Exchange Act reporting companies to use Rule 701 and, in turn, eliminating Form S-8.²⁰ As indicated on the Spring 2019 Unified Agenda, the Division of Corporation Finance is considering recommending that the Commission propose rule amendments to Rule 701 and Form S-8.

As indicated on the Spring 2019 Unified Agenda, the Division of Corporation Finance also is considering recommending to the Commission that it propose rule amendments to modernize and simplify disclosures regarding the description of business, legal proceedings, risk factors, management’s discussion and analysis (MD&A), selected financial data and supplementary financial information.

In addition, as indicated on the Spring 2019 Unified Agenda Long-term Actions, the Division of Corporation Finance also is considering recommending to the Commission that it seek public comment on ways to ease companies’ compliance burdens, concerning areas such as earnings releases and quarterly reports, while maintaining appropriate levels of disclosure and investor protection.

Staff in the Division of Corporation Finance will consider this Forum recommendation in connection with these initiatives.

¹⁷ See “*Solicitations of Interest Prior to a Registered Public Offering*,” SEC Release No. 33-10607 (Feb. 19, 2019).

¹⁸ See “*Amendments to the Accelerated Filer and Large Accelerated Filer Definitions*,” SEC Release No. 34-85814 (May 9, 2019).

¹⁹ See “*Concept Release on Compensatory Securities Offerings and Sales*,” SEC Release No. 33-10521 (July 18, 2018).

²⁰ *Id.* at text accompanying note 102.

3A. Forum Recommendation on Harmonization of Exempt Offerings

Staff in the Division of Corporation Finance will consider this Forum recommendation in connection with the initiative described above on ways to harmonize and streamline the Commission's rules for exempt offerings under the Securities Act.

3B. Forum Recommendation on Finders and Special Purpose Brokers

As indicated on the Spring 2019 Unified Agenda Long-term Actions, the Division of Trading and Markets is considering recommending that the Commission propose rules concerning the status of finders for purposes of Section 15(a) of the Exchange Act.

Staff in the Division of Trading and Markets will consider this Forum recommendation in connection with this initiative.

5. Forum Recommendation on General Solicitation

Staff in the Division of Corporation Finance will consider this Forum recommendation in connection with the initiative described above on ways to harmonize and streamline the Commission's rules for exempt offerings under the Securities Act.

6. Forum Recommendation on Proxy Advisory Firms

In November 2018, the SEC staff hosted a roundtable to engage with the public on the topic of investment advisers' use of proxy advisory firms as part of a broader discussion of the proxy process.²¹ Chairman Clayton has asked the staff to look at the issues raised in the roundtable on this topic and formulate recommendations for the Commission's consideration.²²

As indicated on the Spring 2019 Unified Agenda, the Division of Corporation Finance is considering recommending that the Commission propose rule amendments to address certain advisers' reliance on the proxy solicitation exemptions in Rule 14a-2(b).

Staff in the Divisions of Corporation Finance and Investment Management will consider this Forum recommendation in connection with this initiative.

7. Forum Recommendation on Regulation Crowdfunding

In the Commission's 2015 final release adopting the Regulation Crowdfunding exemption, the staff undertook to study and submit a report to the Commission on the impact of the regulation on capital formation and investor protection no later than three years following the effective date

²¹ See November 15, 2018: SEC Roundtable on the Proxy Process.

²² See SEC Chairman Clayton "SEC Rulemaking Over the Past Year, the Road Ahead and Challenges Posed by Brexit, LIBOR Transition and Cybersecurity Risks," (Dec. 6. 2018).

of the Regulation Crowdfunding exemption.²³ The release indicated that the report will include, but not be limited to, a review of: (1) issuer and intermediary compliance; (2) issuer offering limits and investor investment limits; (3) incidence of fraud, investor losses, and compliance with investor aggregates; (4) intermediary fee and compensation structures; (5) measures intermediaries have taken to reduce the risk of fraud, including reliance on issuer and investor representations; (6) the concept of a centralized database of investor contributions; (7) intermediary policies and procedures; (8) intermediary recordkeeping practices; and (9) secondary market trading practices.

Staff in the Divisions of Corporation Finance and Trading and Markets will consider this Forum recommendation, and the findings from the staff's report on Regulation Crowdfunding, in connection with its earlier described initiative on ways to harmonize and streamline the Commission's rules for exempt offerings under the Securities Act.

In addition, the staff has conducted webinars with FINRA in order to provide additional guidance and has published FAQs regarding Regulation Crowdfunding. The staff expects to continue consulting with FINRA regarding the implementation of Regulation Crowdfunding.

8A. Forum Recommendation on Regulation A

On December 19, 2018, the Commission amended Regulation A to implement Section 508 of the Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018.²⁴ These amendments to Regulation A permit entities subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act to use the exemption and provide that entities meeting the reporting requirements of the Exchange Act will be deemed to have met the reporting requirements of Regulation A.

In the Commission's 2015 final release adopting amendments to Regulation A, Commission staff undertook to study and submit a report to the Commission no later than five years following the adoption of these amendments on the impact of both the Tier 1 and Tier 2 offerings on capital formation and investor protection.²⁵ The final release indicates that the report will include, but not be limited to, a review of: (1) the amount of capital raised under the amendments; (2) the number of issuances and amount raised by both Tier 1 and Tier 2 offerings; (3) the number of placement agents and brokers facilitating the Regulation A offerings; (4) the number of Federal, State, or any other actions taken against issuers, placement agents, or brokers with respect to both Tier 1 and Tier 2 offerings; and (5) whether any additional investor protections are necessary for either Tier 1 or Tier 2.²⁶

²³ See "Crowdfunding," SEC Release No. 33-9974 (Oct. 30, 2015). Regulation Crowdfunding became effective on May 16, 2016.

²⁴ See "Conditional Small Issues Exemption Under the Securities Act of 1933 (Regulation A)," SEC Release No. 33-10591 (Dec. 19, 2018).

²⁵ See "Amendments for Small and Additional Issues Exemptions Under the Securities Act (Regulation A)," SEC Release No. 33-9741, at Section II(A) (Mar. 25, 2015).

²⁶ *Id.*

As indicated on the Spring 2019 Unified Agenda Long-term Actions, the Division of Corporation Finance is considering recommending that the Commission propose amendments to Regulation A to address any staff recommendations resulting from the reviews of the regulation.

Staff in the Divisions of Corporation Finance and Trading and Markets will consider this Forum recommendation in connection with these initiatives.

8B. Forum Recommendation on Secondary Trading of OTC Securities

Staff in the Division of Trading and Markets will consider this recommendation and consult, as needed, with FINRA.

10. Forum Recommendation on Business Development Companies

Commission staff is considering a possible exemption from the AFFE rule for BDCs. As part of this consideration, the staff is seeking to better understand the challenges BDCs are experiencing with the AFFE disclosure requirements and to evaluate how well the disclosure rule achieves its policy goals.

In addition, in connection with a recent proposal to streamline and enhance the regulatory framework applicable to funds that invest in other funds (“fund of funds” arrangements), the Commission solicited public comment on the AFFE rule.²⁷ The request for comment specifically notes concerns that have been raised regarding required disclosure of fees and expenses of acquired funds (including BDCs) by investing funds and seeks comment on whether the AFFE has been effective and whether the fees and expenses of certain acquired funds should be exempted. The Commission received several comments addressing this topic in response to the request for comment.

The Division of Investment Management will consider this Forum recommendation in its evaluation of the AFFE rule and its effectiveness.

²⁷ See “*Funds of Funds Arrangements*” SEC Release No. 33-10590; IC-33329 (Dec. 19, 2018) at text accompanying and following notes 176-179.

BREAKOUT GROUP PARTICIPANTS

The participants identified below took part either in person or by telephone conference call in the Forum breakout groups on December 12, 2018. These participants formulated the Forum recommendations set forth beginning on page 17 and were later given an opportunity to participate in a poll to prioritize the recommendations.

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