The Commonwealth of Massachusetts
Secretary of the Commonwealth
State House, Boston, Massachusetts 02133

William Francis Galvin
Secretary of the Commonwealth

December 18, 2013

The Honorable Mary Jo White, Chairman
The Honorable Luis A. Aguilar
The Honorable Daniel M. Gallagher
The Honorable Kara M. Stein
The Honorable Michael S. Piwowar
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Re: Rulemaking for "Regulation A-Plus" under Title IV of the JOBS Act of 2012
Proposed Rule Amendments for Small and Additional Issues Exemption under Section 3(b) of the Securities Act
(Rel. No. 33-9497; 34-71120; 39-2493; File No. S7-11-13)

Dear Chairman White, Commissioner Aguilar, Commissioner Gallagher, Commissioner Stein, and Commissioner Piwowar:

I write in my capacity as the chief securities regulator for Massachusetts. The Office of the Secretary of the Commonwealth administers and enforces the Massachusetts Securities Act, M.G.L. c.110A, through the Massachusetts Securities Division.

We are dismayed and shocked to see that the Commission's Regulation A-Plus[1] proposal includes provisions that preempt the ability of the states to require registration of these offerings and to review them. The states have tackled preemption battles on many fronts, but never before have we found ourselves battling our federal counterpart. Shame on the S.E.C. for this anti-investor proposal. This is a step that puts small retail investors unacceptably at risk. We urge the Commission to remove these provisions from the rule.

Because many Regulation A-Plus offerings will be made by small and early-stage issuers, they will involve significant risks. That makes these offerings a worrisome choice for small retail

[1] The Commission designates these offerings as Regulation A, Tier 2 offerings in the proposal.

investors. Moreover, offerings made under the current Regulation A very often have a local character. If that pattern continues, Regulation A-Plus offerings will also be sold substantially in the issuers' home states and in local-area markets. For this reason alone, it is crucial for the states to have a role in overseeing these offerings in order to protect their citizens.

The History of Past Efforts to Promote Small Business Capital Raising Demonstrates the Risk of Fraud Facing Small Investors

Many of the segments of the market that have been deregulated and that serve small and early-stage issuers involve significant investment risk and fraud.

Rule 506 offerings, which are preempted "covered securities," and which are substantially deregulated in sales to accredited investors, are the number-one source of state enforcement complaints for fraud. The lower-tier over-the-counter trading markets for stocks, such as the Pink Sheets Market and the OTCBB, which list stocks of small public companies, are notorious for providing insufficient information to the public and for fraudulent and abusive practices. The Securities Division sees a steady stream of investors who have been harmed by bad practices in those markets. We urge the Commission not to compound these existing problems and place investors at even greater risk by preempting state review of Regulation A-Plus offerings.

The S.E.C. demonstrated its inability to adopt rules to protect investors in the Rule 506 market. How is it going to protect investors under the new Regulation A-Plus?

It is crucial not to sacrifice the protection of small investors in pursuit of regulatory speed and convenience. Instead, in the wake of a string of recent financial crises, the Commission should be working with state and other regulators so as to improve regulation and more efficiently and effectively protect investors.

Congress Specifically Preserved State Authority under Title IV of the JOBS Act

When the Regulation A-Plus legislation was under consideration, Congress considered, but ultimately rejected, language that would preempt state review of those offerings. NASAA and the states tracked this legislation and successfully urged that state authority to review these offerings should be maintained. The Commission's proposal contravenes Congress's express intent on this issue. For this reason alone, in order to reflect Congress's intent to preserve state authority in this area, the preemptive provisions in the proposal must be removed.

Two particular pieces of legislative history demonstrate that preemption of state review was not intended by Congress.

First, in remarks to the House of Representatives immediately prior to passing the Bill (H.R. 1070), Representative Peters stated, "[F]inally, the gentleman from Arizona has also worked with Democrats on the remaining issue of contention, and that was the preemption of State law. The gentleman from Arizona's substitute amendment to H.R. 1070 removes the exemption from State level review that was previously provided to an issuer using a broker-dealer to distribute and issue. Regulation A securities can be high-risk offerings that may also be susceptible to fraud, making protections provided by the State regulators an essential future."[2] (emphasis added)

[2] 157 Cong Rec H 7229, 7231 (2011)

Second, a House Report on the JOBS Act noted, "There was one contentious issue that arose during the markup that had nothing to do with the principle of an exemption limit increase, but instead with new language preempting state law. This language preempts state securities law for Regulation A securities offered or sold by a broker or dealer, creating a class of security not subject to state level review, but which will not receive adequate attention at the Federal level. Regulation A offerings can be high risk and federal review alone may be inadequate, so states should not be preempted..."[3] (emphasis added)

The record demonstrates that the intent of Congress was not to preempt the states in this area. State review of these offerings is therefore critical in order to comply with the Congressional goals of protecting investors while increasing access to capital.

Preemption of State Review of Regulation A-Plus Offerings Using the Qualified Purchaser Provision under Sec. 18 of the Securities Act of 1933 Exemption is Dangerous and Plainly Wrong

The Commission proposes to use its power to define "qualified purchaser" under Section 18 of the Securities Act as a means to make Regulation A-Plus offerings transactions in covered securities. This is a jerry-rigged approach to preemption that is contrary to the spirit and letter of the statute. Also, adopting such a definition of "qualified purchaser" sets a dangerous precedent that will put investors at risk in the future.

The Commission's use of the qualified purchaser definition under Section 18 is directly contrary to Congressional intent, which was that qualified purchasers must be investors who can protect themselves in the financial markets. A House Report discussing 18(b)(3) discussed the Congressional intent behind qualified purchasers. Specifically, the Report notes: "...The Committee intends that the Commission's definition be rooted in the belief that "qualified" purchasers are sophisticated investors, capable of protecting themselves in a manner that renders regulation by State authorities unnecessary."[4] (emphasis added)

The Commission's proposal is directly contrary to this express intent, because it bases "qualification" on the type of transaction the issuer is conducting, and not on factors such as investor sophistication, high financial resources, or any other indicator of risk bearing ability.

Moreover, we note that the terms "qualified investor" or "qualified purchaser" are used in the federal securities laws and regulations, such investors are required to have very substantial financial means and risk bearing ability.[5] This traditional approach to the term qualified purchaser makes sense, because in many instances such qualified investors are less in need of the protections provided by the securities laws than are smaller and less sophisticated investors.

The proposal makes investors "qualified purchasers" based on the kind of exemption the issuer is using, not based on the investors' characteristics. This is a conclusion-driven analysis which is directly contrary to investor protection.

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[3] H.R. Rep. 112-206 (2011)

[4] H.R. Rep. No. 104-622, 31-32 (1996)

[5] *E.g.*, (i) under SEC Rule 144A, Qualified Institutional Buyers (QIBs) must be accredited entities that own and invest on a discretionary basis between $10M and $100M in investment securities, and (ii) a "Qualified Purchaser" under Section 2(a)(51)(A) of the Investment Company Act of 1940 must hold not less than $5M in investments. Such investors were specifically determined to be financially and otherwise qualified to purchase investments under exemptions to applicable registration requirements.

The States are Actively Developing a Coordinated Review System for Regulation A-Plus Offerings

The states, through NASAA, have been working actively to develop a simple and streamlined coordinated review system for these offerings. This system will allow issuers in Regulation A-Plus offerings to receive just one state comment letter (rather than several) and to resolve the comments with two lead examiners who will be issuing comments on behalf of the states as a group.

Massachusetts is fully prepared to participate in this system. Such a system will help achieve several beneficial goals, including a simpler and faster review process and more consistent state regulatory comments. Also, this coordinated review process will directly benefit the states by allowing each state to more effectively use its time and resources to protect investors. Massachusetts looks forward to participating in this process and to the gains in efficiency it will provide.

The proposed preemption of state review of offerings under Regulation A-Plus will increase the risks facing investors who participate in this new segment of the securities markets. Such preemption is contrary to the documented intent of Congress and it is bad policy, particularly with respect to small and unsophisticated investors. We urge the Commission to remove state preemption from the proposed rules in order to protect investors and the integrity of the markets.

If you have any questions about this letter or if we can assist in any way, please contact me or Bryan Lantagne, Director of the Massachusetts Securities Division, at (617) 727-3548.

Sincerely,

William F. Galvin
Secretary of the Commonwealth
Commonwealth of Massachusetts