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U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: Request for Public Comments on SEC Regulatory Initiatives Under the JOBS Act: Title IV-Small Company Capital Formation

Ladies and Gentlemen:

This letter is submitted on behalf of the Federal Regulation of Securities Committee (the "Committee") of the Business Law Section (the "Section") of the American Bar Association (the "ABA") with respect to the rules the Securities and Exchange Commission (the "Commission") is required to adopt pursuant to Section 401 of the Jumpstart Our Business Startups Act of 2012 (the "JOBS Act") relating to the exemption from registration set forth in new Section 3(b)(2) of the Securities Act of 1933 (the "Securities Act"). This letter is submitted in response to the Commission's request for public comments relating to the JOBS Act rulemaking.[1]

The comments expressed in this letter represent the views of the Committee, and have also been reviewed and approved by the Middle Market and Small Business Committee, the Private Equity and Venture Capital Committee, the Corporate Governance Committee and the State Regulation of Securities Committee of the Section. The comments expressed in this letter have not been approved by the ABA's House of Delegates or Board of Governors and therefore do not represent the official position of the ABA. In addition, these comments do not represent the official position of the ABA Section of Business Law.

The Committee thanks the Commission for this opportunity to comment on the rulemaking the Commission is required or authorized to undertake in connection with the JOBS Act. This letter addresses the provisions set forth in Section 401 of the JOBS Act relating to small company capital formation. Because our comments are being presented prior to formal rulemaking, our comments are intended to highlight matters we believe the Commission should consider in formulating its proposed rules pursuant to Section 401 or providing guidance pursuant thereto.

Background

Section 401 of the JOBS Act created a new subsection (2) to Section 3(b) of the Securities Act that requires the Commission to adopt an exemption allowing companies to issue up to $50 million in securities subject to certain conditions and requirements.

[1] http://sec.gov/spotlight/jobsactcomments.shtml

Although some have viewed Section 401 as revising Regulation A (adopted under Section 3(b)(1), which exempts small issuances of up to $5 million), Section 3(b)(2) does not replace Section 3(b)(1), but creates a separate exemption. Even though the JOBS Act does not set out a specific timetable for Commission rulemaking action under Section 401, we urge the Commission to act promptly to propose and adopt implementing rules. We believe this can be achieved by the Commission importing into its rules under Section 3(b)(2) certain aspects of Regulation A while raising the dollar threshold applicable to the exemption and adding some investor protection enhancements. This will help to achieve the Congressional purpose of assisting smaller companies in raising the capital they need to spur growth and create jobs. For companies in certain industry sectors, the ability to raise $50 million in each 12-month period without the costs or burdens of full Commission registration and subsequent full reporting, or the liquidity discounts often demanded in private offerings, may permit these companies to expand in ways that are now not available to them. By creating a midpoint between crowdfunded offerings pursuant to Title III of the JOBS Act and offerings under Rule 506 of Regulation D and existing Regulation A, on the one hand, and initial public offerings by emerging growth companies under Title I of the JOBS Act and full registered public offerings, on the other, the Commission's rules under Section 3(b)(2) should, in our view, provide companies with significant flexibility to raise capital while at the same time providing for appropriate investor protections.

Because Section 3(b)(2) does not contain many of the restrictions set forth in existing Regulation A, we encourage the Commission to consider proposing, in its rulemaking, a new offering exemption along the lines outlined in this letter. The Section 3(b)(2) rules should be flexible enough to provide growing companies with a viable capital-raising alternative, while assuring enhanced investor protections through expanded offering statement disclosures and an ongoing disclosure requirement. In addition, the Commission's Section 3(b)(2) rules should seek to avoid the shortcomings of current Regulation A that have limited the use of this exemption by smaller companies.

Discussion

The suggestions set forth below are intended to assist the Commission in promulgating its proposed rules. We have organized our comments below based on specific topic areas that we believe the Commission should address in its proposed rulemaking or in the accompanying release.

1. The Commission should define "qualified purchaser."

In the National Securities Markets Improvement Act of 1996 ("NSMIA"), Congress authorized the Commission to define the term "qualified purchaser" under the Securities Act to include "sophisticated investors, capable of protecting themselves in a manner that renders regulation by State authorities unnecessary."[2] The adoption of such a definition would exempt securities transactions with these persons from state "blue sky" laws. In 2001, the Commission proposed to define a "qualified purchaser" to mirror the definition of "accredited investor" under Regulation D, but to date neither this nor any other definition has been adopted.[3]

Section 401(b) of the JOBS Act provides that securities offered pursuant to the Section 3(b)(2) exemption will be "covered securities" under NSMIA if the securities are offered or sold on a national securities exchange or to qualified purchasers.[4] Because the utilization of the Section 3(b)(2) exemption may depend, in large part, on whether securities issued pursuant to this exemption will be deemed to be covered securities, we urge the Commission to propose and adopt a definition of "qualified purchaser," at least for the purposes of facilitating Section 3(b)(2) offerings. We recommend that the definition be based upon the definition of "accredited investor" in Rule 501 of Regulation D.[5] In our view, if the Commission does not adopt any "qualified purchaser" definition, or adopts an overly restrictive definition, the attractiveness of using the new Section 3(b)(2) exemption could be significantly reduced. The costs and burdens of blue sky law compliance have been among the principal reasons why Regulation A has not been used very often by issuers. In its July 2012 report to Congress entitled "*Factors that May Affect Trends in Regulation A Offerings*," the U.S. Government Accountability Office (the "GAO Report") observed that growing companies may continue to favor Rule 506 offerings over Section 3(b)(2) offerings unless the new exemption addressed state securities registration issues.[6] At the most recent Congressionally-mandated SEC Government-Business Forum on Small Business Capital Formation, held in November 2011, the third ranked participant

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[2] H.R. Rep. No. 622, 104th Cong. 2d Sess. at 31 (1996) ("House Report"). See also S. Rep. No. 293, 104th Cong. 2d Sess. at 15 (1996) ("Senate Report"). These committee reports relate to bills that were eventually enacted as NSMIA.

[3] SEC Release 33-8041 (December 19, 2001). http://sec.gov/rules/proposed/33-8041.htm

[4] As stated above, Section 401(b) of the JOBS Act refers to a security "offered or sold on a national securities exchange." As the GAO Report observes (at note 14), "Regulation A offerings currently are not generally sold on national exchanges because current Regulation A may not be used by companies with SEC reporting obligations and all companies whose securities are listed on national [securities] exchanges have SEC reporting obligations." Similarly, the provisions of Section 401(b) of the JOBS Act with respect to securities offered or sold on a national securities exchange may be meaningless unless the Commission confirms that companies subject to Exchange Act reporting obligations are eligible to rely on the Section 3(b)(2) exemption. In view of the reference in Section 401(b) of the JOBS Act to securities offered or sold on a national securities exchange, we encourage the Commission to propose rules to implement this provision.

[5] In connection with its implementing rules, the Commission may want to seek public comment as to whether the "accredited investor' definition in the context of Section 3(b)(2) should be modified because of the greater protections afforded to investors pursuant to Section 3(b)(2) offerings, as opposed to Rule 506 offerings. These protections may include such filings of offering materials with the Commission as the Commission may prescribe, the possible review of such materials by the Commission staff, and the Section 12(a)(2) liability of persons offering and selling the securities. We note as well that the measures issuers will be required to undertake pursuant to the JOBS Act to verify accredited investor status in Rule 506 offerings should minimize the risk that unqualified persons will participate in offerings to accredited investors. See http://sec.gov/rules/proposed/2012/33-9354.pdf These same steps could be applied as well to Rule 3(b)(2) offerings, should the Commission determine to define "qualified purchaser" to mirror the definition of "accredited investor."

[6] See, for example, the Section in the GAO Report entitled "Complying with State Securities Registration Requirements."

recommendation was that the ceiling for the Regulation A exemption be raised to $50 million and that federal preemption be established for such offerings.

Even if many offerings under the new Section 3(b)(2) exemption are not limited to "qualified purchasers," the adoption of a "qualified purchaser" definition would still be desirable, because it would mean that at least some offerings (or portions of offerings) of securities not listed on a national securities exchange would be exempt from blue sky registration. With a definition, issuers relying on Section 3(b)(2) will be able to determine the states in which they will conduct the offering.

In addition to considering a stand-alone "qualified purchaser" definition, we also suggest that the Commission seek comment in its proposing release as to whether a "qualified purchaser" should also include a customer of a registered broker-dealer through which the customer acquires securities in a Section 3(b)(2) offering. In these instances, the broker-dealer acts as a gatekeeper – in connection with the discharge of its know-your-customer and suitability obligations, the broker-dealer would have to assess whether an investment in an offering pursuant to the Section 3(b)(2) exemption would be appropriate for the customer. A broker-dealer would be well placed to make a determination regarding a prospective investor's sophistication, investment objectives, ability to understand the risks associated with an investment in the Section 3(b)(2) offering, and ability to bear such risks. Moreover, every broker-dealer is regulated, either by the Commission or by the states, and by FINRA. In addition, a broker-dealer also could provide prospective investors with investor education materials similar to those that the JOBS Act requires be provided in a crowdfunded offering. We therefore encourage the Commission to invite comments with respect to this concept in its proposing release.

2. The Commission should consider adopting Section 3(b)(2) disclosure obligations that are generally consistent with the existing Regulation A disclosure obligations, utilizing existing Form 1-A as a basis for such disclosures (with appropriate modifications). The Commission should also consider providing an integration safe harbor.

The GAO Report highlights the need to consider the Section 3(b)(2) requirements against the backdrop of the other offering exemptions available to smaller companies. The GAO Report recognizes the possibility that a Rule 506 offering may remain a more attractive capital-raising alternative than a Section 3(b)(2) offering, depending upon how the Commission exercises its rulemaking discretion.[7]

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[7] Pursuant to the JOBS Act, an issuer may conduct a Rule 506 offering with no maximum offering limitation using general solicitation and general advertising if reasonable steps are taken to verify that all investors are accredited investors. The issuer would not be subject to any prescriptive information requirements, and the securities sold in a Rule 506 offering would be deemed to be covered securities, exempt from state securities registration. The securities sold in the offering would, however, be restricted securities. If the issuer remains below the "holder of record" threshold set forth in Section 12(g) of the Securities Exchange Act of 1934 (the "Exchange Act") (and the

The burdens associated with mandated information requirements may affect an issuer's decision to conduct a Section 3(b)(2) offering. In its proposed rulemaking and its request for public comment, we therefore recommend that the Commission explore the appropriate balance between the information generally provided by issuers in "all accredited" Rule 506 transactions, and the requirements that will be applicable to Section 3(b)(2) transactions.[8] In our view, it will not be necessary for the Commission to devise a new form for use in connection with Section 3(b)(2) offerings. With minimal and appropriate modifications, current Form 1-A can be adapted for offerings exempt under Section 3(b)(2).[9] We believe that the current practice of submitting Form 1-A to the Commission by hard copy should be supplemented (or replaced) by an electronic submission process, as contemplated by Section 3(b)(2). We also recommend that the proposed rule provide for a filed Form 1-A to be accessible on EDGAR, subject to the ability of issuers to obtain confidential treatment of Form 1-A submissions similar to the procedures available to emerging growth companies under the JOBS Act. The Commission should also continue to afford issuers confidential treatment pursuant to Section 252(c) of Regulation A.

We also believe that the anti-integration provisions set forth in Rule 251(c) should apply to Section 3(b)(2) offerings, and continue to apply as well to any revised provisions of Regulation A. Especially because the Section 3(b)(2) exemption must allow for issuers to solicit indications of interest, it is critical that issuers not be at risk that their offerings will be integrated with other offerings.

With respect to periodic filing obligations following the completion of the Section 3(b)(2) offering, we suggest that the Commission not propose prescriptive disclosure requirements resembling those required of a reporting company. No subsequent disclosures are mandated for an issuer that conducts a Rule 506 offering, and we believe the Commission should be cautious regarding the imposition of obligations that will impose substantial burdens on issuers. Form 1-A disclosure, with appropriate adjustments, would seem suitable.

We recommend that the Commission's proposed rulemaking also provide for the termination of periodic Section 3(b)(2) reporting obligations. At a minimum, we believe that the periodic reporting obligations should be automatically terminated as to any fiscal year, other than the year in which the Section 3(b)(2) offering is made, if at the beginning of such fiscal year, the securities of the class sold in the Section 3(b)(2) offering are held of record by fewer than 300 persons. This termination provision is based on similar provisions in Section 15(d) of the Securities Exchange Act of 1934 (the "Exchange Act") applicable to issuers that have filed

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Commission's rules thereunder), it would remain exempt from any statutory or Commission requirement to provide ongoing information to security holders.

[8] Although the Commission does not prescribe any disclosure requirements in connection with "all accredited" Rule 506 transactions, issuers customarily provide certain information to investors.

[9] Form 1-A would, of course, need to be revised to reflect any requirements of Section 3(b)(2). In this connection, although Section 3(b)(2) provides for audited financial statements to be included in an offering statement and in subsequent annual filings with the Commission, we encourage the Commission to consider whether it has the statutory authority to exempt certain smaller companies (such as those having revenues less than a stated threshold) from the audited financial statement requirement. An overly burdensome auditing requirement may inhibit the ability of such companies to raise capital pursuant to the Section 3(b)(2) exemption.

registration statements under the Securities Act. In its proposed rulemaking release, the Commission may also want to seek comment as to whether a different or alternative standard should apply to Section 3(b)(2) issuers. For example, if the class of securities sold in a Section 3(b)(2) offering were also sold to a large number of investors in a crowdfunded offering, issuers may never be able to terminate their Section 3(b)(2) periodic disclosure obligations unless the Commission were to adopt an alternative termination provision, such as one based on the size of the issuer or a period of time following the Section 3(b)(2) offering. We note in this regard that the Commission, under Section 303 of the JOBS Act, is authorized to exclude purchasers in a crowdfunding offering from being counted for purposes of the Section 12(g) threshold.

With respect to both the disclosures required in connection with Section 3(b)(2) offerings, and the periodic disclosures required following such offerings, we recommend that the Commission consider incorporating into the Section 3(b)(2) exemption a provision similar to that set forth in current Rule 508 that would ensure that an immaterial failure to comply with a term or condition of the Section 3(b)(2) requirements will not result in the loss of the offering exemption. The fear that immaterial noncompliance with the Section 3(b)(2) exemption may have significant consequences to an issuer may cause the issuer to elect to conduct an offering pursuant to Rule 506 rather than the Section 3(b)(2) exemption.

3. The Commission should facilitate an issuer's desire to register a class of securities under the Exchange Act, either concurrently with the completion of a Section 3(b)(2) offering or thereafter.

Companies that have conducted Section 3(b)(2) offerings but do not trigger the Exchange Act Section 12(g) registration threshold (as such threshold has been revised pursuant to the JOBS Act) will, unless they choose otherwise, remain exempt from registration under the Exchange Act. We believe that some companies may, however, desire to conduct a Section 3(b)(2) offering and concurrently with (or after) the closing of the transaction either register their securities pursuant to Section 12(g) of the Exchange Act or list their securities on a national securities exchange and register the class to be listed pursuant to Section 12(b) of the Exchange Act.

Although the existing private secondary trading markets and the over-the-counter markets provide some liquidity for the securities of an issuer that completes a Section 3(b)(2) offering and chooses not to register its securities pursuant to the Exchange Act, there may be significant benefits to issuers and security holders alike as a result of Exchange Act registration. Significantly greater information would be available to investors about the issuer, its management, and its financial condition, and its securities are more likely to be actively traded, affording investors greater liquidity. Accommodating Exchange Act registration by companies concurrently with or following a Section 3(b)(2) offering may require the Commission to adopt certain changes to the applicable rules and forms. For example, Form 8-A might be amended to permit the short-form registration to be available to an issuer in conjunction with, or following the completion, of a Section 3(b)(2) offering. In the absence of amending Form 8-A, an issuer that completes a Section 3(b)(2) offering and seeks to register its securities pursuant to the

Exchange Act would be required to incur the cost and burden of preparing and filing with the Commission a registration statement on Form 10. Many of the disclosures currently required to be provided by an issuer in a registration statement on Form 10 could be incorporated as requirements for a Section 3(b)(2) Offering Statement on Form 1-A, applicable to companies that intend to effect an Exchange Act registration. In addition, the periodic and other disclosure requirements applicable to reporting companies should be deemed to satisfy the ongoing disclosure obligations applicable to companies that have engaged in Section 3(b)(2) offerings. To the extent they meet the applicable requirements, such issuers would be entitled to avail themselves of the accommodations that apply to smaller reporting companies and emerging growth companies.

4. The Commission should consider permitting companies subject to Section 13 or 15(d) of the Exchange Act to rely on the Section 3(b)(2) exemption.

The definition of "issuer" in Rule 251(a) of Regulation A excludes companies that are subject to Section 13 or 15(d) of the Exchange Act from participation in Regulation A offerings. However, Section 3(b)(2) does not limit its scope to nonpublic companies. Because many already-public companies may benefit from the ability to issue securities pursuant to the new exemption, we recommend that the Commission not prohibit companies subject to Section 13 or 15(d) of the Exchange Act from being included as "issuers" entitled to rely on the Section 3(b)(2) exemption. The availability of the exemption would provide these issuers a means to effect a public offering of unrestricted securities that is likely to be less burdensome, quicker and less expensive than a full Securities Act registration. The offering statement required by Section 3(b)(2) for already-public companies could consist of an incorporation by reference of the issuer's most recent annual and interim reports and reports on Form 8-K, together with a short statement setting forth the terms of the offering consistent with the Commission's comparable requirements for other Section 3(b)(2) offerings. The Section's periodic disclose requirements would be satisfied by the issuer's Section 13 or 15(d) reports. Because Congress did not restrict Section 3(b)(2) offerings to non-public companies, and because it clearly intended to broaden the capital raising opportunities for smaller companies, we believe that the ability of already-public companies to utilize Section 3(b)(2) would be consistent with the benefits Congress intended in the JOBS Act.[10] We acknowledge that many reporting companies would not be within the scope of the smaller companies Section 3(b)(2) was intended to assist. The Commission may therefore want to request public comment as to whether a size condition should be imposed on the reporting companies that may avail themselves of Section 3(b)(2), such as limiting the

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[10] With respect to reporting foreign private issuers, the periodic disclosure obligations would be satisfied by incorporation by reference of the issuer's Form 20-F and those reports on Form 6-K that the issuer specifically incorporates. In addition, we believe that foreign private issuers that prepare their financial statements in accordance with International Financial Reporting Standards ("IFRS") as adopted by the International Accounting Standards Board ("IASB") should be permitted to use and to file such financial statements without a reconciliation to US-GAAP.

availability of the exemption to companies with total annual gross revenues of less than $1,000,000,000 (as indexed for inflation) during their most recently completed fiscal year.[11]

5. The Commission should not prohibit foreign private issuers from relying on the new exemption.

We believe that foreign private issuers that are exempt from Section 12(g) registration pursuant to Exchange Act Rule 12g3-2(b) should be entitled to rely upon Section 3(b)(2). Regulation A in its current form is only available to non-reporting companies organized in the United States or Canada. This limitation has been part of Regulation A since 1953 when the Commission expanded the use of Regulation A to include Canadian issuers based on its view that international laws had developed in a way that Canadian issuers would not be outside U.S. jurisdiction in the event of fraud.[12] Much has changed since 1953, and considerable progress has been made through the efforts of the Commission and foreign regulators, as well as through organizations like IOSCO, to harmonize disclosure and enforcement standards across jurisdictions. Foreign private issuers that are exempt from Section 12(g) registration pursuant to Exchange Act Rule 12g3-2(b) are required to have and maintain a foreign securities exchange listing and to make certain information available to investors in the English language. Such issuers will presumably also be obligated to provide Section 3(b)(2) investors with the same financial statements and periodic disclosures that domestic issuers will be required to provide under Section 3(b)(2).[13] Not only would Section 3(b)(2) offerings provide U.S. investors an opportunity to diversify their portfolios by investing in offerings by foreign companies, but the development of a U.S. investor constituency may create additional incentives for such issuers to consider Securities Act or Exchange Act registration and a national securities exchange listing.[14]

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[11] Although this is the same revenue threshold applicable to "emerging growth companies" under Title I of the JOBS Act, we would not tie this test to emerging growth company status because, in our view, the loss of such status should not necessarily preclude an issuer from relying on Section 3(b)(2).

[12] At that time, the Commission explained that it believed it could finally adopt its first exemption under Section 3(b) that extended to Canadian issuers as a result of the (then) "recently ratified amendments to the extradition treaty between the United States and Canada, which [were] designed to cover fraud offenses of the type indictable in this country under Section 17(a) of the Securities Act or the Mail Fraud Statute." (SEC Release 33-3451, August 16, 1952).

[13] In addition, we suggest that the Commission provide that such issuers could satisfy the applicable financial statement requirements by providing financial statements prepared in accordance with IFRS as adopted by the IASB without requiring such financial statements to be reconciled to US-GAAP.

[14] Following the decision of the U.S. Supreme Court in *Morrison v. National Australia Bank*, 130 S. Ct. 2869 (2010), which limited rights of action under Section 10(b) of the Exchange Act in certain cross-border transactions, Congress, in the Dodd-Frank Act, granted the Commission and the United States the right to bring actions under Section 10(b) in cross-border transactions. In addition, we note that Congress has specifically provided that the civil liability provision in Section 12(a)(2) of the Securities Act applies to "any person offering or selling… securities" pursuant to Section 3(b)(2). The Commission may also want to consider requiring Rule 12g3-2(b) companies, as a condition to relying on Section 3(b)(2), to expressly consent to the application of Section 10(b) of the Exchange Act in connection with Section 3(b)(2) offerings.

Consistent with our comments herein relating to reporting companies, the Commission may want to seek comment as to whether there should be any limits as to the size of non-U.S. companies that are entitled to avail themselves of the Section 3(b)(2) exemption.[15]

In addition, the Commission should use the opportunity to clarify interpretive questions that have arisen over the years. For example, the Commission should take the opportunity to confirm that a Canadian company with securities listed on a Canadian securities exchange, but not in the United States, remains eligible to use the Regulation A exemption for offerings made in the United States.

6. The Commission should expressly prohibit use of Section 3(b)(2) by blank check companies and shell companies.

The purpose and goal of Section 3(b)(2) should, in our view, be to expand the capital raising opportunities available to operating companies. We are concerned about the possibility of abuse should non-operating companies be able to rely on the exemption. The Commission's proposed rules should, therefore, provide that Section 3(b)(2) will not be available for use by issuers that are blank check companies or shell companies and should define "eligible issuer" for purposes of Section 3(b)(2) to exclude specifically these types of issuers.

7. The Commission should permit the use of Section 3(b)(2) by business development companies.

The Staff's guidance in relation to the JOBS Act makes clear that a business development company may qualify as an emerging growth company.[16] In view of the policy of encouraging investment in growth-oriented companies, it would be consistent with this approach to permit business development companies to avail themselves of Section 3(b)(2) and for these issuers to be "eligible issuers."

8. The Commission should not restrict the ability of issuers to include selling security holders in Section 3(b)(2) offerings.

Rule 251(b) of Regulation A currently provides that no more than $1.5 million of the $5 million of securities that may be offered by an issuer in any 12-month period in reliance on Regulation A can be collectively offered by all selling security holders. We suggest that, in connection with its rulemaking pursuant to Section 3(b)(2) of the JOBS Act, the Commission seek comment with respect to not imposing limitations on resales by selling security holders, including affiliates of the issuer.

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[15] Although enabling non-U.S. companies to rely on Section 3(b)(2) may not initially appear to foster U.S. job creation, we note that many non-U.S. companies have, either directly or through subsidiaries, operations in the U.S., and capital raising efforts in the U.S. may in fact encourage the expansion of their U.S. operations.
[16] See Question 21 of the JOBS Act Frequently Asked Questions at http://sec.gov/divisions/corpfin/guidance/cfjjobsactfaq-title-i-general.htm

Many smaller companies rely on Rule 506 to raise capital. Because the securities issued in such transactions are restricted, the amount that companies realize from such offerings is often affected by the value discount associated with the holding period. Investors who are also affiliates of the issuer are subject to more extensive resale restrictions. Because the costs and burdens of a public offering may be prohibitive for a smaller company, we suggest that the Commission consider not imposing any resale cap on Section 3(b)(2) offerings. Enhancing the ability of security holders to resell restricted or control securities would be of special benefit to angel investors, venture capital firms and private equity investors. These investors may be more likely to invest in privately held companies if they have a broader range of liquidity opportunities. Although resales of securities by security holders pursuant to Section 3(b)(2) do not directly raise capital for an issuer, issuers may determine that it would be in their best interest, in addition to utilizing Section 3(b)(2) to meet their own capital-raising needs, to permit security holders to participate in the offering without strict limits such as those set forth in current Regulation A. Accordingly, we encourage the Commission to consider not imposing limitations on resales by selling security holders.

Also, in connection with its consideration of the ability of an issuer to rely on Section 3(b)(2) to effect affiliate resales, we do not believe that the Commission should replicate the existing limitations of Rule 251(b) relating to affiliate resales under Regulation A. Under Rule 251(b), affiliate resales are not permitted if the issuer has not had net income from continuing operations in at least one of its last two fiscal years. This limitation may not be appropriate for a broad range of companies, including technology, biotech and drug discovery companies, which may devote substantially all of their revenues to research and development efforts, resulting in no net income from continuing operations. In our view, this restriction should not be included in the proposed rulemaking under Title IV, and the Commission should also consider eliminating this restriction in Rule 251(b).

9. To the extent that the Commission proposes disqualification provisions pursuant to Section 3(b)(2), they should be substantially similar, if not identical, to the Regulation D "bad actor" provisions.

The Commission is authorized to adopt disqualification provisions under Section 3(b)(2). Although the Commission has not yet adopted final rules under Rule 506 to implement the "bad actor" disqualifications required under Section 926 of the Dodd-Frank Act, we recommend that, if it determines to proposed disqualification rules pursuant to Section 3(b)(2), the Commission consider the comments it has received in connection with the Section 506 rulemaking[17] in proposing such disqualification rules. Ideally, were the Commission to propose and adopt disqualification rules, the rules applicable to Section 3(b)(2) offerings should be substantially similar, if not identical, to the Rule 506 disqualification provisions. In addition, to the extent that the Rule 506/3(b)(2) disqualification provisions differ from the disqualification provisions currently set forth in Rule 262 with respect to Regulation A offerings, we recommend that the Commission consider proposing an amendment to Rule 262 to conform the provisions to the

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[17] See Release No. 33-9211, File No. S7-21-11 RIN 3235-AK97, "Disqualification of Felons and Other 'Bad Actors' from Rule 506 Offerings" at http://sec.gov/rules/proposed/2011/33-9211.pdf.

extent possible. We believe that investors and issuers will benefit from a reasonably uniform disqualification standard.

Conclusion

The Committee appreciates the opportunity to submit these comments. Members of the Committee are available to meet and discuss these matters with the Commission and its staff and to respond to any questions.

Very truly yours,

/s/ Catherine T. Dixon
Catherine T. Dixon
Chair, Federal Regulation of Securities Committee

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