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June 1, 2020

Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
Attn: Secretary

Re: Request for Comment – Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets – File No. S7-05-20

Dear Ladies and Gentlemen:

I appreciate the opportunity to submit this letter in response to the request by the Securities and Exchange Commission (the "Commission") for comment on proposed rules to simplify, harmonize and improve the exempt offering framework under Regulation A ("Regulation A") and Regulation D ("Regulation D") of the Securities Act of 1933, as amended (the "Securities Act") to promote capital formation and expand investment opportunities, while also maintaining appropriate investor protections set forth in the Release on Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets, as published in the Federal Register on March 4, 2020 (File No. S7-05-20) (the "March 4 Release").

To provide some perspective to this letter, Goodwin Procter LLP (the "Firm") represents more than twenty-five issuers who have utilized, or plan to utilize, Regulation A since the adoption in June 2015 of the substantive revisions that were made to implement Section 401 of the Jumpstart Our Business Startups Act ("JOBS Act"). Please note, however, that the comments reflected in this letter represent my views alone and are not necessarily the views of the Firm. However, this letter, as it relates to Regulation A comments, does reflect input from our client Fundrise, which is one of the most successful adopters of the Regulation A format and who provided valuable assistance in formulating the comments related to Regulation A reflected in this letter.

In light of our and Fundrise's experience in dealing with the revised filing, review and qualification process under Regulation A since 2015, and our continuing representation of issuers raising capital under Regulation D, I am writing in response to several of the requests for comment posed in the March 4 Release. For convenience, the comment number and request for comment are reproduced below followed by my response.

Regulation A Comments

49. Should we amend the Regulation A exhibit filing requirements as proposed? Is there any reason not to extend this simplified confidential treatment application process to Regulation A issuers? Do our proposed amendments raise any investor protection concerns?

Based on our experience as counsel to Regulation A issuers and issuers with securities registered under the Securities Act, the Regulation A exhibit filing requirements should be amended as proposed by the Commission to permit issuers to file certain redacted material contracts and other documents in accordance with the FAST Act. Regulation A issuers, similar to issuers with registered offerings, may have confidential and/or private information contained in certain material agreements. Currently, in these situations, Regulation A issuers must submit a detailed and time-consuming application to the Commission explaining why such information is not necessary to be disclosed to investors.

As of March 2019, issuers conducting registered offerings are able to take advantage of the FAST Act, which provides a streamlined and simpler process for redacting confidential information in exhibits. Under the FAST Act, issuers conducting registered offerings may redact confidential information and include a legend explaining why such information was excluded. These redactions are subject to review by the Commission, but do not require pre-approval ahead of filing the exhibit, allowing issuers a more streamlined process to redact confidential information. Regulation A issuers, as well as issuers conducting registered offerings, are subject to similar concerns regarding privacy and confidentiality in their exhibit filings, and therefore, should be subject to the same policies regarding redactions. In my opinion, extending the policy to Regulation A issuers does not raise investor protection concerns that are not otherwise addressed through the SEC's ability to review any redactions and require that redacted information be filed.

50. Should we, as proposed, amend Form 1-A to allow non-public draft offering statements, amendments and related non-public correspondence to be made publicly available through the use of the EDGAR system, rather than requiring issuers to file such documents as exhibits to a publicly filed offering statement?

Yes, the Commission should amend Form 1-A, as proposed, to allow non-public draft offering statements, amendments and related non-public correspondence to be made publicly available through the use of the EDGAR system, without having to file them as exhibits on the publicly-filed offering statement. Currently, Item 17.16(a) of Form 1-A requires issuers who submit confidential draft offering statements and other related documents to file these as exhibits on their publicly-filed offering statement. Issuers registering securities under the Securities Act, on the other hand, do not have to file draft registration statements as exhibits; instead, such issuers are able to release confidential

submissions directly on the EDGAR system. While the process for including the exhibits themselves in a Regulation A offering statement already allows the issuer to "flip a switch" and publicly file draft offering statements, that mechanic is not available for correspondence. This creates situations where issuers could foot fault and otherwise assume that listing the correspondence as exhibits automatically makes make them publicly available. Given that the 21-day public filing requirement prior to qualification does not start to run if these exhibits are not publicly available, the proposed amendment is a welcome revision.

We see no reason for differentiating between Regulation A issuers and those issuers conducting a registered offering with respect to this exhibit mechanic. This proposal would simplify and make less expensive the filing process for Regulation A issuers who have made confidential submissions and should be implemented.

51. Should we amend Form 1-A to allow incorporation by reference of an issuer's previously filed financial statements, as proposed? How would such an amendment affect investors? Would this cause any increase in costs for issuers, such as in connection with consent fees from auditors?

Yes, Form 1-A should be amended to permit incorporation by reference of an issuer's previously filed financial statements into an issuer's offering statement through a hyperlink. Form 1-A, in its current form, requires that issuers' financial statements "be filed as part of the offering statement and included in the offering circular that is distributed to investors."[1] This requirement precludes issuers from incorporating by reference (by a hyperlink or otherwise) to previously-filed financial statements. By amending Form 1-A to permit incorporation by use of a hyperlink, the Commission will streamline preparation of the offering statement and reduce issuer costs.

Generally, the inclusion of audited financial statements in the body of the offering statement (whether or not otherwise incorporated by reference) requires that the auditor review the offering statement, including previously filed financial statements, prior to filing. Such review costs the issuer time and money in connection with filing its offering statement. By permitting issuers to hyperlink to financial statements, issuers may be able to reduce these costs and more efficiently prepare and file its offering statement and/or post-qualification amendment on Form 1-A ("PQA"). Regulation A already acknowledges the cost constraints of an issuer obtaining an auditor's consent, and explicitly does not require such consent in an offering statement amendment when an issuer includes audited financial statements that have not been amended.[2] As such, the Commission should permit Regulation A issuers to incorporate by reference previously filed financial statements to lessen, or at the very least not increase, the time and financial costs to issuers arising from the issuance of an auditor's consent or an auditor's review of the offering statement.

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[1] See Form 1-A, Part F/S.
[2] See Rule 252(f)(1)(ii).

Finally, such an amendment would have no negative affect on investors because the financial statements would be available to be viewed through a hyperlink in an issuer's offering statement. As a practical matter, initial offering statements will still need to physically include financial statements in any event. It is only after an issuer has commenced its offering and periodic reporting that investors would no longer have the financial statement included directly in the filing and, in our experience, most investors that acquire securities in a Regulation A offering already use the internet to access offering materials. Importantly, investors would not have to search for such financial statements on EDGAR, but would instead have access to them directly through a hyperlink.

53. Should we allow forward incorporation by reference in Regulation A offerings? Should issuers using forward incorporation by reference still be required to file an annual post-qualification amendment to their Form 1-A to include updated financial statements as well as to reflect a fundamental change in the information set forth in the offering statement?

Yes, Regulation A should be amended to permit forward incorporation by reference in offering statements and annual PQAs should be eliminated. Currently, Form 1-A prohibits future incorporation by reference, meaning that issuers may not include information from future filings merely by identifying that document in their offering statement. In fact, Rule 252 specifically requires the filing of a PQA annually to include (i) updated financial statements, and (ii) any updates that represent a fundamental change to that previously disclosed in the offering statement.[3] Forward incorporation of certain future filings would permit Tier 2 issuers to incorporate into their offering statement information (e.g. updated financial statements) that would otherwise need to be filed in a future PQA.

The Commission should remove the requirement under Rule 252(f)(2) that issuers file PQAs annually. As discussed herein, as well as in our September 24, 2019 letter, Regulation A issuers are subject to significant legal and audit expenses with each PQA filing. Such costs burden smaller Regulation A issuers and may discourage potential issuers from utilizing Regulation A to raise capital. The Commission's proposal to permit forward incorporation by reference in an issuer's offering statement would have no effect on issuer liability under Rule 12(a)(2) of the Securities Act because future financial statements and other information included in periodic reports and Form 1-Us would be incorporated by reference in the offering statement, and therefore, liability would attach to such information. Amendments would still be required if there are fundamental changes or an issuer wants to qualify additional shares using a PQA.

Finally, forward incorporation of periodic and current reports would help minimize the burden of the collection of information requirements on Tier 2 issuers because such issuers would be able to expend less time and money in connection with preparing and filing updated PQAs. Instead, the

[3] See 17 CFR 230.252(f).

information contained in the periodic and current reports filed with the Commission would automatically be incorporated into the issuer's offering statement.

55. Should we, as proposed, increase the Regulation A Tier 2 offering limit from $50 million to $75 million? Is another limit more appropriate, such as $100 million? What are the appropriate considerations in determining a maximum offering size? In connection with an increase, should we consider additional investor protections, such as aligning standards for when an amendment to an offering statement is required with those in registered offerings? Should we instead simply adjust the offering limit for inflation?

As discussed previously in our September 24, 2019 letter, based on the significant costs to conduct a Tier 2 offering under Regulation A, I believe the $50 million Tier 2 limit should be raised to $100 million in any forward rolling 12-month period. Pursuant to Rule 251, Tier 2 issuers under Regulation A may raise an aggregate of $50 million over any rolling 12-month period through the filing and qualification of an offering statement on Form 1-A.[4] In a continuous offering, after the initial 12-month period, issuers are permitted to file a PQA[5] to qualify additional amounts, rather than filing a new offering statement, [6] provided that the $50 million limit is not exceeded during any rolling 12-month period. Whether an issuer utilizes a PQA or opts to file a new offering statement to cover additional securities, either filing must then be reviewed and qualified by the Commission prior to the issuer making any subsequent sales.[7] However, as discussed in our letter dated September 24, 2019, we believe Regulation A should be clarified to permit the 180-day selling extension for continuous offerings to also apply to (i) PQAs filed solely to qualify additional securities and (ii) annual PQA filings, if the annual PQA filing requirement in not eliminated as discussed above.[8]

In deciding upon the appropriate maximum offering amount for Tier 2 issuers, the Commission must weigh the costs incurred by issuers to file additional PQAs or offering statements with the benefits gained by investors of such additional PQA filings. The Commission has estimated that issuers will expend approximately 731 hours to prepare and file an offering statement on Form 1-A.[9] Besides the number of hours required, issuers will incur substantial monetary costs from outside professionals, including legal and accounting personnel, who are required under Regulation A to provide legal opinions and/or audited financial statements in each offering statement.[10] In connection with these

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[4] See 17 CFR 230.251(a)(2).
[5] See 17 CFR 230.251(d)(3)(i)(F) and Note to 17 CFR 230.253(b).
[6] The ability to utilize a PQA rather than filing a new offering statement was a benefit given to small issuers under Regulation A in connection with continuous offerings to lessen the burden on capital raising.
[7] See 17 CFR 230.252(f)(2)(ii).
[8] See Appendix A – Letter dated September 24, 2019, comment 47, "PQA Review/Qualification Process".
[9] Conditional Small Issues Exemption Under the Securities Act of 1933 (Regulation A), 84 Fed. Reg. 21 (January 31, 2019) at p. 528. *Federal Register: The Daily Journal of the United* States. Web. 2 March 2019.
[10] See Form 1-A exhibit list; although Regulation A issuers need not obtain an auditor's consent if the financial statements have not changed in a subsequent filing.

expenses, issuers are forced to spend an increased amount of offering proceeds to pay for such outside professionals. In limiting the amount of capital that Tier 2 issuers can raise to $50 million or even $75 million (as currently proposed by the Commission) unless a PQA or new offering statement is filed, Regulation A burdens issuers who are successful in raising capital with significant time and resource constraints when a higher initial maximum offering amount would lessen the need for additional filings and, therefore, allow for limited resources to be used in a more productive and efficient manner.[11] In a similar vein, it is unlikely that investors benefit from the filing of additional PQAs since all Tier 2 issuers (regardless of how much capital they raise) are required to file PQAs at least annually under Rule 252, although as discussed above, we believe the annual PQA filing requirement should be removed. These tremendous costs would be more easily justified if issuers were able to raise a larger amount of capital.

By increasing the maximum annual aggregate offering amount to $100 million, the Commission would minimize the burden on successful issuers by permitting them to raise 100% more capital before requiring such issuers to file PQAs or new offering statements with the Commission. This may encourage prospective issuers who may not otherwise raise capital under Regulation A due to the costs of conducting a Tier 2 offering to undertake such an offering.

In addition, the increase in the maximum offering amount would create a better pathway for Regulation A issuers to eventually evolve to become publicly traded companies. Very few issuers would be able to build a company that is ready to be traded on a national securities exchange on the basis of annual $50 million or $75 million capital raises. However, allowing successful, high-growth issuers the ability to more fully fund their growth with higher maximum offering amounts utilizing the simpler offering process allowed under Regulation A may encourage such issuers to decide to accelerate their growth and permit or require them to become listed companies under the Exchange Act.

In our experience representing Regulation A issuers since 2015, current investor protections, including the standards for when a PQA is required to be filed, are sufficient protections for investors and should not be revised to be aligned with the more rigorous additional amendment standards required for registered offerings of securities. The Regulation A amendment standards under Rule 252 were designed as an accommodation to smaller issuers, who generally do not have the resources to amend their offering statement as often as more sophisticated issuers conducting registered offerings. In addition, investors are and will continue to be protected from fraudulent or material misstatements

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[11] My sense from the Release with respect to the final rules adopted by the Commission in "Amendments for Small and Additional Issues Exemptions under the Securities Act (Regulation A)" (June 19, 2015) (the"Adopting Release") was that there was uncertainty as to the correct balance to achieve in setting the initial offering limit and that there was certainly an expectation that reasonable minds could differ on what amount was most appropriate. That been said, there appeared to be an expectation that the limit could be raised if the revisions to Regulation A proved to be popular and that issuers did not take undo advantage of the improvements built into the new regulations. In other words, the $50 million limit recognized the experimental nature of the new regulations while acknowledging that it should be allowed to grow if the new regulations were used responsibly.

made by issuers in their offering statements because such Regulation A issuers are still subject to Rule 10b-5 liability. Finally, the standards for the filing of (i) a PQA under Rule 252 or a Form 1-U under Rule 257(b)(4) (each for a "fundamental change" and, in the case of a Form 1-U certain other events) and (ii) an offering circular supplement under Rule 253 (for a "substantive change") are sufficient safeguards for investors. This is because Regulation A issuers are required, and will continue to be required, to amend their offering statement, file a Form 1-U, or file a supplement to disclose any materially new information to investors.[12]

65. Should we extend federal preemption to secondary sales of Regulation A, for example, by expanding the definition of "qualified purchaser"?

Yes, the Commission should extend federal preemption of state law registration and qualification requirements to secondary sales of securities qualified under Regulation A but should require that the Regulation A issuer remain current in its periodic filings. There is no reason why the benefits of federal preemption that inure to a primary offering by Regulation A issuer should not also inure to secondary sales of such securities by investors with respect to an issuer that is current in its periodic reports. .

The concept of "qualified purchaser" is a subset of the pre-emption available to "covered securities" under Section 18(b) of the Securities Act. Section 18(b)(3) of the Securities Act provides the Commission with the ability to "define the term 'qualified purchaser' differently with respect to different categories of securities, consistent with the public interest and the protection of investors." The Commission has previously exercised this authority in the context of Regulation A[13], and would be within its authority to further amend the definition to allow secondary sales under Regulation A to come within the definition of "covered securities". See "Additional Comments – Expanding Federal Preemption to Securities Registered under the Securities Act", below for further details related to this recommendation.

By expanding the federal preemption framework to include secondary sales of Regulation A securities, the Commission would allow for greater liquidity opportunities for holders of Regulation A securities without lessening the protection for those holders, and their transferees, as the issuer will still be required to be current in its periodic reporting in order for such preemption to continue to be available. In addition, such a change could have the additional benefit of encouraging small issuers to utilize Regulation A for their primary offerings because it potentially will make such offerings more attractive to investors. This is due to the fact that investors will know they have a greater chance of

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[12] See Rule 252(f)(2) and Rule 253(g)(2).

[13] See 17 CFR 230.256:

> "For purposes of Section 18(b)(3) of the Securities Act [15 U.S.C. 77r(b)(3)], a "qualified purchaser" means any person to whom securities are offered or sold pursuant to a Tier 2 offering of this Regulation A."

liquidity in their holdings because the issuer is no longer burdened by the need to register its securities with all 50 states to allow for secondary sales.

Regulation D Comments

35. Should we provide an additional method of verification, as proposed, that would allow an issuer to establish that an investor that the issuer has previously verified remains an accredited investor as of the time of sale, so long as the investor provides a written representation to that effect to the issuer and the issuer is not aware of information to the contrary? If so, should we impose a time limit on this method of verification, and if so, how long should that time limit be?

In our experience as counsel to issuers raising capital under Rule 506(c) of the Securities Act, the verification requirements under Rule 506(c) should be revised, as proposed by the Commission, to permit issuers to rely on written representations by investors who have previously invested with such issuers to satisfy their verification requirement under Rule 506(c). Currently, Rule 506(c) requires that issuers verify the status of accredited investors by taking "reasonable steps," including, but not limited to, those set forth in Rule 506(c)(2)(ii), without regard to whether an issuer has previously verified the status of such investor. In my experience as counsel to issuers conducting multiple offerings under Rule 506(c), issuers predominantly rely on the same network of investors (*e.g.,* friends and family) to invest in their sponsored offerings. For such issuers, Rule 506(c) as it currently stands requires them to verify time and again the status of these investors. Regardless of whether the issuer or the investor pays for the verification, the process is time consuming and expensive. The Commission's proposal to allow repeat investors to certify in writing that they are accredited investors would save issuers and investors the time and expense of going through the full investor verification process multiple times (sometimes over the course of a short period of time) for the same issuer.

The written representation provided by the investor regarding the investor's status as an accredited investor should not be constrained by time limits. In and of itself, the written representation certifies an investor's status as of the time of sale of an issuer's securities, regardless of when that investor was last verified to be accredited. In other words, an investor's written certification is no less dispositive if executed closer in time to the investor's prior verification. In addition, there can be no assurances that imposing an arbitrary time window in which to accept written representations would render the issuer's verification of status any less "reasonable" under Rule 506(c). Therefore, the Commission's proposal should be adopted without any time constraints.

Additional Comments

Although not directly addressed in the March 4 Release, we would ask the Commission to consider the following additional amendments to further enhance opportunities to facilitate capital formation, expand investment opportunities, and improve access to capital.

Expanding Federal Preemption to Securities Registered Under the Securities Act.

The Commission should also expand the federal preemption to primary and secondary offers and sales of securities pursuant to a registration statement declared effective pursuant to the Securities Act. As discussed in our letter dated September 24, 2019 to the Commission, Regulation A, by itself, is an insufficient means by which an issuer can grow into one that is ready to be traded on a national securities exchange. However, there remains an oddly counterintuitive element of the Securities Act whereby offers and sales of up to $50 million (or more if the cap is increased) of securities to unaccredited investors under Regulation A constitute "covered securities" and offers and sales of an unlimited amount of securities to accredited investors under Regulation D also constitute "covered securities", but *registered offerings* of securities do not, by default, constitute "covered securities". Issuers conducting registered offerings of securities ought to be entitled to the same benefits of federal preemption, including preemption of state blue sky registration requirements, that Regulation A and Regulation D issuers are provided.

As noted above, under Section 18(b)(3) of the Securities Act the Commission has the authority to define the term 'qualified purchaser' (which is a subset of the pre-emption available to "covered securities") "…differently with respect to different categories of securities, consistent with the public interest and the protection of investors." The Commission has previously exercised this authority in the context of Regulation A[14], and would be within its authority to further amend the definition to allow both registered and qualified offerings under the Securities Act to come within the definition of "covered securities".

To provide additional investor protection, issuers would be required to be current in their periodic reporting obligations under Rule 15(d) (registered offerings) and, as noted above, Rule 257 (qualified offerings) in order for their securities to be entitled to take advantage of such expanded pre-emption (*i.e.* initial issuance for registered offerings and secondary sales for both registered and qualified offerings). To accomplish this, the Commission could determine to add a new definition to Rule 405 for "Qualified Purchaser" as follows:

> *Qualified purchaser*. For purposes of Section 18(b)(3) of the Securities Act [15 U.S.C. 77r(b)(3)], a "qualified purchaser" means any person to whom securities are offered or sold pursuant to (i) an effective registration statement or (ii) a Tier 2 offering under Regulation A; provided that the initial Tier 2 offering complied with the requirements of Rule 251((d)(2).

By expanding the federal preemption framework to include registered offerings of securities, the Commission would encourage successful Tier 2 issuers to make the jump to becoming full Exchange

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[14] See 17 CFR 230.256:

> "For purposes of Section 18(b)(3) of the Securities Act [15 U.S.C. 77r(b)(3)], a "qualified purchaser" means any person to whom securities are offered or sold pursuant to a Tier 2 offering of this Regulation A."

Act reporting companies and, eventually, list their securities on a national exchange pursuant to a registration statement declared effective pursuant to the Securities Act, while also making the definition of "covered securities" more consistent across Regulation A, Regulation D, and registered offerings.

Expanding the Application of the Section 12(g) Exemption to Include Private Placements by Issuers with Regulation A Qualified Securities

We believe that Regulation A should be amended to expand the scope of the conditional exemption from registration of securities under Section 12(g) of the Exchange Act to include those securities issued in a private placement by Issuers of Regulation A-qualified securities, provided they are current in their periodic reporting obligations (a "Qualified Regulation A Issuer").

Section 12(g) does not require an issuer to register under the Exchange Act if (i) the issuer had total assets of less than $10 million, or (ii) the class of securities was held of record by fewer than 2,000 persons and fewer than 500 of those persons were not accredited investors.[15] Section 12g5-1(a)(7) expands the Section 12(g) exemption from registration on a conditional basis to include securities issued in a Tier 2 Regulation A offering where the issuer (i) is current in filing its Regulation A periodic reports, (ii) has engaged a transfer agent and (iii) has a public float of less than $75 million, or if no public float, has annual revenues of less than $50 million.[16] In other words, under the plain language of the rule, securities issued in a Tier 2 Regulation A offering are exempt from registration under the Exchange Act ***regardless of how many shareholders have subscribed in the offering*** (if the other requirements, including public float and revenue amounts, are met).

This conditional exemption from registration under the Exchange Act should be expanded to include securities that are issued by Qualified Regulation A Issuers in private placements. Based on the Adopting Release, the underlying rationale of the expanded exemption was that Regulation A issuers should not have to be Exchange Act reporting companies merely because of the number of record holders it had. Investors in a Qualified Regulation A Issuer, whether obtaining their securities in a Regulation A or private placement offering, would still receive relevant ongoing pertinent information in the form of periodic reports and ongoing PQA and offering circular supplement filings, and would be protected by the issuer's use of a transfer agent. Moreover, the Commission, in the Adopting Release, expressed concern that without such exemption from registration, issuers may be dissuaded from using Regulation A altogether or may be dissuaded from making sales to non-accredited investors in Regulation A offerings, instead focusing their offerings on accredited investors under an exemption pursuant to Regulation D:

> Finally, we are concerned that, as commenters suggested, the lack of an exemption from mandatory registration under the Exchange Act may undermine the utility of amended Regulation A either by discouraging use of the exemption altogether or by dissuading issuers

[15] See Section 12g-1.
[16] See Section 12g5-1(a)(7).

from making sales to non-accredited investors in Regulation A offerings in an effort to avoid the application of Section 12(g).[17]

The Commission further observed that the 12(g) exemption could actually increase the amount of information about an issuer that otherwise would continue to utilize Regulation D:

> …the inclusion of a conditional exemption from Section 12(g) may entice small issuers that would have otherwise generally preferred to raise capital in private offerings to enter the public markets through a Tier 2 offering pursuant to Regulation A. In this regard, the conditional exemption could increase the availability of information about companies that would otherwise remain relatively obscure in the private markets. [18]

The Commission concluded that while there were costs associated with the conditional exemption, those costs were outweighed by the benefits and were limited by the fact that a Regulation A issuer would lose its conditional exemption if it got too large:

> We recognize that there are costs associated with the conditional exemption adopted today. Under this exemption, some issuers in Tier 2 offerings with a large number of shareholders could avoid—potentially indefinitely—the comprehensive disclosure requirements of the Exchange Act, which may decrease the informational efficiency of prices and potentially result in less informed investment decisions by a larger number of investors than in the absence of a conditional Section 12(g) exemption. The issuer size limit partly mitigates this concern.[19]

By exempting securities issued by Qualified Regulation A Issuers in a private placement from Exchange Act registration, regardless of the number of shareholders of record, the Commission would be fulfilling its stated goal of encouraging issuers to utilize the Regulation A offering exemption, while still facilitating their ability to continue to raise capital through private placements.[20] By enticing issuers to enter the public markets through a Tier 2 offering, investors in Qualified Regulation A Issuers, including those who acquire securities in a private placement, obtain the benefit of ongoing public reporting obligations under Regulation A (such disclosure not being required under an offering to accredited investors pursuant to Regulation D). This would further the Commission's stated goal of facilitating access to capital for smaller issuers, while ensuring that investors receive ongoing public disclosure regarding their investments. If the Qualified Regulation A Issuer gets too big, which was the

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[17] Adopting Release at page 60.
[18] Adopting Release at page 289
[19] Adopting Release at page 288.
[20] I note that in the March 4 Release, the Commission's clarification of its position on integration, reinforces its view that Regulation A and private placement offerings can be undertaken before, after or concurrently (provided each offering complies with the requirements of its exemption) with each other.

driving concern in limiting the scope of the conditional exemption rather than the number of shareholders, it would need to become registered under the Exchange Act.

I would welcome the opportunity to discuss any questions with respect to this letter; my telephone number is (212) 813-8842.

Sincerely,

/s/ Mark Schonberger

cc: Matthew Schoenfeld, Esq.
Bjorn Hall, Esq.
Michelle Mirabal, Esq.

Attachment

Appendix A

GOODWIN

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September 24, 2019

Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
Attn: Secretary

Re: Request for Comment – Concept Release on Harmonization of Securities Offering Exemptions – File No. S7-08-19

Dear Ladies and Gentlemen:

I appreciate the opportunity to submit this letter in response to the request by the Securities and Exchange Commission (the "Commission") for comment on possible ways to simplify, harmonize and improve the exempt offering framework under Regulation A ("Regulation A") of the Securities Act of 1933, as amended (the "Securities Act") to promote capital formation and expand investment opportunities, while also maintaining appropriate investor protection set forth in the Concept Release on Harmonization of Securities Offering Exemptions, as published in the Federal Register on June 26, 2019 (File No. S7-08-19) (the "June 26 Release").

To provide some perspective to this letter, Goodwin Procter LLP (the "Firm") represents more than fifteen issuers who have utilized, or plan to utilize, Regulation A since the adoption in June 2015 of the substantive revisions that were made to implement Section 401 of the Jumpstart Our Business Startups Act ("JOBS Act"). Please note, however, that the comments reflected in this letter represent my views alone and are not necessarily the views of the Firm. However, this letter does reflect input from our client Fundrise, which is one of the most successful adopters of the Regulation A format and who provided valuable assistance in formulating the comments reflected in this letter.

In light of my and Fundrise's experience in dealing with the revised filing, review and qualification process under Regulation A since 2015, I am writing in response to several of the requests for comment posed in the June 26 Release. For convenience, the comment number and request for comment are reproduced below followed by my response.

47. Do the requirements of Regulation A appropriately address capital formation and investor protection considerations? Is the process for qualifying Regulation A offerings appropriately tailored to the needs of investor protection? Is there anything about the process that is unduly burdensome? Do the costs associated with conducting a Regulation A offering dissuade issuers from relying on the exemption? If so, can we alleviate burdens in our rules or reduce costs for issuers while still providing adequate investor protection?

In my experience as counsel to Regulation A issuers, the requirements of Regulation A appropriately address investor protection considerations, and the process for qualifying such offerings is appropriate for the needs of protecting investors. However, Regulation A by itself does not adequately create a pathway for an issuer to transition from Regulation A to a fully registered offering or trading on a national securities exchange. As discussed in more detail below, the maximum offering amounts and trailing 12-month offering calculations inherently limit the amount of capital a successful Tier 2 issuer can raise in any given year, while creating immense regulatory costs and uncertainty. This, in effect, stymies the potential of a high growth company that wishes to primarily rely on Regulation A as its means of capital formation. In addition, as discussed in further detail in this letter, the process of preparing, filing and qualifying a post-qualification amendment ("PQA") on Form 1-A requires significant expenditures of time and money that burden issuers and may dissuade prospective issuers from undertaking a capital raise under Regulation A in the first instance, especially where they expect to use a continuous offering and have success in doing so.

PQA Amendment Process. Regulation A should be amended to permit issuers conducting a continuous offering who are otherwise required to file post-qualification amendments once every 12-months, to include in such amendment the ability to qualify an additional $50 million for the following 12-month period.

Pursuant to Rule 251 under the Securities Act[1], Tier 2 issuers may raise an aggregate of $50 million during any rolling 12-month period.[2] Such issuers who wish to raise additional capital in excess of this amount may file a PQA on Form 1-A to qualify an amount that, in the aggregate, would not result in the issuer offering more than $50 million over the prior rolling 12-month period. In certain circumstances, intentionally or not, issuers may stagger their capital raise over a 12-month or longer period as permitted in a continuous offering, and raise more money in certain months than in others. For such issuers, Regulation A could potentially require them to file multiple PQAs over a 12-month period in order for such issuer to meet the aggregate offering requirements under Rule 251.

Under current Commission guidance on Regulation A, if an issuer in a continuous offering were to sell $5 million of qualified securities in month one, $5 million in month two and thereafter sell the $40

[1] Except as otherwise specifically stated, references to "Rules" in this letter are to Regulation A rules under the Securities Act (17 CFR 230.251 through 230.263).
[2] See 17 CFR 230.251(a).

million remainder of the $50 million cap over the next 10 months, in month 13 such issuer is only able to file a PQA to qualify an additional $5 million of securities. If the issuer wanted to continue its offering, it would need to file consecutive PQAs each month to qualify the amount of securities under the cap that would "free up" each month. In addition, as a result of the rolling 12-month lookback, issuers conducting continuous offerings will never be able to raise the full $50 million in any calendar year after the first year so long as the offering remains ongoing. Given Fundrise's experience, as a result of the rolling 12-month lookback and PQA qualification process, after the initial year, an issuer that is able to fully raise $50 million under Regulation A would, as a practical matter, be limited to only being able to raise approximately $25 million per year following the initial 12 months.

This requirement to file multiple PQAs over the course of a year creates tens of thousands of dollars in unnecessary expenditures for each PQA filed, as such filings necessitate the legal costs of preparing the documents, obtaining auditor consents, etc., while doing nothing to enhance investor protection or increased disclosure. Further, as each PQA must be reviewed and qualified by the Commission, requiring the filing of multiple PQAs to keep a continuous offering ongoing creates immense operational uncertainty for issuers as it can be difficult to predict how long such qualification process may take (or if such process will proceed at all in the case of government shutdowns). Finally, I respectfully note that limiting the ability to raise capital under Regulation A in a subsequent year based on the success of capital raising in a previous year inherently penalizes those issuers in which there is the most public interest.

Rule 252 already requires issuers in continuous offerings to file a PQA at least once every 12 months after qualification. By amending Rule 251 to permit issuers, as part of the required annual PQA filings, to qualify an additional $50 million regardless of the amount such issuers have sold up to that date, the Commission will help minimize the burden on issuers who would otherwise need to make multiple filings, while also minimizing the burden on the Staff who must review and qualify each such PQA filing. Provided that such issuers do not sell more than $50 million in the 12-month period following the qualification of the PQA, such amendment would reduce the preparation, filing and review burden on issuers by potentially hundreds of hours and tens of thousands of dollars, without changing the substance of Rule 251: issuers would still only be allowed to raise $50 million per year, but could do so without filing multiple PQAs over that period, and incurring the substantial costs and uncertainties associated with such filings.

I respectfully ask that the Commission amend Rule 251 to permit issuers, as part of the annual PQA filings, to qualify an additional $50 million, provided that such issuers may only sell up to $50 million in the 12-month period following the qualification of the PQA. In connection with such a filing, issuers would not be able to "roll-over" any securities that remain unsold under the previously qualified offering statement or PQA.[3] Such an amendment would help minimize the burden of preparing and

[3] Another alternative to this suggestion would be permit issuers to file annually for up to $50 million in additional securities with the self-policing obligation to only sell an aggregate of $50 million of securities in any 12 month rolling period.

filing PQAs, while still maintaining the $50 million rolling maximum offering amount. As noted in the final release with respect to the adoption of the amendments to Regulation A that were effective in 2015 (the "Adopting Release"),[4] such amendments sought to "continue to allow for certain traditional shelf offerings to promote flexibility, efficiency, and to reduce unnecessary offerings costs."[5] This proposed amendment helps accomplish the same goals outlined in the Adopting Release.

PQA Review/Qualification Process. Regulation A should be clarified to permit the 180-day selling extension for continuous offerings to also apply to annual PQA filings. Rule 251(d) permits issuers conducting continuous offerings to sell qualified securities for up to three years from the initial date of qualification.[6] Prior to the end of the three year period, issuers who file a new offering statement may continue to sell the previously-qualified securities until the earlier of (i) the qualification of the new offering statement or (ii) 180 calendar days after the third anniversary of initial qualification.[7]

Rule 252 requires that issuers file PQAs at least annually to incorporate updated financial statements, or to reflect a fundamental change to the information in a previously-qualified offering statement.[8] However, in contrast to Rule 251(d), Regulation A currently does not permit an issuer to sell previously-qualified securities before a PQA is qualified by the Commission, and the timeline for such qualification of a PQA by the Commission can vary. The annual PQA requirement and the uncertain length of the qualification process potentially burdens issuers conducting continuous offerings with having to temporarily shut down their sales operation until the Commission qualifies the PQA.

Both the three-year and annual filing requirements were adopted to require issuers to periodically "refresh" their offering statements. There is no substantive difference between the two requirements and, therefore, no logical reason to apply a more burdensome standard for the annual PQA filings. Regulation A already conditions the ability of a Tier 2 issuer to sell securities in a continuous offering on being current in its annual and semiannual report filings at the time of sale. Therefore, any updated information, although not technically included in the PQAs, is nonetheless available to investors in the issuer's periodic filings and, as applicable, offering circular supplements.

I respectfully request that the Commission – or the Staff by interpretation – amend Regulation A or simply clarify that the 180-calendar day selling extension that issuers may utilize pursuant to Rule 251 is also available to issuers when filing PQAs under Rule 252. This clarification would minimize the burden on issuers of potentially having to halt offers and sales in connection with such filings if they are unable to submit such PQA filings well in advance of the one-year deadline as they may not be able to accurately predict how long it will take for such PQA filings to be qualified by the Commission.

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[4] Amendments for Small and Additional Issues Exemptions Under the Securities Act (Regulation A), 80 Fed. Reg. 75 (April 20, 2015). *Federal Register: The Daily Journal of the United* States. Web. 2 March 2019.
[5] See Id. at p. 21840, footnote 510.
[6] See 17 CFR 230.251(d)(3)(i)(F).
[7] Id.
[8] See 17 CFR 230.252(f)(2).

General. If the Commission were to adopt this suggestion above, I believe that the same principles would apply to continuous offerings of up to $100 million per year as discussed in response to Comment Request #48 below.

48. Should we increase the $50 million Tier 2 offering limit? What are the appropriate considerations in determining a maximum offering size? Would increasing the maximum offering size encourage issuers to undertake the cost of conducting a Regulation A offering?

Based on the significant costs to conduct a Tier 2 offering under Regulation A, I believe the $50 million Tier 2 limit should be raised to $100 million in any forward rolling 12-month period. Pursuant to Rule 251, Tier 2 issuers under Regulation A may raise an aggregate of $50 million over any rolling 12-month period through the filing and qualification of an offering statement on Form 1-A.[9] In a continuous offering, after the initial 12-month period, issuers are permitted to file a PQA[10] to qualify additional amounts, rather than filing a new offering statement, [11] provided that the $50 million limit is not exceeded during any rolling 12-month period. Whether an issuer utilizes a PQA or opts to file a new offering statement to cover additional securities, either filing must then be reviewed and qualified by the Commission prior to the issuer making any subsequent sales.[12]

In deciding upon the appropriate maximum offering amount for Tier 2 issuers, the Commission must weigh the costs incurred by issuers to file additional PQAs or offering statements with the benefits gained by investors of such additional PQA filings. The Commission currently estimates that issuers will expend approximately 731 hours to prepare and file an offering statement on Form 1-A, as amended.[13] Besides the number of hours required, issuers will incur substantial monetary costs from outside professionals, including legal and accounting personnel, who are required under Regulation A to provide legal opinions and/or audited financial statements in each offering statement.[14] In connection with these expenses, issuers are forced to spend an increased amount of offering proceeds to pay for such outside professionals. In limiting the amount of capital that Tier 2 issuers can raise to $50 million unless a PQA or new offering statement is filed, Regulation A burdens issuers who are successful in raising capital with significant time and resource constraints when a higher initial maximum offering amount would lessen the need for additional filings and, therefore, allow for limited resources to be

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[9] See 17 CFR 230.251(a)(2).
[10] See 17 CFR 230.251(d)(3)(i)(F) and Note to 17 CFR 230.253(b).
[11] As noted in Comment #2 below, the ability to utilize a PQA rather than filing a new offering statement was a benefit given to small issuers under Regulation A in connection with continuous offerings to lessen the burden on capital raising.
[12] See 17 CFR 230.252(f)(2)(ii).
[13] Conditional Small Issues Exemption Under the Securities Act of 1933 (Regulation A), 84 Fed. Reg. 21 (January 31, 2019) at p. 528. *Federal Register: The Daily Journal of the United* States. Web. 2 March 2019.
[14] See Form 1-A exhibit list; although Regulation A issuers need not obtain an auditor's consent if the financial statements have not changed in a subsequent filing.

used in a more productive and efficient manner.[15] In a similar vein, it is unlikely that investors benefit from the filing of additional PQAs since all Tier 2 issuers (regardless of how much capital they raise) are required to file PQAs at least annually under Rule 252. These tremendous costs would be more easily justified if issuers were able to raise a larger amount of capital.

By increasing the maximum annual aggregate offering amount to $100 million, the Commission would minimize the burden on successful issuers by permitting them to raise 100% more capital before requiring such issuers to file PQAs or new offering statements with the Commission. This may encourage prospective issuers who may not otherwise raise capital under Regulation A due to the costs of conducting a Tier 2 offering to undertake such an offering.

In addition, the increase in the maximum offering amount would create a better pathway for Regulation A issuers to eventually evolve to become publicly traded companies. Very few issuers would be able to build a company that is ready to be traded on a national securities exchange on the basis of annual $50 million capital raises. However, allowing successful, high-growth issuers the ability to more fully fund their growth with higher maximum offering amounts utilizing the simpler offering process allowed under Regulation A may encourage such issuers to decide to accelerate their growth and permit or require them to become listed companies under the Exchange Act.

49. Should we extend eligibility to rely on Regulation A to additional categories of issuers, such as those organized and with a principal place of business outside of the United States and Canada, investment companies, or blank check companies? What changes, if any, would need to be made to the offering statement disclosure requirements to accommodate these additional categories of issuers? What would be the effect on investors of permitting these additional categories of issuers?

Since the revisions to the JOBS Act were implemented in June 2015, my experience representing Regulation A issuers, and the experience of my clients who have raised capital under Regulation A, have been overwhelmingly positive. Based on these experiences, the Commission should consider extending eligibility to rely on Regulation A to those issuers with a principal place of business outside of the United States and Canada.

Given the success of Regulation A over the last four years, I see no reason why such issuers should not have the ability to rely on Regulation A to raise capital. Foreign issuers, for example, are entitled to register their securities on Form F-1 (rather than Form S-1) under the Securities Act. The

[15] My sense from the Adopting Release was that there was uncertainty as to the correct balance to achieve in setting the initial offering limit and that there was certainly an expectation that reasonable minds could differ on what amount was most appropriate. That been said, there appeared to be an expectation that the limit could be raised if the revisions to Regulation A proved to be popular and that issuers did not take undo advantage of the improvements built into the new Regulations. In other words, the $50 million limit recognized the experimental nature of the new regulations while acknowledging that it should be allowed to grow if the new regulations were used responsibly.

Commission should implement a similar alternative form for use under Regulation A, and require prospective foreign issuers to disclose pertinent information about their businesses, shareholder information and foreign tax implications of their offerings. By potentially enlarging the pool of Regulation A issuers, investors may benefit from increased competition in the marketplace, which in turn, may lead issuers to innovate and maximize value to shareholders.

With regard to investment companies (that are otherwise regulated under the Investment Company Act of 1940) and blank check companies, I believe there still needs to be more experience in the use of Regulation A before allowing it to be utilized by such issuers (especially blank check companies given the more retail audience that can access Regulation A offerings and the potential for a lack of appreciation of the risks involved in those types of offerings, even if fully disclosed).

51. Should we eliminate or change the individual investment limits for non-accredited investors in Tier 2 offerings?

Based on my experiences over the last four years as counsel to issuers such as Fundrise that utilize Regulation A to raise capital, the individual investment limits for non-accredited investors in Tier 2 offerings are sufficient and should not be altered at this time. In my view, such investment limits balance individual investor protection with the goal of expanding investment opportunities to members of the general public. In addition, given that issuers are able to rely on the representations of individual investors that such investors are not exceeding such investment limits, the regulatory burden placed upon issuers is minimal.

54. Are the ongoing reporting requirements of Rule 257 appropriate from the perspective of issuers and investors? Should we consider changes to these requirements? If so, what changes should we consider?

Based on my experience and the experience of my clients, including Fundrise, the ongoing reporting requirements of Rule 257 are appropriate from the perspective of both issuers and investors. The reporting requirements of Rule 257 provide for annual audited financial statements in substantially the same form as that required by the Exchange Act, while providing for appropriate scaled disclosure in the form of semi-annual reports on Form 1-SA, as well as fewer mandated ongoing reports on Form 1-U. The flexibility of Rule 257 provides issuers with the option, but not the requirement, of disclosing additional events or information to investors in any of its periodic filings as well as under Item 9 of Form 1-U.

57. Should we amend Regulation A to allow incorporation by reference of the issuer's financial statements in the Form 1-A?

Yes, Regulation A should be amended to permit issuers to incorporate previously-filed financial statements into their offering statement through a hyperlink. Form 1-A, in its current form, requires that issuers' financial statements "be filed as part of the offering statement and included in the offering

circular that is distributed to investors."[16] This requirement precludes issuers from incorporating by reference (by a hyperlink or otherwise) to previously-filed financial statements. By amending Form 1-A to permit incorporation by use of a hyperlink, the Commission will streamline preparation of the offering statement and reduce issuer costs. For many issuers, the inclusion of audited financial statements in the offering statement, even if such financial statements had previously been filed, requires that the auditor review the offering statement, including the financial statements, prior to filing. Such review may cost the issuer time and money in connection with filing its offering statement. By permitting issuers to hyperlink to financial statements, issuers may avoid these costs and more efficiently prepare and file its offering statement and/or PQA.

In addition, Form 1-A prohibits future incorporation of such filings, meaning that issuers may not include information from such future filings merely by identifying that document in their offering statement. In fact, Rule 252 specifically requires the filing of a PQA annually to include (i) updated financial statements, and (ii) any updates that represent a fundamental change to that previously disclosed in the offering statement.[17] Forward incorporation of certain future filings would permit Tier 2 issuers to incorporate into their offering statement information (*e.g.* updated financial statements) that would otherwise need to be filed in a future PQA. Given that the annual PQA filings will still be required, this change would not undercut the liability that attaches to the financial statements under Rule 12(a)(2) under the Securities Act. Forward incorporation of periodic and current reports would help minimize the burden of the collection of information requirements on Tier 2 issuers because such issuers would be able to expend less time and money in connection with preparing and filing updated PQAs. Instead, the information contained in the periodic and current reports filed with the Commission would automatically be incorporated into the issuer's offering statement.

61. Do issuers find state advance notice and filing fee requirements burdensome? If so, are there changes it would be possible and appropriate for us to consider to alleviate such burdens or would legislative changes be necessary or beneficial in order to do so?

State Notice/Filing Fee Requirements. Based on discussions with Fundrise and other issuers who have utilized Regulation A to raise capital, state notice and filing fee requirements are extremely burdensome to issuers. In particular, these state requirements cost issuers time and tens of thousands of dollars each year in filing fees and legal expenses. Based on my experience counseling Tier 2 issuers, some issuers pay upwards of $25,000 per year in notice and filing fees to the 50 states – and, because this fee is paid before sales take place, it is a cost that issuers must incur regardless of whether an offering ultimately has a single investor in a given state in which the fee is paid. Contrast this to the requirements of Regulation D, which only require that a notice filing and fee be paid once a sale has occurred in a given state.

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[16] See Form 1-A, Part F/S.
[17] See 17 CFR 230.252(f).

The amounts described above are required for each offering, so issuers can pay multiples of this fee depending on the number of offerings they qualify (or re-qualify, in the case of PQAs). The state notice and filing fees coupled with the fees and expenses that issuers pay to legal counsel to research state laws and prepare the notice filings for each state are thus extremely expensive and burdensome on Tier 2 issuers. As discussed previously, one change to alleviate this financial burden would be to increase the maximum aggregate offering amount from $50 million to $100 million over a rolling 12-month period. An increase in the maximum offering amount would permit issuers to register greater amounts in each of the states, which would conceivably permit issuers to renew their state filings (and pay the notice and filing fees) less frequently.

Most states have adopted reasonable fee amounts and relatively simple processes to both initially file and renew such filings. However, a handful of states require that issuers pay very significant fees in order to avoid having to keep track of the amount of securities sold in their states. The burden on issuers to keep track of sales is those states, and to remember to refresh their filings and/or pay increased fees when selling limits are exceeded, results in unnecessary "foot faults" by issuers where the penalties far outweigh the investor protections afforded by the requirements. While additional fees – and even reasonable penalties – can be justified/understood, mere overselling should not have to result in consent decrees and other legal consequences for administrative "foot faults". The burden of such regulations affects an issuer's bottom line and falls ultimately on the issuer's investors.

Secondary Sales Under State Law. As the adoption of improvements such as amended Regulation A shows, the Commission and Congress are committed to opening up the capital markets to a wider audience. Given that objective, the pre-emption of state laws with respect to resales of Tier 2 offerings needs to be reviewed and addressed. Currently, many state laws do not permit the resale of otherwise freely tradable securities under Regulation A due to the imperfect coordination of the NASAA Guidelines with the federal securities laws. While there are some states' laws that allow for resales (generally if they come within what is known as the Manual Exemption), many states have either not updated the Manual Exemption to allow securities qualified under Regulation A to be freely resold in their states or they do not have an applicable resale exemption. As with listed securities, I believe that the pre-emption afforded to an initial offering of Regulation A securities to "qualified purchasers", should be extended to the resale of those securities.

I am cognizant that as with the original adoption of the Regulation A amendments, some states have very strong views as to their obligation to their citizens to maintain controls over sales of securities in their state. However, I believe that expanding pre-emption to resales of securities originally offered pursuant to Regulation A will further the intent of Congress, the Commission and the states to enhance the viability of small capitalization companies to raise capital. Public policy suggests that impairing liquidity of securities does not protect investors. The purpose of implementing Regulation A was not to undercut investor protection but rather to encourage it. Guidelines pursuant to Regulation A have provided a framework that encourages issuers to remain compliant and investors to be protected. However, the utility of Regulation A has opened the opportunities for more innovative purposes. The innovative developments in technology beyond simply the internet, including in the blockchain and

cryptocurrency space, have further made us consider the critical reliance on regulation that will dictate the issuance and the resale of traditional and digital securities.

As for how to technically implement pre-emption for such secondary sales, see Request for Comment #137 below, which addresses suggestions with respect to both registered and qualified securities that are not otherwise afforded the benefit of pre-emption from state laws.

62. Should the conditional Section 12(g) exemption for Regulation A Tier 2 securities be modified? If so, in what way? For example, should we increase the thresholds in Exchange Act Rule 12g5-1(a)(7)? Should we, as recommended by one commenter, amend 12g-5-1 to tie the thresholds to those in the smaller reporting company definition? If we were to broaden the Section 12(g) exemption or make it permanent, would potential issuers be more likely to use Regulation A?

I continue to believe that the Commission should amend the conditional exemption for Tier 2 securities under Rule 12(g)5-1 of the Exchange Act so the revenue limit for Tier 2 issuers is tied to the revenue limit for "smaller reporting companies" (each, an "SRC"). Section 12(g) of the Exchange Act provides the required thresholds at which issuers must register their securities with the Commission. Pursuant to Rule 12(g)5-1, however, Tier 2 issuers under Regulation A are exempt from the Exchange Act's registration requirements if, among meeting other requirements, such issuers have annual revenues of less than $50 million as of their most recently completed fiscal year.[18] Item 10 of Regulation S-K under the Securities Act establishes the qualifications for an issuer to be considered an SRC. In September 2018, the Commission increased the revenue limits for a company to be considered an SRC; specifically, a company could be an SRC if it had less than $100 million in annual revenue as of its last fiscal year (an increase of 100% from the previous $50 million revenue limit). Similar to Regulation A issuers, SRCs are afforded scaled disclosure requirements, including less stringent periodic reporting and financial statement disclosure under Regulation S-K and Regulation S-X of the Securities Act.[19] According to the Adopting Release:

> The final rules also provide that the exemption from Section 12(g) is only available to companies that meet requirements similar to those in the "smaller reporting company" definition under Securities Act and Exchange Act rules.[20]

While the revenue requirements were similar at the time of the Regulation A Adopting Release, since September 2018, the revenue limits for an SRC and a Tier 2 issuer are now significantly different,

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[18] See 17 CFR 240.12g5-1(a)(7)(iv).
[19] See https://www.sec.gov/corpfin/amendments-smaller-reporting-company-definition#_ftn2.
[20] Amendments for Small and Additional Issues Exemptions Under the Securities Act (Regulation A), 80 Fed. Reg. 75 (April 20, 2015) at p. 21820, footnote 199. *Federal Register: The Daily Journal of the United* States. Web. 2 March 2019.

and are burdensome on Tier 2 issuers whose revenues increase beyond the $50 million limit. In particular, once such issuers are required to register their securities with the Commission, these issuers must expend substantial time and money in complying with the enhanced disclosure requirements under Regulation S-K and the full-scale financial statement disclosure under Regulation S-X. By tying the Section 12(g) exemption to the revenue limit of SRCs, the Commission would make clear to Tier 2 issuers that the exemption from registration mirrors the requirements of SRCs under the Securities Act and the Exchange Act. Such consistency would help minimize the burden of stringent periodic reporting and financial statement disclosure required under Regulation S-K and Regulation S-X by scaling back the disclosure required of those Tier 2 issuers who may in the future be required to register with the Commission, while also ensuring that any future changes to the revenue limits of SRCs automatically result in changes to the revenue limits of Tier 2 issuers.

137. Should we extend federal preemption to additional offers and sales of securities, for example, by expanding the definition of "qualified purchaser"? For example, should we preempt state securities registration or other requirements applicable to secondary sales of securities:

• _offered or sold pursuant to Section 4(a)(1) or 4(a)(3), if the issuer of such security is a Tier 2 Regulation A issuer and remains current in its ongoing reporting required under the rules, as recommended by the 2014 and 2015 Small Business Forums;

• _initially issued in a Tier 2 Regulation A offering, as recommended by the 2014-2018 Small Business Forums and the 2017 Treasury Report; or

• _initially issued in an offering registered under the Securities Act, as recommended by the 2015 Small Business Forum?

Securities Registered Under the Securities Act. The Staff should expand the federal preemption to additional offers and sales of securities pursuant to a registration statement declared effective pursuant to the Securities Act. As discussed in this letter, Regulation A, by itself, is an insufficient means by which an issuer can grow into one that is ready to be traded on a national securities exchange. However, there remains an oddly counterintuitive element of the Securities Act whereby offers and sales of up to $50 million of securities to unaccredited investors under Regulation A constitute "covered securities" and offers and sales of an unlimited amount of securities to accredited investors under Regulation D also constitute "covered securities", but *registered offerings* of securities do not, by default, constitute "covered securities". Issuers conducting registered offerings of securities ought to be entitled to the same benefits of federal preemption, including preemption of state blue sky registration requirements, that Regulation A and Regulation D issuers are provided.

Proposed Amendments to the Definitions of "Covered Securities" and Qualified Purchasers". The concept of "qualified purchaser" is a subset of the pre-emption available to "covered securities"

under Section 18(b) of the Securities Act. Section 18(b)(3) of the Securities Act provides the Commission with the ability to "define the term 'qualified purchaser' differently with respect to different categories of securities, consistent with the public interest and the protection of investors." The Commission has previously exercised this authority in the context of Regulation A[21], and would be within its authority to further amend the definition to allow both registered and qualified offerings under the Securities Act to come within the definition of "covered securities".

To provide additional investor protection, issuers would be required to be current in their periodic reporting obligations under Rule 15(d) (registered offerings) and Rule 257 (qualified offerings) in order for their securities to be entitled to take advantage of such expanded pre-emption (*i.e.* initial issuance for registered offerings and secondary sales for both registered and qualified offerings). To accomplish this, the Commission could determine to add a new definition to Rule 405 for "Qualified Purchaser" as follows:

> *Qualified purchaser*. For purposes of Section 18(b)(3) of the Securities Act [15 U.S.C. 77r(b)(3)], a "qualified purchaser" means any person to whom securities are offered or sold pursuant to (i) an effective registration statement or (ii) a Tier 2 offering under Regulation A; provided that the initial Tier 2 offering complied with the requirements of Rule 251((d)(2).

By expanding the federal preemption framework to include registered offerings of securities, the Commission would encourage successful Tier 2 issuers to make the jump to becoming full Exchange Act reporting companies and, eventually, list their securities on a national exchange pursuant to a registration statement declared effective pursuant to the Securities Act, while also making the definition of covered securities more consistent across Regulation A, Regulation D, and registered offerings.

I would welcome the opportunity to discuss any questions with respect to this letter; my telephone number is ([redacted].

Sincerely,

/s/ Mark Schonberger

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[21] See 17 CFR 230.256:

> "For purposes of Section 18(b)(3) of the Securities Act [15 U.S.C. 77r(b)(3)], a "qualified purchaser" means any person to whom securities are offered or sold pursuant to a Tier 2 offering of this Regulation A."

cc: Matthew Schoenfeld
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