Law Offices of Ford C. Ladd
908 King Street, Suite 350
Alexandria, VA 22314
Direct: (703) 836-4880
Cell: (
E-Mail:

March 19, 2014

Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: SEC File Number S7-11-13
(SEC Rel. 33-9497, Proposed Rule Amendments for Small and Additional Issues Exemption Under Section 3(b) of the Securities Act)

Dear Ms. Murphy:

Thank you for this opportunity to comment on SEC Rel. 33-9497, which proposes new rules for Regulation A (sometimes referred to herein as the "Proposed Rules").[1]

The Securities and Exchange Commission (SEC) and its Staff should be commended for adopting a definition for "qualified purchasers" that allows Tier 2 issuers to avoid prohibitively high costs and delays associated with inconsistent state registration requirements. However, the Proposed Rules must be modified so that reduced disclosure requirements will apply to offerings greater than $10 million because brokerage firms have expressed unwillingness to become "holders of record" for Regulation A securities.

This comment focuses on why the Proposed Rules should be modified to base disclosure requirements on the larger of the issuer's public float or the aggregate amount of securities sold to non-affiliates under Regulation A, and why the SEC must impose disclosure requirements that encourage issuers to adopt internal controls that will enhance the integrity of disclosures, remove investor purchase limitations, and extend the definition of "qualified purchasers" to cover Tier I issuers who provide audited financials, and meet all continuing disclosure requirements.

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[1] SEC Release Nos. 33-9497, 34-71120 and 39-249, "*Proposed Rule Amendments for Small and Additional Issues Exemptions Under Section 3(b) of the Securities Act*" are reproduced at 79 Fed. Reg. 3926 (Jan. 23, 2014).

Summary of Comments

- Retain the definition of "Qualified Purchaser" so that overly burdensome costs and delays associated with state registration are avoided;

- Exempt Regulation A from Section 12(g), and, in lieu thereof, impose scaled disclosure requirements based on the larger of the issuer's aggregate amount of securities sold to non-affiliate purchasers under Regulation A or its public float because:

  (i) brokers are not willingness to be "holders of record" for securities issued under Regulation A, and

  (ii) Congress has expressed clear intent for qualification of all Regulation A Offerings to have less costs and delay associated with full registration;

- Require disclosure of Code of Ethics and Corporate Governance Principles in a manner that encourages issuers to adopt internal controls that will avoid adverse audit reports required by PCAOB AU 325 and 9325, and otherwise conform to the FAR and other federal guidelines;

- If the SEC believes that using a single Offering Circular format may shorten the time for the SEC to review and qualify Regulation A Offerings, it should require all Regulation A Offerings greater than $10 million to use the Part I of S-1 Offering Circular format;

- Remove Investor Purchase Limitations, or alternatively, exempt all accredited investors, and those non-accredited affiliates, founders, employees, agents, independent contractors and owners;

- Extend the definition of "qualified purchaser" to Tier 1 Offerings on condition the issuer provides audited financials, and complies with all Tier 2 continuing disclosure requirements;

- Require all Regulation A issuers to maintain a corporate web-site where copies of all non-confidential SEC filings can be accessed by the public;

- Develop an on-line database available to the public that identifies all Bad Actors with copies of the findings and orders that triggered such status; and

- Allow States to have immediate access to all Testing the Waters disclosures.

A. Proposed definition for "Qualified Purchaser" must be maintained

The proposed definition for "qualified purchaser" is an excellent solution for Tier 2 issuers to avoid the overwhelming burden imposed by inconsistent state registration requirements for Regulation A offerings, and must be preserved for Regulation A to have any viable chance of success.

All federal studies and reports have concluded that the state registration process is simply too costly and complicated under the existing Regulation A,[2] with the total number of applications for Regulation A offerings dropping from 116 in 1997 to 19 in 2011, and those which became qualified, plummeting from 57 in 1998 to only 1 in 2011.[3]

State registration has proven to be overly burdensome because States have inconsistent disclosure requirements and procedures, with most States adding a merit review.[4] These differences complicate what information issuers have been required to place in their offering statements, and increase legal and filing fees.[5]

NASAA has asked to be entrusted with developing consensus among all States to conduct a coordinated registration process for all Regulation A Offerings under a "Proposed Coordinated Review Program for Section 3(b)(2). However, there are substantial political and technical grounds to question whether NASAA and its members can agree and implement such a program for many more years.

There is clear absence of political resolve among the States to reach uniform consensus as demonstrated by the simple fact that NASAA its member States have known for more than 15 years that the burden of inconsistent state registration requirements has forced nearly all issuers away from Regulation A and to seek capital under Regulation D and other private offering exemptions,[6] even though private offerings cost the issuer's founders substantially higher intermediary fees and investor premiums, and typically result in the founders losing voting control over the company they built and, in most cases, employment. Yet, the best solution that NASAA and its member States could reach consensus was the NASAA SC-SCOR coordinated review program which divided United States into 6 regions, with each having its own registration requirements and procedures, and with some states, like New York, opting out and requiring other sets of filing requirements.

NASAA also lacks technical expertise to implement the proposed, complex, interactive web-site for Regulation A applications. The proposed Regulation A site is far more complex than the on-line, "check-

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[2] *See, e.g.*, U.S. Gov't Accountability Office, GAO12-839 *Factors that may Affect Trends in Regulation A Offerings* (July 2012), available at http://www.gao.gov/assets/600/592113.pdf.
[3] *Id*. at Highlights.
[4] *See, id*. at 13, n.28.
[5] *See, e.g., id*. at 18.
[6] *See, e.g., id*. at Highlights.

the-box" filing process NASAA proposed for filing Form Ds during or about 2009, which NASAA has yet to implement.[7]

Our economy, its employers, and those citizens who may benefit from increased economic growth cannot, and should not, be forced to wait many more years for NASAA to attempt to reach consensus among each of its member States for a uniform disclosure requirement without merit review, and then attempt to develop a substantially more complex website than for filing Form D filings, which has taken NASAA more than 5 years to develop, when the SEC can begin the process of qualifying Regulation A Offerings this year.

B. Congress intended for Regulation A to be exempt from Section 12(g) by stating that all Regulation A Offerings should have disclosure requirements that are without the costs and delays associated with the full registration process under the 34 Act

The SEC should develop scaled disclosure requirements for all Regulation A offerings that do not depend on the keeping the number of "holders of record" below 2,000 for those offerings that exceed $10 million because Congress has declared that the purpose of Regulation A is to help "**small companies gain access to capital markets without the costs and delays associated with the full-scale securities registration process.**" H.R. 112-206, *Small Company Capital Formation Act of 2011* [to accompany H.R. 1070] at 2-3 (Sept. 14, 2011) (emphasis added).

Failure to declare that Regulation A offerings are exempt from Section 12(g) will require that all offerings above $10 million meet substantially higher costs of compliance for full registration, which would violate express Congressional intent, and force companies offerings more that $10 million to use higher cost private offerings.[8] Further, Congress intended for the SEC to preserve investor protection with lower disclosure requirements by requiring issuers to disclose their corporate governance policies in a manner that would compel the issuers to adopt internal controls scaled to the size of the issuer and the offering.

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[7] NASAA's requests to implement a single point on-line state filing process for Form Ds resulted in a *Memorandum of Understanding Between U.S. Securities and Exchange Commission and North American Securities Administrators Association, Inc.*, dated April 5, 2010.

[8] The proposing Release states there were approximately 25 registered initial IPOs in 2012, see, 79 Fed. Reg. at 3976, n.553, at a time there were 9,986 Reg. D, 506 offerings up to $50,000, *see, id*. at Table of Reg. D Offerings during 2012 by issuers eligible to rely on Regulation A. The proposing Release also reports that two surveys found the regulatory cost of compliance of IPOs average $2.5 million with an ongoing annual cost of $1.5 million, *see, id*. at 3977. These numbers demonstrate that if the costs of compliance for Smaller Reporting Companies is so great that it drove issuers to Reg. D for offerings up to $75 million, then imposing similar costs of full registration on offerings between $10 to $50 million will only magnify the costs of compliance many times, thereby making it more probable that the total number of Reg. A Offerings will be less than the 21 which opted to file in the range of a smaller reporting company. Clearly not the intent of Congress or the Administration when it passed H.R. 1070 and the JOBS Act.

1. Legislative History for Titles III and IV of the JOBS Act demonstrate Congress intended for the SEC to adopt separate Disclosure Requirements that are less costly than Full Registration for all Regulation A Offerings

The Legislative History for Titles III and IV of the JOBS Act provides clear and express Congressional intent for the SEC to develop a separate set disclosure requirements for all Regulation A Offerings that are less costly than for full registration under the 34 Act, and that no inference should be drawn against that intent because Title III (Crowdfunding) contains an express exemption from Section 12(g) of the Securities and Exchange Act of 1934. SEC Staff who were advising Congress on the content of H.R. 1070, 112th Cong. (2011)[9] also know that Congressional opposition to raising Regulation A to $50 million dissipated after H.R. 1070 was amended to require disclosure of the issuer's corporate governance principles.

The JOBS Act was not created until March 7 and 8, 2012, when the House formed an omnibus JOBS Act during floor debate by adding Titles II through VII to H.R. 3606[10] by drawing from the text of other Bills that had passed the House and were pending before the Senate with full Administration support (except for concerns of fraud associated with Crowdfunding).

Title IV was taken from H.R. 1070, which had been introduced by Representative David Schweikert on March 14, 2011, and, after amendments that included disclosure of corporate governance principles and Section 12(a)(2) liability during mark-up before the House Financial Services Committee on May 3 and 4, 2011, and was passed by the House on November 2, 2011, by an overwhelming, bipartisan vote of 421 to 1.

The initial text of Title III of the JOBS Act was taken from H.R. 2930, which was introduced by Representative Patrick McHenry on September 14, 2011, and reported by the House Financial Services Committee after a hearing held September 21, 2011.[11] All these actions occurred after H.R. 1070 had been considered by the House Financial Services Committee, and without any comment in the analysis of the section exempting crowdfunding from Section 12(g) about H.R. 1070 or any other exemption because, at the time H.R. 2930 was considered by the Committee, it was a stand-alone Bill with no person suspecting that it would be used to interpret H.R. 1070.[12]

Once H.R. 3606 was amended by the House on March 7 and 8, 2011, and passed by a vote of 390-23 on March 8, 2011, the Senate stopped considering its own set of bills, and began debate on H.R. 3606. There was considerable debate how to amend Title III to reduce fraud under Crowdfunding. The Senate passed the Merkley Amendment which rewrote Title III, and passed the H.R. 3606 with a

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[9] All House Bills referenced in this comment were introduced during the 112th Congress.

[10] H.R. 3606 was introduced on December 8, 2011, after H.R. 1070 had passed the House, and contained only those provisions in Title 1, which directed the SEC to exempt a new category of Emerging Growth Companies from certain 34 Act disclosure requirements and to allow EGC to test the waters with certain investors. *See, e.g.*, H. Rept. 112-406, Reopening American Capital Markets to Emerging Growth Companies Act of 2011 [to accompany H.R. 3606] (Mar. 1, 2012).

[11] *See, e.g.*, H. Rept. 112-262, Entrepreneur Access to Capital Act [to accompany H.R. 2930] (Oct. 31, 2011).

[12] *See, id*. at 10.

substituted Title III on March 22, 2012. The House accepted the Senate change on March 27, 2012, and President Obama signed the JOBS Act into law on April 5, 2012.

H. Report 112-206, Small Company Capital Formation Act of 2011 [to accompany H.R. 1070] (Sept 14, 2011) is the only Congressional Report that describes how Congress intended New Regulation A Plus to be implemented by the SEC. The Purpose and Summary section affirmatively states:

> H.R. 1070, the Small Company Capital Formation Act, raises the offering threshold for companies exempted from registration with the U.S. Securities and Exchange Commission (SEC) under Regulation A from $5 million—the threshold set in the early 1990s—to $50 million. **Raising the offering threshold helps small companies gain access to capital markets without the costs and delays associated with the full-scale securities registration process.**

Id. at 2-3 (emphasis added). The Performance Goals and Objectives section again states:

> H.R. 1070, the Small Company Capital Formation Act, increases the offering threshold for companies exempted from SEC registration under Regulation A from $5 million to $50 million. **The purpose of the change is to help small issuers, such as venture-capital backed companies, gain access to funding without the costs and delays associated with the full-scale securities registration process.** The legislation provides the SEC with the authority to increase the threshold and requires the SEC to re-examine the threshold every two years and report to Congress on decisions regarding the adjustment of the threshold.
>
> The objective of H.R. 1070 is to make Regulation A into a viable channel for small companies to access capital, which will permit greater investment in these companies, resulting in economic growth and jobs. Small companies are critical to economic growth in the United States. By reducing the regulatory burden and expense of raising capital from the investing public, H.R. 1070 will boost the flow of capital to small businesses and fuel America's most vigorous job-creation machine. Regulation A offerings can also help entrepreneurial businesses attract private capital by providing companies with additional working capital at reduced costs than might be feasible when compared with an initial public offering using full SEC registration.

Id. 7 (emphasis added). These same purposes and objectives were repeated many times without opposition during all subsequent proceedings that addressed Title IV of the JOBS Act.

This history demonstrates clear Congressional intent for the SEC to develop:

- disclosure requirements for all Regulation A issuers that would be "**without the costs and delays associated with the full-scale securities registration process,"** which requires a separate disclosure regime and process that is exempt from the Section 12(g) trigger and less burdensome than imposed by the 34 Act on Smaller Reporting Companies; and

- disclosure of corporate governance principles that will induce issuers to adopt internal controls that will enhance the integrity of all corporate disclosures.

There are no grounds for any inference to be drawn from provisions in Title III because H.R. 2930 (Crowdfunding) was not introduced until three days after comment on H.R. 1070 was complete, 2011, and there was no comment in any subsequent record to for the SEC to impose 34 Act reporting requirements on any Regulation A offering.

2. Brokers have expressed unwillingness to become "holders of record" for securities issued under Regulation A until a mature market for such securities develops.

The final rules must be amended to state Regulation A offerings are exempt from Section 12(g) [15 U.S.C. § 78l(g)][13] because the Proposed Rules are premised on an incorrect presumption that brokerage firms will be "holders of record" for securities issued under Regulation A.[14]

There is substantial cause to believe brokerage firms will not agree to become "holders of record" for securities offering under Regulation A. This concern is shared by at least one other commentator familiar with the brokerage industry.[15]

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[13] Section 12(g)(1) states, in part, that every issuer shall register with the SEC:

> (A) within 120 days after the last day of its first fiscal year ended on which the issuer has total assets exceeding $10,000,000 and a class of equity security (other than an exempted security) held of record by either—
> (i) 2,000 persons, or
> (ii) 500 persons who are not accredited investors (as such term is defined by the Commission), and
> (B) in the case of an issuer that is a bank or a bank holding company, as such term is defined in section 1841 of title 12, not later than 120 days after the last day of its first fiscal year ended after the effective date of this subsection, on which the issuer has total assets exceeding $10,000,000 and a class of equity security (other than an exempted security) held of record by 2,000 or more persons, ….

[14] The Proposing Release presumes incorrectly that brokers will be "holders of record" for securities issued under Regulation A, and then concludes that subjecting Regulation A issuers to the Section 12(g) trigger will not impose a great burden:

> Because of the manner in which shareholders of record are tabulated, the likelihood of a Regulation A issuer triggering the 12(g) threshold is low if not triggered at the time of offering. In particular, beneficial owners of Regulation A issuers who hold their shares at a broker are not counted as a record holder. Their shares, held in ''street name,'' are counted at the broker level, so that each brokerage at which there is a least one beneficial owner would constitute one shareholder of record. Because of this treatment, the number of shareholders of record is often significantly less than the number of beneficial owners.

SEC Rel. 33-9497, 79 F.R. 3926, 3985 (January 23, 2014).

[15] *See, e.g.*, William Hambrecht, Comment to SEC File No. S7-11-13 at 5 (Mar. 4, 2014).

During February 2014, this counsel asked the compliance and/or legal departments of the three largest brokerage firms and several other smaller firms whether they will be "holders of record" for securities issued under proposed Regulation A. Each firm stated: "Yes, if the securities are (i) registered with the SEC, (ii) have a discrete CUSIP, and (iii) can be transferred under DTC." When told securities offered under Regulation A are exempt from registration but are "qualified" by the SEC, each firm equivocated by repeating the same statement, and refusing to state they would become holders of record for securities offered under Regulation A. One firm stated the obvious, "There simply is not enough money for brokerage firms to be 'holders of record' for Regulation A securities in view of all the risks and problems they present, unless needed to retain a large client." That officer listed many other reasons his firm would not to be a holder of record, including:

- Since Regulation A is an exemption from full registration under the 34 Act, and is not within the express exemption stated in FINRA Rule 5123(b), will brokers be barred from selling any Regulation A security before submitting copies of all placement memorandums to FINRA for approval under FINRA Rule 5123(a);

- How will brokers establish a "Market Value" for Regulation A securities without an efficient market;

- When will brokers know to mark the price of Regulation A securities to levels triggering regulatory and internal restrictions on low priced securities; and

- How will FINRA and NYSE Rules governing Supervision, Suitability, and Know your Customer" be applied to Regulation A securities without an efficient market and more complete disclosure requirements.

While the first of these points may be overcome by amending the FIRNA 5100 Series of Rules, it is clear that these expressions demonstrate that most brokerage firms are unwilling to become "holders of record" for Regulation A securities until after there are efficient trading platforms and the firms can see profits that exceed other opportunities, including underwriting activities for Regulation D and other private placements that are in direct conflict with the Congressional intent for Regulation A.

The SEC should not create a regulatory monopoly that would force issuers to use brokers who may use that monopoly to extract higher fees. Rather, the SEC should use this rulemaking opportunity to adopt disclosure requirements based on the larger of the aggregate value of Regulation A shares sold to non-affiliates, or its "public float." These are more accurate measures of market risk.

3. Congress intended for the SEC to require disclosure of corporate governance principles to protect investor interests by encouraging issuers to adopt internal controls that enhance the integrity of all required disclosures

Congress intended for the SEC to require disclosure of "corporate governance principles" so that investor protection could be maintained with reduced reporting requirements up to the $50 million

exemption limit, as evidenced by debate and voting records during markup of H.R. 1070 to include disclosure of "corporate governance principles."

These should be no increased burden to issuers to report they adopted, or state specific reasons why they did not adopt, the following corporate governance principles:

- Codes of Ethics proscribed under 17 C.F.R. § 229.406; and

- Corporate Governance principles proscribed under 17 C.F.R. § 229.407, but modified so that:
    a. No Audit Committee Financial Experts shall be required;

    b. There shall not be less than two Independent Directors, and that number may be increased based on size of the issuer (including the proposed offering); and

    c. The need for separate audit and other committees will depend on the size of the issuer (including the proposed offering).

Auditors engaged solely to audit financial statements are required by PCAOB standards to report to the issuer any substantial deficiencies that may affect the financial statements, which include absence of codes of ethics and corporate governance principles. *See, e.g.*, PCAOB AU Sections 325 and 9325.

Any failure to adopt internal controls described in 17 C.F.R. §§ 229.406 and 229.407, or to correct substantial deficiencies reported by auditors, will expose the issuer, its directors and all officers to substantial liability.

Further, these same internal controls are imposed on government contractors and other persons that receive grants and other funding under the American Recovery and Reinvestment Act of 2009. *See, e.g.*, 48 C.F.R. Subparts 3.9 (Whistleblower Protections) and 3.10 (Contractor Code of Business Ethics and Conduct), 48 C.F.R. §§ 52.203-13 (Contractor Code of Business Ethics and Conduct), 52.203-14 (Display of Hotline) and 52.203-15 (Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009), and have become part of customary practice for corporate and securities counsel to provide their clients at relatively low cost, particularly in view of the benefits of adopting and maintaining Effective Compliance and Ethics Programs under the U.S. Attorney's Manual, Chapters 9.27.00 and 9.2800, Federal Sentencing Guidelines, §8B1.1 *et seq.*, and SEC Enforcement Manual at § 6.1.2.

Since these internal controls also tend to improve management effectiveness and stewardship of investor proceeds, reduce D&O insurance premiums and those premiums charged by lenders, there is no reason for the SEC to exempt Regulation A from 17 C.F.R. §§ 229.406 and 229.407 as modified.

4. SEC should adopt scaled disclosure requirements based on the larger of the Issuer's Aggregate Regulation A Offerings to non-affiliates or its Public Float

The Congressional mandate for the SEC to adopt disclosure requirements that would "help **small issuers, such as venture-capital backed companies, gain access to funding without the costs and delays associated with the full-scale securities registration process,** H. Rept. 112-206 at 7, is best met by developing scaled disclosure requirements based on the larger of the value of issuer's aggregate shares sold to non-affiliates under Regulation A or its "public float." This can be accomplished most easily by adding a subsection to proposed regulation 17 C.F.R. § 230.257 to require issuers making offerings that exceed $10 million to follow Part 1 of Form S-1,with disclosure of modified corporate governance principles under 17 C.F.R §§ 229.406 and 229.407.

C. <u>The SEC should adopt Part I of S-1 as a uniform Offering Circular format for all offerings over $10 million if that may shorten the time to review and qualify Regulation A Offerings</u>

The SEC should require all Regulation A issuers offering more than $10 million to use only the Part I of S-1 Offering Circular format if that standardized format will reduce the time to review and qualify Regulation A Offerings.

Smaller companies tend to need less time from the date they decide to pursue an offering to when they must obtain commitments for additional capital than larger companies. This tendency is caused by many factors that include lower financial reserves, and greater financial sensitively to changing market opportunities, and will force smaller companies to use other exemptions if the time to review and qualify Regulation A Offerings remains above 90 days.

The ability to "test the waters" will help issuers and their creditors determine market demand and value of the issuer's equity; but the need for firm financial commitments will still force smaller companies to pursue private offering exemptions.

While it is reasonable to expect that Regulation A Offerings will take more time to be qualified than for private placements to begin solicitations, that difference in time should not be so great that it forces most smaller companies to pursue private offering exemptions which result in higher dilutions of the founders' equity, loss of founders' voting rights, and, ultimately, loss of founders' employment with the company they built.

Statistics cited in the Release suggest that Offering Circulars prepared with the Part I of S-1 format are qualified more quickly than other formats, with the average time for a Regulation A filings to be qualified during the period 2002 through 2012 at 301 days for Model A, 220 days for Model B, and 167 days for those using Part I of S-1. *See* Release 33-9497, 79 F.R. 3926 at 3975. The Release states that the median for qualification was 189 days, and suggests a steep learning curve to prepare Offering Circulars because issuers with more than $1.4M in assets were qualified 97 days faster than smaller issuers, with 4 days being the fastest time to qualify. *See, id.*, 79 F.R. at 7935. While the Release states that state registration and other factors contributed to increasing the time for Regulation A offerings to

be qualified, the statistics suggest that the average time to review an Offering Circular and number of office actions can both be reduced by adopting requiring the Part I of S-1 format for all Regulation A Offerings that exceed $10 million.

It stands to reason that the SEC can review and qualify Regulation A Offering in less time when there is only one uniform Offering Circular format because: (i) time to train SEC reviewers should be reduced; (ii) the depth of SEC guidance on disclosure items can be increased; and (iii) the quality of disclosures should improve because counsel will tend to be more specialized.

There are other reasons for requiring all Tier 2 offerings above $10 million to use the Part 1 of S-1 filing format. First, while Congress intended disclosure requirements to be less costly than full registration requirements imposed on Smaller Reporting Companies, Congress understood that disclosure requirements would be scaled with the size of the offering and/or issuer, and not create regulatory arbitrage with requirements for Smaller Reporting Companies. These objectives are best met by requiring Regulation A Offerings to follow the same format as Smaller Reporting Companies, but with reduced disclosure.

Requiring the S-1 Offering Circular format, will also reduce investor confusion when comparing two Regulation A offerings that may otherwise be allowed to use different Offering Circular formats, or an offering of $50 million subject to Regulation A disclosure and an offering of $75 million that must follow S-1 format under the 34 Act.

D. Investor Limitations should be removed or modified.

The proposed ten percent (10%) limitation on investor purchases should be removed because such limitations were not intended by Congress, will place transactional burdens on brokers and issuers, and may unfairly exclude those persons who participated in building the issuer from buying securities they are most knowledgeable.

At the time H.R. 1070 was passed by Congress, New Regulation A Plus was a separate Bill and there were no discussions of limitations on investor purchases as was proposed and later adopted in H.R. 2930 and the Merkley Amendment for Crowdfunding. Had Congress intended for the SEC to impose investor purchase limitations drawn from Crowdfunding on Regulation A it would have come up in House Floor Debate on H.R. 3606, and most certainly in Senate debates to substitute Title III (Crowdfunding) and whether to adopt Senator Reed's or Senator Merkley's Amendments -- but did not. This legislative history demonstrates clear Congressional intent not to impose investor purchase limitations on Regulation A.

The costs of imposing any limitation, whether by means of self-verification or not, is particularly harmful to the viability of Regulation A for multiple reasons. First, as proposed Regulation A will not be viable for offing above $10 million unless brokers agree to become "holders of record" because the number of beneficial owners will exceed the 2,000 limit in Section 12(g) of the 34 Act. This will require issuers to engage brokers for the initial offering and to be holders of record in any secondary trading.

Not only does investor limitations impose complications and costs as to who will be responsible for collecting self-certification forms and monitoring aggregate sales during the initial offering, but it also places additional liability on brokers who have duties of Suitability and "Know Your Customer" that may be used by investors against firms who may have records on file placing the brokerage firm on record notice that purchase limits have been exceeded. This is another reason brokers may use for refusing to become holders of record for securities they do not now find to be in their economic interests.

Should it become politically necessary to impose some form of investor purchase limits to preserve the definition of "qualified purchase" for Tier 2 offerings, then any such limits should not be applicable to any accredited investor, and, of even greater importance, not applicable to any current or former investor, employee, agent or independent contractor of the issuer. These later persons have better knowledge of the issuer and its potential than any other person, and, given that these persons sweated during the early phases of building the issuer to a point where the issuer may have it greatest growth potential, it would be perverse for the SEC to restrict these persons from partaking in that growth.

In lieu of placing investor purchase limits, the SEC may consider a rule that requires all Regulation A Offering Circulars to contain a conspicuous notice stating that non-accredited investors should limit their total holdings in Regulation A offerings to 10% of their total net worth and income.

E. Tier I Offerings should be exempt from state registration on condition that Issuers meet Tier 2 continuing disclosure requirements

There is no reason to subject Tier 1 to state registration requirements given the adverse impact of state registration on existing Regulation A Offerings found by the GAO, which have stifled nearly all Regulation A Offerings under the current rules.[16] Therefore, the SEC should allow Tier 1 offerings to be exempt from state registration if it agrees to adopt internal controls and meet all continuing disclosure requirements, including audited financials beginning not more than 12 months after the initial filings became qualified.

The SEC may later consider some form of coordinated state review after NASAA had demonstrated to the SEC and the Controller General that the NASAA requirements and procedures are no more burdensome on issuers than by filing with the SEC.

F. Issuers should be allowed to Test the Waters with Non-Accredited Investors

The SEC proposal to allow Regulation A issuers to test the waters without restriction on the type of investor on condition that all statements are filed with the SEC before they are communicated to others, and all other required filings are up to date. These proposals are reasonable and should be kept in the final rules.

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[16] *See, e.g.*, U.S. Gov't Accountability Office, GAO12-839 *Factors that may Affect Trends in Regulation A Offerings* at Highlights.

As stated below, the SEC should allow States immediate access to all Testing the Waters disclosures before first use so that duplicative State filings of such statements are not required by individual States, and so that the States may have notice to take necessary law enforcement action to deter fraud.

It would be unreasonable and counter to Congressional intent for the SEC to bar prospective issuers of Regulation A securities from testing of the waters with accredited and non-accredited investors because the testing the waters provisions for new Regulation A were created by Congress so that issuers could access and gauge the viability of a Regulation A offering made to capital markets not accessible to Regulation D and other offering exemptions. Since most Regulation D and other private and public offerings are largely dependent and targeted on Accredited Investors and Qualified Institutional Buyers (QIBs), it is clear that Congress intended, and the market will require, for Regulation A issuers to be able to test the waters with non-accredited and all other potential investors.

It is also necessary for the SEC to require that all required filings and disclaimers be kept confidential and exempt from any public FOIA request during the qualification phase so that the issuer's competitors may not have access to vital information before the issuer is ready and desires to make such information public.

G. SEC should require all issuers of Regulation A Securities to maintain a corporate web site where copies of all non-confidential filings to the SEC may be accessed by the public.

Issuers should be required to maintain a corporate web site where the public may access copies of all non-confidential filings to the SEC in a timely manner so that investors not familiar with EDGAR may access the most complete information provided to the SEC. This disclosure requirement is in the public interest, and should not impose significant costs.

H. SEC should Maintain a public data- base that identifies all Bad Actors with copies of the Findings and Orders that triggered such status.

Issuers and potential investors alike should have access to an On-Line Data Base that lists all "Bad Actors" for purposes of Regulations A and D, and to prevent regulatory arbitrage by Bad Actors who may use other offering exemptions.

Issuers and their counsel should have ready access to data bases that identify all Bad Actors before preparing to submit any filing that requires disclosure or may bar an offering from going forward. Even if the issuer can show it exercised reasonable care in detecting and removing a Bad Actors from its management, board and beneficial owner group, there will be adverse economic consequences for any such failure.

While it is presumed that commercial data bases like Westlaw and Lexis/Nexis will provide develop such databases, those services have charged fees that vary substantially on size and geographic location of the subscriber, which may be unreasonably burdensome on some issuers, and have omitted material

decisions issued by non-court forums, including SROs and state administrative proceedings. The bottom line is that issuers should have an accessible database they may access, even for reasonable fees that is uniform for all persons, so that they may not be put in the position of correcting or being forced to withdraw a filing.

Further, the database should be accessible to all investors so that Bad Actors may not avoid disclosure by using other offering exemptions that do not require disclosure of their bad acts to potential investors, and so that Investors may review copies of the proceedings and findings that triggered Bad Actor status.

I. States should have immediate access to all Testing the Waters Disclosures

While stated above, it is important for the SEC to allow States to have immediate access to all Testing the Water disclosures filed by issuers with the SEC so that duplicate State filings are not required, and so that States may have notice of such activities for enforcement actions that may become necessary.

CONCLUSION and RECOMMENDATIONS

Congress expressed clear intent for New Regulation A to:

- reinvigorate our economy by expanding the exemption for unrestricted securities to $50 million so that smaller businesses would have access to more capital without the higher costs of compliance and delays imposed by the 34 Act on Smaller Reporting Companies; and

- protect investors by requiring audited financials and disclosure of other items, specifically including corporate governance principles to encourage internal controls that will enhance the integrity of all disclosures.

Congress also knew and intended for Regulation A to:

- Democratize our markets by allowing the lower 93% of all US. Households (those who do not have enough money to qualify as an accredited investor) to invest in economic opportunities that have been restricted to the wealthiest 7% of all U.S. Households; and

- Allow founders who conceived and built a company to access existing and new capital markets at lower costs, and under terms that will not impose substantial premiums that dilute the founders' equity, restrict their voting rights, and, in most instances, terminate the founders' employment with the business they built, . for the founders and their employees in the company.

The Proposed Rules go a long way to meeting these goals by adopting a definition for "qualified investors" that avoids the overly burdensome costs and delays imposed by state registration, but must be modified further to reduce the costs of compliance for all Regulation A Offerings because brokers are not willing to commit to becoming holders of record for securities offered under Regulation A:

1. Require issuers with an aggregate Regulation A Offering Amount to use the Part I of S-1 Offering Circular format, with reductions from those Items imposed on a Small Reporting Company based solely on the issuer's aggregate Regulation A Offering Amount;

2. Require issuers to post conspicuous warnings to issuers that they have not adopted a Code of Ethics in compliance with 17 C.F.R. § 229.406 and/or that they have not adopted corporate governance principles that meet 17 C.F.R. § 229.407, as modified further based on the larger of the aggregate Regulation A Offerings or "public float" as defined in 17 C.F.R. § 229.229.10(f), where Regulation A issuers:

    (a) will not be required to have Audit Committee Financial Experts, but

    (b) will be required to have not less than two independent directors, and that number will increase as the size of the issuer increased from $10 million to the $50 million exemption limit;

    (c) will be require to maintain an anonymous reporting line to the board or audit committee for reports of financial fraud and other enterprise risk; and

    (d) adopt audit and other committees as determined by the issuer's size.

Respectfully submitted,

Ford C. Ladd