

DRAFT RECOMMENDATIONS

From: Laporte, Gerald
Sent: Friday, January 27, 2012, 6:11 PM
Cc:
Subject: Recommendations for Consideration at Feb. 1 Meeting

Dear Advisory Committee Member:

At the request of Co-Chairs Steve Graham and Chris Jacobs, we are sending you the attached draft recommendations to be considered at the meeting of the SEC Advisory Committee on Small and Emerging Companies at its meeting next Wednesday, February 1, in Washington. We hope to see you there.

Gerry

Gerald J. Laporte
Chief, Office of Small Business Policy
Division of Corporation Finance
U.S. Securities and Exchange Commission

**SECURITIES AND EXCHANGE COMMISSION
ADVISORY COMMITTEE ON
SMALL AND EMERGING COMPANIES**

Washington, DC 20549-3628

February 1, 2012

The Honorable Mary L. Schapiro
Chairman
U. S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1070

Dear Chairman Schapiro:

As you know, the Securities and Exchange Commission organized the Advisory Committee on Small and Emerging Companies to provide the Commission with advice on the Commission's rules, regulations, and policies with regard to its mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation, as they relate to the following:

- (1) capital raising by emerging privately held small businesses and publicly traded companies with less than \$250 million in public market capitalization;
- (2) trading in the securities of such businesses and companies; and
- (3) public reporting and corporate governance requirements to which such businesses and companies are subject.

On behalf of the Advisory Committee, we are pleased to submit the enclosed recommendations to the Commission on registration requirements and reporting obligations under the Securities Exchange Act of 1934.

We and the other members of the Advisory Committee are prepared to provide any additional assistance that the Commission or its staff may request with respect to these recommendations.

Respectfully submitted on behalf of the Committee,

Stephen M. Graham
Committee Co-Chair

M. Christine Jacobs
Committee Co-Chair

Members of the Committee:

David A. Bochnowski
John J. Borer, III
Dan Chase
Milton Chang
Joseph "Leroy" Dennis
Stephen M. Graham
Shannon L. Greene
M. Christine Jacobs
Kara B. Jenny
Steven R. LeBlanc
Richard L. Leza
Paul Maeder

Kathleen A. McGowan
Catherine V. Mott
Karyn Smith
Dan Squiller
Charlie Sundling
Timothy Walsh
Gregory C. Yadley

Official Observers:
A. Heath Abshure
Sean Greene

Enclosure

cc: Commissioner Elisse Walter
Commissioner Luis Aguilar
Commissioner Troy A. Paredes
Commissioner Daniel M. Gallagher
Meredith B. Cross
Lona Nallengara
Elizabeth Murphy
Gerald J. Laporte
Jennifer Zepralka

U.S. Securities and Exchange Commission
Advisory Committee on Small and Emerging Companies

**Recommendations Regarding Registration Requirements and
Reporting Obligations under the Securities Exchange Act of 1934**

[•], 2012

AFTER CONSIDERING THAT:

1. Under Section 12(g) of the Securities Exchange Act of 1934 (the “Exchange Act”) and the rules of the Securities and Exchange Commission (the “Commission”) thereunder, a company is required to register a class of its equity securities and is subject to a reporting obligation under Section 12(g) of the Exchange Act if, at the end of the company’s fiscal year, the securities are held of record by 500 or more persons and the company has total assets exceeding \$10 million;
2. A company becomes subject to a reporting obligation, under Section 15(d) of the Exchange Act, upon effectiveness of a registration statement relating to an offering of the company’s securities under the Securities Act of 1933;
3. Under Section 12(g)(4) of the Exchange Act and Rule 12g-4 thereunder, a company that has a class of securities registered under Section 12(g) may terminate that registration and suspend its reporting obligation when the number of holders of record of that class falls below 300 or, alternatively, when the number of holders of record of that class falls below 500 and the company’s assets have not exceeded \$10 million at the end of each of its last three fiscal years;
4. Under Rule 12g5-1 under the Exchange Act and Commission staff interpretations, the definition of “held of record” includes only those persons who are registered as shareholders on the records maintained by a company, which means that a broker-dealer or other securities intermediary that holds securities of a company would be registered on the records of the company as only one holder even if it holds securities of that company on behalf of a large number of clients, each of whom would be a beneficial owner;
5. Section 15(d) of the Exchange Act and Rule 12h-3 of the Commission’s Exchange Act rules provide for the suspension of a company’s Section 15(d) reporting obligation under the same thresholds as those that apply to suspending a Section 12(g) reporting obligation;
6. The Advisory Committee is concerned that, under the current thresholds that trigger Exchange Act registration and reporting, some private companies may be required to register and begin reporting sooner than desired and at a time in a

company's development that is not the most advantageous to the company or its shareholders, or companies may be driven to manage their capital raising or equity compensation activities to avoid registration in ways that may not be in the company's or its security holders' best interests;

7. The Advisory Committee also is concerned that public companies have been able to cease reporting under the Exchange Act – referred to as “going dark” – while their securities continue to be actively traded publicly, leaving shareholders and investors with little or no information, because ownership through securities intermediaries has resulted in fewer than 300 holders of record of the class of securities, even though the number of beneficial owners may be far greater;
8. The Advisory Committee believes that the characteristics that are most relevant in connection with a determination of whether a company should be subject to reporting obligations have changed since the enactment of Section 12(g), and that the current triggers and thresholds for registration and reporting under the Exchange Act may no longer be the correct tests by which a determination should be made as to whether a company should be required to register and report under the Exchange Act;
9. The Advisory Committee has considered whether the thresholds for Exchange Act registration and reporting, as well as for terminating registration and suspending reporting, should be adjusted, including whether a test based on the number of beneficial holders, rather than a test based on the number of holders of record, should be considered, whether the size of the assets test should be reconsidered, and whether a new standard or standards should be used to determine whether a company is required to register and report, or to terminate registration and suspend reporting, under the Exchange Act;
10. The staff of the Commission currently is undertaking a comprehensive study of the registration and reporting requirements under the Exchange Act, which includes, among other things, a consideration of the questions described in paragraph 9, above; and
11. The Commission has authority under Section 12(h) of the Exchange Act to exempt companies from the registration requirements of Section 12(g) and reporting obligations under Section 15(d), if the Commission finds that the action is not inconsistent with the public interest and protection of investors, and the Commission also has broad exemptive authority with respect to requirements of the Exchange Act under Section 36 of that statute.

THE ADVISORY COMMITTEE RECOMMENDS that

1. The Commission take action immediately to amend its registration and reporting rules under the Exchange Act to adopt a rule, pursuant to which:
 - a company's obligation to register and begin public reporting would not be triggered until it had a class of securities held by [1000] or more beneficial owners; and

- a company that is currently obligated to file reports with the Commission could not cease public reporting until the number of beneficial owners of the class of securities that subjects the company to reporting is less than [500];
2. The Commission staff include in the study of the registration and reporting requirements under the Exchange Act, a preliminary assessment of the effects of the above-referenced rule changes; and
 3. After completion of the staff study and an analysis of findings thereunder, the staff of the Commission would be required to evaluate the registration and reporting rules under the Exchange Act and to recommend to the Commission further amendments and modifications of such rules based on the findings of such staff study.

**SECURITIES AND EXCHANGE COMMISSION
ADVISORY COMMITTEE ON
SMALL AND EMERGING COMPANIES**

Washington, DC 20549-3628

February 1, 2011

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Chairman
U. S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1070

Dear Chairman Schapiro:

As you know, the Securities and Exchange Commission organized the Advisory Committee on Small and Emerging Companies to provide the Commission with advice on the Commission's rules, regulations, and policies with regard to its mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation, as they relate to the following:

- (4) capital raising by emerging privately held small businesses and publicly traded companies with less than \$250 million in public market capitalization;
- (5) trading in the securities of such businesses and companies; and
- (6) public reporting and corporate governance requirements to which such businesses and companies are subject.

On behalf of the Advisory Committee, we are pleased to submit the enclosed recommendation to the Commission on improving access to the public markets for small and emerging companies.

We and the other members of the Advisory Committee are prepared to provide any additional assistance that the Commission or its staff may request with respect to this recommendation.

Respectfully submitted on behalf of the Committee,

Stephen M. Graham
Committee Co-Chair

M. Christine Jacobs
Committee Co-Chair

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U.S. Securities and Exchange Commission
Advisory Committee on Small and Emerging Companies

**Recommendation Regarding Improving Access to the
Public Markets for Small and Emerging Companies**

February 1, 2011

AFTER CONSIDERING THAT:

12. Small and emerging companies could significantly benefit from modifications to the rules and regulations of the Securities and Exchange Commission (“Commission”) affecting access to the capital markets afforded to small and emerging companies;
13. Modifications to these rules and regulations can help facilitate the development and growth of small and emerging companies, which may help rebuild the initial public offering market in the United States and encourage economic growth and job creation;
14. Any such modifications should be made keeping in mind investor protections afforded by any existing rules or regulations or that may be necessary in connection with any new rules or regulations;
15. Presently, Regulation A, or the “Conditional Small Issues Exemption,” provides an exemption from the registration requirements under the Securities Act of 1933, as amended (the “Securities Act”), for public offerings of up to \$5 million in any 12-month period by non-reporting companies pursuant to which securities can be offered publicly, are eligible to trade freely immediately after the offering in the over-the-counter market without any restrictions on the types of investors that can participate in the offering;
16. The volume of Regulation A offerings has been immaterial in recent years, with only 24 Regulation A offering statements being filed with the Commission in each of 2009 and 2010, and only three Regulation A offerings being qualified by the Commission in each of those years;
17. Proponents for regulatory change to facilitate capital formation for small and emerging companies have asserted that the Regulation A \$5 million offering limitation is too low for Regulation A to be a viable tool for capital formation for small and emerging companies, particularly in light of the lack of a state “blue sky” exemption for Regulation A offerings, effectively preventing companies from taking advantage of rapidly changing means to access and communicate with potential investors;

18. The traditional sources of equity capital, which include private equity, venture capital and “angel” capital investors, have been unavailable to many small business owners and entrepreneurs seeking “seed capital” to fund a developing business or an “idea;”
19. The internet, in particular “social media” websites, provides a potential new tool through which small business owners and entrepreneurs can identify investors and raise seed capital;
20. Crowdfunding — the use of social media websites to solicit investments from a large number of individuals that, in general, make investments of smaller dollar amounts — has been asserted as a cost-effective method through which small businesses and other entrepreneurs can raise relatively smaller amounts of equity;
21. The current exemptions from the registration requirements of the Securities Act do not permit offers and sales of securities in the manner contemplated by a crowdfunding offering; and
22. Any exemption from the registration requirements of the Securities Act that permits crowdfunding must contain robust investor protections designed to prevent fraud, which is the necessary if crowdfunding as a capital raising tool is to succeed.

THE ADVISORY COMMITTEE RECOMMENDS that:

1. The Commission develop and implement a new exemption for offerings by [reporting and non-reporting companies], that is modeled on terms and conditions of Regulation A, but that provides for public offerings of up to \$50 million annually.
2. The new exemption should, as required under Regulation A, require issuers to prepare, file with the Commission and provide to potential investors an offering statement pursuant to requirements established by the Commission, and the Commission, in connection with identifying the requirements for such offering statement shall consider additional disclosure requirements necessary for the protection of investors in light of the increased offering cap, including the requirement for audited financial statements.

3. The Commission should consider additional investor protections for the new exemption, including public filings of offering statements, periodic reporting for companies that have completed an offering pursuant to the new exemption and “bad actor” disqualification provisions.
4. In developing the terms and conditions of the new exemption, the Commission should appropriately calibrate the requirements of the new exemption taking into account the relatively smaller size and more limited resources of the companies that will take advantage of the new exemption.
5. The Staff of the Commission review and consider the various proposals offered for an exemption from the registration requirements of the Securities Act to permit crowdfunding, including any investor protection ideas developed by the Staff, and recommend to the Commission as to whether the Commission should consider implementing such an exemption and, if so recommended, the terms and conditions of such an exemption.