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Via E-mail: rule-comments@sec.gov

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

Re: *Request for Public Comments on SEC Regulatory Initiatives under the JOBS Act – Title I: Reopening American Capital Markets to Emerging Growth Companies*

Dear Ms. Murphy:

This letter is submitted on behalf of the Committee on Securities Regulation (the "Committee") of the New York City Bar Association in response to the request for comments by the Securities and Exchange Commission (the "Commission") in advance of rulemaking required to be undertaken pursuant to the Jumpstart Our Business Startups Act of 2012 (the "JOBS Act"). In this letter, we address questions relating to Title I of the JOBS Act.

Our Committee is composed of lawyers with diverse perspectives on securities issues, including members of law firms and counsel to corporations, investment banks, investors and government agencies. As such, this letter does not necessarily reflect the individual views of all members of the Committee.

Most of Title I has taken effect without rulemaking, and the staff of the Division of Corporation Finance has issued substantial, and generally very helpful, guidance on many of these provisions. We are writing to offer a few suggestions that we believe would enhance the practical utility of the "emerging growth company" provisions and thus promote the policy objectives underlying Title I.

1. The "testing the waters" provision of Section 105(c) should incorporate a "reasonable belief" standard.

Section 105(c) of the JOBS Act permits "emerging growth companies" ("EGCs") to engage at any time in oral or written communications "with potential investors that are qualified institutional buyers ["QIBs"] or institutions that are accredited investors ["IAI"s]," to determine their potential interest in a contemplated securities offering. Before enactment of the JOBS Act, such communications would not have been permitted prior to the filing of a registration statement. We think that the purpose underlying Section 105(c) – to facilitate capital raising by EGCs – would be best served by clarifying that the exemption will be available as long as the issuer has a "reasonable belief" as to the QIB or IAI status of the investors approached.

The definition of "accredited investor" in Rule 501(a) already has built into it the concept of "reasonable belief'. The Section 105(c) exemption is therefore clearly available in respect of an institutional investor that the issuer reasonably believes to come within one of the enumerated categories of the rule 501(a) definition. While Rule 144A also incorporates a "reasonable belief" standard, this is not part of the definition of QIB, and so Section 105(c) could theoretically be read as applying a different, absolute standard as to the identity of investors approached on the basis that they are QIBs. It is true that most QIBs could also be qualified as IAIs, but we think that the more straightforward approach, and the one that best promotes the policy underlying Section 105(c), would be to apply a "reasonable belief" standard as to the status of any investor approached pursuant to that section.

We note that the "reasonable belief" standard has always applied in exempt transactions effected pursuant to Rule 144A and Regulation D. The Regulation M exceptions for transactions in Rule 144A securities (in Rules 101(b)(10) and 102(b)(7)) incorporate a similar "reasonable belief" standard. This reflects a recognition by the Commission that an absolute standard would diminish the attractiveness and utility of those safe harbor rules and exceptions. Applying an absolute standard as to investors' status in the context of "testing the waters" would have a similar unhelpful effect, which we believe the Commission should avoid.

2. The Commission should provide for a smoother transition out of "emerging growth company" status.

"Emerging growth company" is inherently a transitional status. Once an EGC completes its initial public offering, it must start preparing for full reporting company status over the short to medium term. The greater the uncertainty as to when it will lose EGC status, the less useful EGC status will be to an issuer. We are concerned that for some issuers, the definition of EGC – particularly the $1 billion gross revenues test of Securities Act section 2(a)(19)(A) – may give rise to very substantial uncertainty. A similar concern arises in respect of Section 2(a)(19)(C), particularly if issuances of short-term debt, and of debt that has been refinanced, are counted toward the cumulative $1 billion threshold. (We assume that the Commission will maintain the staff's interpretive position that "debt", in Section 2(a)(19)(C), should be understood to include only debt securities, since a different interpretation would significantly alter the EGC definition, excluding many issuers that rely on short-term bank funding.)

Under Section 2(a)(19), an issuer that crosses the $1 billion gross revenues threshold in a fiscal year apparently loses the benefits of EGC status as of the end of that fiscal year, which would impact many filings made in the next fiscal year, including its Annual Report on Form 10-K for that fiscal year. As a practical matter, however, an issuer will not be able to comply with full reporting company obligations – and in particular, the requirements of Section 404(b) of the Sarbanes–Oxley Act – unless it has begun work on that compliance well before year-end. It would therefore promote the policies underlying Title I to move the compliance deadline later in time, relative to the triggering event, so that EGCs are not forced to undertake precautionary preparations for compliance that may or may not be necessary. The timing of debt issuances is typically within the issuer's control, at least to some extent, so the concern in respect of Section 2(a)(19)(C) is perhaps less acute. But the absence of a transition period would still give rise to non-economic, regulatory-driven incentives to time debt issuances in a certain way, which we think is undesirable in principle. We therefore suggest that Section 404(b) compliance be required only in the Form 10-K for the fiscal year following the fiscal year in which the gross revenues threshold of Section 2(a)(19)(A), or the debt issuance threshold of Section 2(a)(19)(C), is crossed.

3. Foreign private issuers should not be forced to choose between the previously available confidential submission procedures or "EGC" status.

In its Frequently Asked Questions on Title I, in response to Question 9, the staff of the Division of Corporation Finance states that a foreign private issuer ("FPI") may not avail itself of any EGC relief if it chooses to use the previously available confidential submission procedures for FPIs rather than the EGC confidential submission procedures. We think that this is an unfortunate position. The procedures for confidential submissions by FPIs reflect a longstanding policy to facilitate and encourage FPIs' accessing the U.S. capital markets. The Commission may at any time choose to modify those procedures, or harmonize them with confidential submission procedures for EGCs, or even withdraw them. Indeed, the policy on FPI confidential submissions was recently revised, and the FPI offerings that remain eligible will often need confidential treatment in the U.S. that is broader than that permitted for EGCs in order to reconcile conflicting requirements applicable to simultaneous offerings in other markets. But it seems to us inappropriate to condition access to those procedures on an FPI's foreswearing reliance on any of the entirely unrelated JOBS Act relief for EGCs, which is the consequence of the position taken in the response to Question 9. We suggest that the staff reconsider this interpretive position.

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Members of the Committee would be pleased to answer any questions you may have concerning our comments.

Respectfully submitted,

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Chair
Committee on Securities Regulation

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