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Invested in America

April 27, 2012

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

Re: Jumpstart our Business Startups Act (the "JOBS Act")

Dear Ms. Murphy:

The Securities Industry and Financial Markets Association ("SIFMA") appreciates the opportunity to comment in advance of the Securities and Exchange Commission (the "Commission") promulgating rules pursuant to the JOBS Act (the "Rules"). We have limited our initial comments in this letter to Titles I and II of the JOBS Act and intend to submit additional comments on these and other sections of the JOBS Act at a later date.

Emerging Growth Company Status

There are a number of interpretational questions related to the determination of emerging growth company ("EGC") status that we would appreciate the staff of the Commission (the "Staff") clarifying in the Rules or providing guidance on.

Issuer

We believe that the definition of "issuer" for purposes of determining EGC status should be limited to the legal entity that is the issuer of the securities in the proposed or completed offering. For example, the issuance of debt or a registered sale of common equity by a subsidiary should not disqualify an issuer from being an EGC. Notwithstanding the foregoing, for purposes of the revenue prong of the test for EGC status revenues of a predecessor for accounting purposes should also be considered in determining the "issuer's" revenues, since for accounting purposes the revenues of a predecessor are deemed to be the revenues of the issuer. We believe that this interpretation is consistent with one of the fundamental goals of the JOBS Act, to facilitate initial public offerings by private companies. Whether or not a subsidiary of a private company contemplating an initial public offering has previously issued debt or equity should have not affect its ability to enjoy the benefits of the JOBS Act.

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Time of determination of EGC status and ability to requalify

We are supportive of the guidance provided to date by the Staff regarding the time of determination of EGC status. Namely, that for conduct the status should be tested as of the time of such conduct, but for any registration statement it should be determined as of the time of the first filing thereof as provided in Securities Act of 1933 ("Securities Act") Rule 401(a).

There remain other ambiguities, however, regarding the timing of determination of EGC status. In particular, the interplay between qualifying as an emerging growth company "as of the first day of that fiscal year" and loss of that status on the "earliest of . . . ." raises the issue as to whether once an issuer qualifies as an EGC and thereafter loses that status it can ever regain such status. We believe the answer should depend on whether the issuer is a reporting company at the time of determination. An issuer that at the relevant time of determination is not a reporting company should not be disqualified from EGC status by the fact that in the past it had qualified and thereafter ceased to qualify as an EGC. For example, a non-reporting issuer that issued $1 billion of debt ten years ago should not be disqualified from qualifying as an EGC even if immediately prior to such issuance it was an EGC and such issuance caused it to lose EGC status. Similarly, an issuer that was an EGC but thereafter disqualified because it became a large accelerated filer should not be disqualified if it "went private" or otherwise ceased to be a reporting company and thereafter seeks to go public again. A reporting company that ceases to be a reporting company should be able to "reset" its status and not be disqualified from EGC status by (i) revenues of greater than $1 billion in a fiscal year prior to its most recently completed fiscal year, (ii) prior issuances of equity securities in a registered offering (whether they were prior to December 8, 2011 or more than five years before the date of determination) or (iii) prior status as a large accelerated filer. Conversely, once an EGC becomes a reporting company and thereafter ceases to qualify as an EGC it should no longer be eligible to qualify as an EGC for so long as it is a reporting company. We believe this interpretation is consistent with the principal aim of the JOBS Act – namely, to facilitate initial public offerings by private companies. Whether an issuer previously qualified and then ceased to qualify as an EGC should not be relevant to whether it is entitled to the flexibilities of the JOBS Act at the time it pursues an initial public offering. On the other hand, there is no need to provide that a reporting company that ceases to qualify as an EGC, for example by having revenues in excess of $1 billion, can thereafter requalify when it is still a reporting company, for example by having revenues of less that $1 billion in a subsequent year.

$1 billion of debt

Under the JOBS Act an issuer loses EGC status if it has "issued" more than $1 billion of non-convertible debt during the previous three-year period. We believe that including all debt "issued" regardless of whether it was issued in exchange for other debt or still remains outstanding can lead to incongruous results. Only debt that remains outstanding at the time of determination should be taken into account. Including all debt issued would mean that debt issued with traditional registration rights requiring a registered exchange offer would be double counted (the original issuance plus the issuance of

registered notes in exchange therefor pursuant to the exchange offer). Similarly, commercial paper or other debt that is rolled-over or refinanced could be counted multiple times resulting in an issuer losing EGC status even though the actual capital raised might have only been a fraction of $1 billion threshold.

First sale of common equity

The Staff should reconsider its interpretive guidance that "the first sale of common equity securities pursuant to a registration statement" could also include an offering of common equity pursuant to an employee benefit plan registered on Form S-8. We believe that the exclusion in the JOBS Act of issuers that had completed their first sale of common equity securities prior to December 8, 2011 was intended to exclude issuers that had "gone public" prior to December 8, 2011 and therefore did not need the benefits of such provisions as opposed to intending to exclude issuers that may have technically issued some common equity under a registration statement pursuant to compensation plans but for all practical purposes are still private companies.

Grace period

There should be a grace period for loss of EGC status. While certain disqualifying events will be readily ascertainable and within the issuer's control, such as issuing more than $1 billion of debt, other events, such as achieving $1 billion of revenues or qualifying as a large accelerated filer may not be immediately ascertainable or within the issuer's control.

This is especially problematic with respect to long lead time items such a compliance with Section 404(b) of the Sarbanes-Oxley Act of 2002 ("SOX"), with respect to which issuers typically begin preparing over a year in advance. The Staff has recognized the long lead time required for SOX compliance by providing a phase in for newly public companies, effectively not requiring SOX 404(b) compliance until the issuer's second annual report on form 10-K after going public. We believe a similar grace period should be afforded to EGCs. Issuers that lose EGC status should not be required to comply with the requirements of SOX 404(b) until their second annual report on Form 10-K after losing EGC status. To provide otherwise would effectively require many EGCs to undertake the burdensome time and expense of SOX 404(b) compliance whether or not they are entitled to relief under the JOBS Act. If the Staff is unwilling to treat EGCs like new reporting companies for SOX 404(b) purposes, the Staff should, at a minimum, consider providing a determination date for SOX 404(b) purposes as of the end of the issuer's second fiscal quarter, similar to the test for large accelerated filers.

Opt-in

Section 107 of the JOBS Act provides that an EGC electing to comply with financial accounting standards to the same extent that a non-EGC is required to comply with such standards must make such choice "at the time the company is first required to file a registration statement, periodic report, or other report with the Commission under section 13 of the Securities Exchange Act of 1934." While such election is required at such time, we believe an EGC that is a "voluntary filer" should be permitted to make such an

election in any registration statement, periodic report, or other report with the Commission under section 13 of the Securities Exchange Act of 1934.

Financial disclosures and accounting pronouncements

Information required in registration statements

We are supportive of the guidance by the Staff to the effect that no more than two years of selected financial data needs to be included in registration statements relating to an EGC's initial public offering and that other registration statements need not include audited or selected financial data for periods prior to the audited financial information included in the initial public offering registration statement. We are also supportive of the Staff's extension of such principle to other financial statement requirements such as financial statements of acquired companies pursuant to Rule 3-05 or 3-09 of Regulation S-X. The only issue that remains is with respect to registration statements filed before an EGC's IPO registration statement. The flexibility to provide only two years of financial statements and reduced executive compensation disclosure should not be limited to an EGC's IPO registration statement and any subsequent registration statement. Any registration statement filed by an EGC, including, registration statements filed before its IPO registration statement, such as an S-4 for a debt exchange offer or a Form 10 for a spin-off should also be entitled to relief.

New or revised accounting standards

The Staff should confirm that the date for determination of whether a financial accounting standard is "new or revised" for purposes of Section 102 of the JOBS Act is the date of adoption of the JOBS Act. Providing for an issuer specific date, such as the initial filing date of the registration statement for its initial public offering could create countless "versions" of GAAP that would lead to confusing incomparability for investors.

Draft registration statements

Road show definition

We support the Staff's guidance to the effect that activity in reliance on Securities Act Section 5(d) should not be considered a road show for purposes of an issuer's ability to confidentially submit a registration statement as contemplated by Section 106 of the JOBS Act. We agree with the Staff's conclusion that such a reading is necessary to read these provisions in a coherent fashion.

Initial public offering date

An issuer that ceases to be a reporting company should get to "reset the clock" for purposes of the definition of "initial public offering date" just as they should for purposes of the definition of EGC. An issuer that is no longer a reporting company should not be precluded from making a confidential submission of a registration statement as contemplated by Section 106 of the JOBS Act notwithstanding that such submission is technically after its "initial public offering date". We do not believe there is a policy

reason to distinguish between issuers that once were public, regardless of how long ago, and those that are not. The benefits of the IPO on ramp should be available to all private companies regardless of whether they once were a reporting company or not.

Form 10s

The Staff should reconsider its guidance that registration statements on Form 10 will not be eligible for the confidential submission process. Whether a company "goes public" using a registration statement on Form 10 or Form S-1 is a purely a function of whether it happens to be raising capital in the process at the same time or not. The content of the two documents is substantially the same. While one of the aims of the JOBS Act was to facilitate capital creation, that was not its sole aim. The JOBS Act was also designed to make it easier for EGCs to go public and to reduce the burdens on them as public companies. These latter two objectives are unaffected by whether an EGC is raising capital at the time it becomes a public company. Limiting the confidential submission process to registration statements under the Securities Act serves no public policy purpose and will only incentivize issuers to include a concurrent nominal capital raise so that they can file a registration statement on Form S-1 or F-1 as opposed to Form 10.

Comment letters

The JOBS Act requires that the initial confidential submission and all amendments thereto be publicly filed not later than 21 days before the road show. The JOBS Act does not require, and we believe the Staff should confirm that they will not require, that any correspondence related thereto, such as comment letters and responses, be publicly filed. We believe that the congressional intent that such correspondence need not be filed is clear based on the explicit reference in the JOBS Act to the initial submission and each amendment thereto and the absence of any reference to correspondence.

Expanding permissible communications

Reasonable belief

Section 105(c) of the JOBS Act permits EGCs to engage in oral or written communications with potential investors that are qualified institutional buyers ("QIBs") or that are institutions that are accredited investors ("IAIs"). Unlike rule 144A or Regulation D, however, it does not provide for any reasonable belief standard regarding the status of such investors. We believe that the exemption created by Section 105(c) should be based on a reasonable belief standard similar to that in Rule 144A and Rule 506. Any securities sold to such investors will ultimately be sold in a registered offering. Accordingly, there is no policy reason to impose a higher standard that that which would be required if the transaction were not registered. To provide otherwise would expose issuers and underwriters to a potential put right where they reasonably believed that the investor was a QIB or an IAI.

Pre-marketing materials

We support indications made by members of the Staff that materials used in connection with determining investor interest in reliance on Section 105(c) of the JOBS Act will not be required to be filed with the Commission.

Research

NYSE Rule 472

Sections 105(b) and (d) of the JOBS Act only explicitly refer to the Commission or any national securities association and do not explicitly refer to the New York Stock Exchange. The Staff should confirm that NYSE Rule 472 no longer separately applies to broker-dealers because, pursuant to an Commission-approved agreement between FINRA's predecessor and NYSE, FINRA has sole regulatory responsibility for the rule.

Global research settlement

While the Commission and national securities associations are prohibited from adopting or maintaining certain rules or regulations regarding research, many broker dealers are subject to similar restrictions as a result of the Global Research Settlement. Accordingly, in order to create a level playing field, the Commission should issue a rule superseding the portions of the Global Research Settlement that are inconsistent with the spirit of the JOBS Act.

Prohibition on general solicitation and general advertising

Section 4(2) and Regulation S

In Section 201 of the JOBS Act the Commission is directed to revise Rule 506 promulgated under the Securities Act to remove the prohibition on general solicitation and general advertising contained in Rule 502(c) and to revise Rule 144A promulgated under the Securities Act to provide that securities may be offered pursuant thereto by means of general solicitation or general advertising. While the JOBS Act does not explicitly address Section 4(2) or the definition of "directed selling efforts" in Regulation S, we do not believe there is a policy basis for distinguishing between the various exemptions and maintaining a prohibition against general solicitation or general advertising in some but not others.

Reasonable steps versus reasonably believes

The JOBS Act provides that in revising the prohibition on general solicitation and general advertising in Rule 502(c) the new rules should require issuers to take "reasonable steps" to verify that purchasers of the securities are accredited investors, using such methods as determined by the Commission. We do not believe that this should impose a higher burden than the "reasonable belief" standard currently contained in Rule 506. Namely, that an issuer will be viewed as having taken "reasonable steps" if the issuer "reasonably believe" that the offeree is an eligible offeree. In addition, we note that it is generally

accepted that certification by an offeree as to its status as an accredited investor or qualified institutional buyer provides a basis for a reasonable belief and believe that such certification should constitute reasonable steps for purposes of Section 201(a) of the JOBS Act.

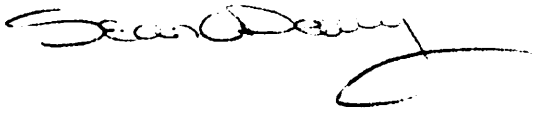
Blue sky

In order to permit all issuers to realize the benefits of the change in general solicitation and general advertising for 144A offerings, the Commission should use its authority under Section 18 of the Securities Act to preempt blue sky laws for offerings pursuant to Rule 144A which would align them with the existing preemption for offerings pursuant to Rule 506. Section 18 of the Securities Act preempts blue sky laws with respect to offerings of "covered securities". Offerings pursuant to Rule 506 are exempt from blue sky requirements because they are pursuant to a Commission rule issued under Section 4(2) of the Securities Act and therefore constitute "covered securities". Since Rule 144A was created under Section 4(1) of the Securities Act, offerings pursuant to Rule 144A do not necessarily constitute offerings of "covered securities" and therefore blue sky requirements, including prohibitions on general solicitation and general advertising, may not be preempted. For example, in offerings of debt securities with subsidiary guarantees, the subsidiary guarantors are typically neither reporting companies nor do they have any listed securities. Accordingly, such subsidiary guarantees are not covered securities and blue sky laws are not preempted with respect to such offering. The Commission has the authority under Section 18 to preempt blue sky laws for Rule 144A offerings by providing that purchasers in Rule 144A offerings are "qualified purchasers" for purposes of the definition of covered security. Failure to do so will limit the ability of certain issuers in offerings pursuant to Rule 144A to realize the benefits of the changes to Rule 144A relating to general solicitation and general advertizing.

We appreciate the opportunity to express our views and commend the Staff for the practical guidance it has issued to date with respect to the JOBS Act.

If you have any questions with respect to the request contained in this letter, or require any further information, please feel free to contact the undersigned, or Richard D. Truesdell, Jr., Davis Polk & Wardwell LLP, at (212) 313-1118 and (212) 450-4674, respectively.

Very truly yours,



Sean Davy
Managing Director

cc: Hon. Mary L Schapiro, Chairman
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Hon. Luis A. Aguilar, Commissioner
Hon. Troy A. Paredes, Commissioner
Hon. Daniel M. Gallagher, Commissioner
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