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March 19, 2014

Via Electronic Mail at rule-comments@sec.gov

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

Re: Proposed Rule Amendments for Small and Additional Issues Exemptions Under Section 3(b) of the Securities Act; Release Nos. 33-9497; 34-71120; 39-2493; File No. S7-11-13

Dear Ms. Murphy:

Thank you for the opportunity to provide comments to the Securities and Exchange Commission (the "Commission") on its proposed rule amendments to Regulation A made pursuant to Section 401 of the JOBS Act (the "Proposals").

The Milken Institute is a nonpartisan, nonprofit, public charity with a mission of improving lives around the world by advancing innovative economic and policy solutions that create jobs, widen access to capital and enhance health. At our Center for Financial Markets, we believe that well functioning financial markets, accessible to all, can expand opportunities to develop human and social capital, magnify productive investment, and dramatically improve global prosperity.

The following guiding principles/observations and recommendations[1] are intended to aid the Commission in implementing Title IV of the Jumpstart Our Business Startups Act (the "JOBS Act"). It is important to note at the outset that we believe the Commission has done an admirable job in drafting its Proposals to create a potentially viable exemption. The new exemption may complement other recently created or amended exemptions and facilitate a well-functioning capital access pipeline for businesses at various stages of development.

I. Guiding Principles/Observations

What follow are guiding principles/observations that we believe are useful in undertaking an analysis of the Proposals. The following take into account: (i) the anticipated significant interest in the exemption from issuers in wide-ranging industries and sectors; (ii) the importance of facilitating secondary trading in Tier 2 offerings (also called Reg A+); and (iii) the merit to promoting a viable Tier 1 exemption (or what was previously called Reg A) for small offerings.

- ***Issuers from a broad range of industries and sectors will consider using this new exemption*.** Many small companies are looking to raise capital in order to grow, but are not yet mature enough or ready for today's registered IPO market. The ability to raise up to $50 million in a twelve-month period through the sale to the public of unrestricted securities that are not subject to state registration will

[1] Guiding principles/observations and recommendations were discussed at a recent Milken Institute Center for Financial Markets roundtable discussion held in partnership with the Georgetown University Law Center. We thank our diverse group of participants for providing valuable feedback and suggestions, and for contributing to many of the ideas presented here. A number of our participants are noted as additional signatories at the conclusion of this letter.

prove compelling to many issuers. Industries and sectors primed for such a capital-access mechanism include biotech/life sciences, community and regional banks, real estate, technology, local brick-and-mortar businesses (especially with respect to Tier 1), and business development companies ("BDCs"). If successful, the new exemption could provide issuers with an effective bridge from private to public markets.

- ***The ultimate success of Tier 2 offerings hinges on the development of robust secondary markets.*** The primary benefit of a Tier 2 offering compared to a Reg D private offering is the fact that these securities are unrestricted and as a result are able to attract a large number of investors – both institutional and retail. These investors will only contribute significant pools of capital to such offerings, however, if there is real liquidity generated through secondary trading. As envisioned by the Proposals, Tier 2 offerings are effectively mini-public offerings with a robust qualification process and ongoing reporting regime. The public nature of these offerings should accordingly be embraced by simplifying the process to list on an exchange, and by eliminating any artificial limits that intend to maintain a 'private market' aspect to Tier 2 offerings (such as the 500 non-accredited investor cap under section 12(g)). As discussed below, these efforts will facilitate secondary trading of Tier 2 offerings and increase the attractiveness of the exemption.

- ***A right-sized Tier 1 exemption is an important capital-raising tool for small businesses.*** The audit and ongoing reporting requirements of a Tier 2 offering will likely preclude the participation of offerings falling under a certain size. At the same time, Regulation Crowdfunding only permits an issuer to raise up to $1 million in a twelve-month period. Accordingly, a Tier 1 offering of up to $5 million could bridge the gap between a crowd-raise and Tier 2, but only if costs to issuers are decreased by preempting state registration requirements or creating a streamlined, efficient, and predictable multi-state review process.

II. Comments on Proposed Rules

To the extent that the Commission is inclined to act on the rules as proposed, and guided by the above principles/observations, please find below specific comments on the Commission's release:

A. *Qualified Purchaser*

The Proposals define a 'qualified purchaser' as any purchaser of a Tier 2 security. Under Title IV of the JOBS Act, this definition has the effect of preempting state registration requirements – an outcome that was cited at the Milken Institute's recent roundtable on the Proposals as perhaps the most important factor contributing to the viability of this new exemption.

Such preemption is appropriate since a Tier 2 offering includes important investor protections. First, an offering is subject to a robust SEC review and qualification process. And second, a Tier 2 offering requires substantial disclosures akin to a registered offering, and requires an issuer to engage in ongoing reporting. Based on these information disclosures, in a well-functioning market, third-party analysts may be incentivized to contribute additional company research that market participants can utilize in making investment decisions. Investors, accordingly, will have access to sufficient information absent state registration.

B. *Tier 1: State Review*

The Proposals do not preempt state registration requirements for Tier 1 offerings. The proposing release notes that the states, under the auspices of NASAA, are working on a uniform multi-state filing process aimed at streamlining state review. Under NASAA's proposal, one lead reviewer from a disclosure-review state and one lead reviewer from a merit-review state would be responsible for reviewing a Tier 1 filing and communicating on behalf of peer states with the issuer.

While we appreciate NASAA's effort to enhance the attractiveness of Tier 1, we question the benefit of state review. We are also concerned that maintaining state review for offerings in the range of $1 - $5 million (assuming that an issuer uses Title III crowd-investing for a raise of less than $1 million) will put small companies seeking that capital at a disadvantage. Small issuers seeking less than $1 million under Title III or larger issuer seeking up to $50 million under Tier 2 would be exempt from state registration, but not those seeking $1 - $5 million – this could inadvertently create a gap or disruption in the capital access pipeline. We would therefore suggest the following:

- The Commission should consider preempting state registration requirements, but requiring an issuer to include audited financial statements in the initial filing. This approach would be consistent with blue sky preemption under Title III of the JOBS Act and Tier 2 under Title IV. To the extent there are concerns that offerings over $1 million require greater protection, requiring audited financials along with the SEC review and qualification process should mitigate those concerns.

- To the extent the Commission is inclined to maintain the state registration requirement, it should carefully monitor final implementation of NASAA's multi-state review mechanism and marketplace developments. The hope is that the competitive pressure of alternative exemptions that already preempt blue sky laws will drive the states to create a viable Tier 1 regulatory structure for today's marketplace. If, however, the end result continues to deter issuers from Tier 1 offerings in the $1 - $5 million range, then the Commission should carefully reconsider state law preemption.

C. *Investment Caps*

The Proposals provide that an investor may not invest greater than 10% of his or her income or net worth (not including a primary residence) in a Tier 2 offering. This restriction is inconsistent with norms of U.S. securities law, which have historically relied on fair and accurate disclosure as the best way to protect investors. The importation of investment caps based on income or wealth may seem to follow from congressionally imposed investment limits applicable to crowdfunded offerings under Title III of the JOBS Act and existing accredited investor wealth/income limits applicable in private offerings under Reg D. Title IV is distinguishable, however, from both Title III and Reg D private offerings in that it requires comprehensive SEC review and qualification of an offering – elements that provide significant investor protection. Moreover, the Reg D accredited investor standards are conceptually very different from the investment caps in crowdfunded offerings and those proposed for Tier 2. The accredited investor standards do not impose limits on the amount an investor can invest or seek to regulate investment risk once the investor is presumed able to fend for himself or herself because of meeting the wealth/income requirements.

Notwithstanding the above, we appreciate that the Commission is exercising caution in creating the Tier 2 exemption and is seeking to limit investor risk. If the Commission is inclined to pursue this approach in the final rules, we suggest the following:

- First, the Commission should review the development of the Tier 2 marketplace after a year and determine whether the investor caps remain necessary. The concept of investor caps is paternalistic and departs from traditional federal regulatory practice; such an approach should be withdrawn absent compelling evidence demonstrating the need.

- Second, the Commission should clarify that the investor cap applies only to natural persons, and not to institutional investors. We see no reason to limit institutional investor participation in this market.

- Finally, the Commission should exempt investors who purchase Tier 2 securities on an exchange from the investment cap. It would be an even more egregious departure from traditional federal securities regulation to limit investor participation on an exchange. Moreover, in practice, such rules could create a significant conflict with Canadian securities law in that securities that were offered in a Tier 2 offering could be listed on the TSX Venture Exchange, for example, which does not impose an investment cap on investors.

D. *Eligible Issuers*

The Proposals currently exclude business development companies (BDCs) and non-Canadian foreign issuers from those issuers eligible to execute a Tier 1 or Tier 2 raise. While it may be prudent to maintain the exclusion of non-Canadian foreign issuers until the Tier 2 marketplace has had time to develop and regulators are prepared to address international cooperation issues, we believe the Commission should expand the definition of "eligible issuer" to include BDCs. BDCs provide key lending support to small and mid-sized American businesses, and will likely assume an even larger role as banks – in response to a shifting regulatory landscape – sell assets and alter the composition of their lending portfolios. Moreover, if able to raise public funds at lower cost, more BDCs may choose to employ a venture capital equity model, thereby increasing overall investment in high-growth startup companies. Finally, because we see little reason to distinguish between REIT and BDC models when it comes to Tier 2 eligibility, the Commission should treat both similarly by extending eligibility to BDCs. In extending eligibility to BDCs, the Commission should consider the following:

- Given the importance of understanding BDC holdings at a given point in time, the Commission should consider requiring quarterly financial disclosures from BDCs to enhance transparency and provide the market with critical investment information. This will permit market participants and equity analysts to appropriately assess the merits of a particular BDC investment with timely information.

- At the very least, the Commission should extend eligible issuers to include SBIC-licensed BDCs that provide capital to smaller American businesses. SBIC-licensed BDCs undergo a substantial review process before receiving such a license, and are focused on providing investment to a sector that has traditionally struggled to access capital. It is sound policy to enhance the ability of these BDCs to raise deployable funds, and retail investors will benefit from an increased array of BDC options that permit a diversified approach to investing in small businesses.

E. *Secondary Sales*

The Proposals replicate the current Tier 1 ceiling placed on sales by existing security holders by setting the limit at $1.5 million for a Tier 1 raise and $15 million for a Tier 2 raise (effectively a 30% rule). The proposed rules go on to allow sales by affiliates even if the company has not had net income from continuing operations in at least one of the previous two years. Given the fact that many of the companies likely to utilize Tier 2 may run net losses for a number of years, including due to high R&D costs, we believe it is prudent to permit affiliate sales absent net income.

We are more circumspect, however, on the limits provided on sales by existing security holders. We appreciate that the 30% rule may be based on general market practice that looks skeptically at offerings where more than 30% of the securities are offered for sale by existing security holders. That said, we believe it is arbitrary for the Commission to establish a hard rule at 30% since situations may arise where such sales by existing security holders are appropriate and help provide liquidity in the stock. Indeed, the prospect of increased liquidity in this marketplace is a central factor that must be embraced in order to attract investors and make certain that high quality investment banks will take an active part in this market. The Commission should accordingly consider the following:

- To the extent the Commission is inclined to retain the cap on existing security holder sales, we suggest that similar to the investor cap, the Commission should review the limitation within a year of implementing Tier 2. Imposing this arbitrary limit may have unintended effects on the market, and may limit interest in Tier 2 due to concerns by investors and investment banks. Unless a compelling reason is identified within the first year of implementation of Tier 2, we recommend eliminating the cap and allowing the market to determine appropriate thresholds of existing security holder sales.

- The Commission should also consider removing non-affiliate existing security holder sales from the 30% proposed limit, because concerns over investor information asymmetries are significantly reduced when dealing with a non-affiliated security holder. More specifically, we believe the liquidity benefits derived from excluding sales by non-affiliates from the proposed selling security holder limit outweigh the relatively small risk that new investors will be harmed as a result of information asymmetries with existing non-affiliate security holders. There is little reason to assume that a non-affiliate will have enhanced access to information that would put a new investor at a disadvantage.

F. *Facilitating Secondary Trading: Rule 144; Rule 15c2-11*

Rule 144 allows for public resale of restricted securities so long as the offering satisfies a number of criteria, including the need to provide "current information." Separately, Rule 15c2-11(g) permits a broker to provide quotations for an unlisted security only if the broker has and makes available on request certain information, including "reasonably current" financial information as described in the rule. We believe that compliance with Tier 2 reporting obligations should be deemed to furnish adequate "current information" under Rule 144(c)(2) and "reasonably current" financial information under Rule 15c2-11(g). This will increase secondary trading in related securities.

Rule 144(c)(2) defines "current information" for issuers that do not file reports under Section 13(a) or 15(d) of the Securities Exchange Act by referring to the informational standards of Rule 15c2-11. As a result, compliance with the Tier 2 reporting requirements would not result in there being adequate current information under Rule 144(c)(2) except during the three months following the filing of the issuer's annual report and the filing of the issuer's semiannual report. This would create the strange result that for part of each year, affiliates could not rely on the safe harbor provided by Rule 144 in making transfers of the securities of Tier 2 issuers.

We believe that the Tier 2 reporting requirements provide sufficiently up-to-date information to satisfy the current information requirements of Rule 144(c)(2). Therefore, compliance with the Tier 2 reporting requirements should be deemed to provide "current information" for purposes of Rule

144A(d)(4)(ii)(A), so that affiliates may also resell to qualified institutional buyers in reliance on Rule 144A.

Moreover, under Rule 15c2-11, a broker may generally initiate quotations for an unlisted security only if the broker has and makes available on request certain information, including "reasonably current" financial information as described in Rule 15c2-11(g).

We support amending Rule 15c2-11(g) to provide that an issuer that is current in its Tier 2 reporting obligations under Regulation A would be deemed to have "reasonably current" financial information, even if its most current balance sheet is as of a date up to nine months old and it had not provided other updated information.

G. *Treatment Under Section 12(g)*

The Proposals do not exempt a Tier 1 or Tier 2 offering from section 12(g) Exchange Act reporting requirements that are triggered once a company has more than 2,000 shareholders of record, or 500 record holders if they are non-accredited. This proposed rule confuses the public (versus private) nature of these offerings, and will likely deter issuers from utilizing this new mechanism, as well as hinder secondary trading critical to bringing liquidity to the marketplace.

As a threshold matter, Tier 1 and Tier 2 offerings are public offerings with robust disclosure, review, and qualification processes. And with Tier 2 offerings, significant ongoing disclosure is required. The public nature of these offerings and the information requirements distinguish them from Reg D offerings; Tier 2 offerings should be embraced as properly-scaled IPOs for smaller issuers and not treated like private offerings.

The fact that Reg D offerings are subject to a section 12(g) trigger makes sense since attaining a critical mass of investors shifts the company from being "private" to taking on an increasingly public nature. Once this shift occurs, it is prudent to require increased disclosure. But, this is precisely what Tier 2 already does by way of its disclosure and ongoing reporting regime. If the public disclosure and ongoing reporting is sufficient for 499 retail investors, we see little reason why its sufficiency changes simply by virtue of the fact that more investors are participating.

To subject Tier 2 to section 12(g) triggers will likely deter issuers from utilizing the exemption, and will hinder secondary trading. Small company issuers will be attracted to Tier 2 due to its right-sizing of disclosures and reporting requirements. If, however, a successful offering results in robust secondary trading (which should be viewed as a positive outcome), the issuer may inadvertently trip section 12(g) and become subject to the expanded Exchange Act reporting regime. For some issuers, this may be a fine result. However, other issuers may seek to complete a Tier 2 offering and remain exempt from traditional Exchange Act reporting requirements. To prevent triggering Exchange Act thresholds, issuers may seek to restrict re-sale of securities in the offering agreements, which will serve only to decrease the attractiveness of the offering and limit secondary trading. This, in turn, impairs the promise of liquidity – one of the key features that renders Tier 2 a viable option for issuers.

Based on the foregoing, we recommend that the Commission exclude Tier 2 offerings from the automatic reporting triggers in section 12(g). We believe that the Commission would be able to do this pursuant to this section, as it has, for example, exempted option holders. To the extent that there may be a question of the Commission's statutory authority to do this under section 12(g), the Commission could achieve the same result by scaling the smaller reporting company reporting rules for section 12 companies to provide that compliance with Tier 2 reporting would be deemed sufficient to satisfy their Exchange Act reporting obligations.

At the very least, in order to promote Tier 2 as a right-sized option for smaller issuers, the Commission should exempt Emerging Growth Companies[2] from the section 12(g) Exchange Act reporting triggers until the company reaches a certain level of revenue or market capitalization.

H. *Confidential Treatment of Submissions*

The Proposals envision that Tier 1 and Tier 2 filings with the SEC may be done confidentially, but note that such filings may still be subject to FOIA requests unless a filer requests treatment under the Commission's Rule 83. Title I of the JOBS statutorily exempts confidential filings from FOIA disclosure; this provision has been cited by issuers as a key factor driving the popularity of the Title I IPO on-ramp. We see little reason not to replicate the Title I confidential filing model in its entirety for Tier 2. If the Commission can exclude Tier 2 offerings from potential FOIA disclosure without having to require filing under Rule 83, we believe that efficiency and simplicity dictate such an outcome. To the extent the Commission believes it lacks statutory authority to provide such an FOIA exemption, it should seek Congressional authority to do so.

I. *Disclosures and Qualification*

We generally support the ongoing reporting requirements proposed by the Commission, with some modifications particularly for smaller Tier 2 issuers.

We agree with the Commission that an adequate flow of information through ongoing reporting obligations will benefit investors and foster the development of secondary trading markets for securities of Tier 2 issuers, and believe that imposing ongoing reporting obligations on Tier 1 issuers would be unduly burdensome. That said, some reporting obligations for Tier 2 issuers should be modified or scaled, so as not to impose too great a burden on smaller issuers in Tier 2 offerings.

Current reports pose a particular challenge to smaller companies, as they may lack the legal and compliance personnel who in larger companies would be able to prepare the required report within the four business day timeframe proposed by the Commission. We would recommend extending the time period for reporting from four business days to fifteen calendar days for most Tier 2 issuers, and eliminating the requirement to file current reports for the smallest issuers, based on a measure such as asset size or capitalization.

Additionally, we believe the Proposals' requirement of biannual ongoing disclosures for Tier 2 offerings is an appropriate regulatory baseline. That said, we anticipate that market best practices will result in many issuers providing investors with quarterly updates – a convention that will assist equity analysts and provide market participants with greater access to information.

J. *Exchange Listings*

The Proposals would require an issuer to file a Form 10 in order to list its securities on a national securities exchange. We believe that it would be more appropriate to require the filing of a "super" Form 8-A if a Tier 2 issuer opted to list on a national securities exchange contemporaneously with

[2] An Emerging Growth Company is an issuer reporting less than $1 billion in total annual gross revenues in the most recently completed fiscal year.

completing a Tier 2 offering. This could increase the number of small companies choosing to "go public" and list on an exchange by decreasing the overall costs of their initial listing.

Given the substantial initial filing involved in a Tier 2 offering, many of the required disclosures in Form 10 would be duplicative and costly. A "super" Form 8-A that includes any additional required disclosure items, coupled with a Tier 2 filing, would provide investors with complete information on the exchange-listing, and encourage small company participation.

We again thank you for the opportunity to present these recommendations as the Commission continues its important work on implementing the JOBS Act. We appreciate the Commission's efforts to date, and hope that this letter is helpful. Please let us know if we can provide any additional information, and we would be honored to have the opportunity to continue this discussion in person.

Sincerely,

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