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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 V: Private Company Flexibility and Growth*

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 offer suggestions relating to Title V 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.

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Section 501 of the JOBS Act amends section 12(g)(1)(A) of the Securities Exchange Act of 1934, to increase the number of record holders triggering the registration requirement to "(i) 2,000 persons, or (ii) 500 persons who are not accredited investors (as such term is defined by the Commission)." Our comments focus primarily on the use of the "accredited investor" concept in this context.

First, we suggest that the Commission confirm that "accredited investor", for this purpose, has the meaning set forth in Rule 501(a) under the Securities Act. We think that is the Congressional intent underlying Section 501, and it would be quite cumbersome and inefficient to use a different definition in the Section 12(g) context.

Second, we suggest that the Commission address, through rulemaking, the question of when a determination must be made whether a given holder is an accredited investor. We are concerned that issuers may have limited or no practical ability to determine, at any particular point in time, whether shareholders qualify as "accredited investors". "Accredited investor" status often turns on information peculiarly within the control of the investor, and issuers typically have no legal right to compel shareholders to confirm their status. If the Section 12(g) trigger for registration in effect requires continuous monitoring of holders' status as "accredited investors", the utility of Section 501's carveout of accredited investors will be substantially diminished.

There are some exceptions to the general rule that issuers have limited ability to determine the status of their holders. In the context of new investment, issuers can obtain a basis for determining "accredited investor" status, because they can condition the investment

opportunity on the investors' providing such confirmations. Resale restrictions in connection with new investment may require confirmations in respect of subsequent transferees, which would similarly afford the issuer a basis for determining "accredited investor" status. We therefore suggest that, for purposes of JOBS Act Section 501, an issuer should be expressly permitted to rely on any determination of "accredited investor" status made in connection with the issuer's most recent sale of securities to the relevant investor, or the most recent transfer to the investor in connection with which the issuer actually determined that the investor was "accredited." We see this as a practical accommodation that would further the purpose underlying the JOBS Act provision, and do not believe there is any significant risk that issuers could somehow use such a provision to "game" the new Section 12(g) triggers. While some holders will, inevitably, lose "accredited investor" status between the time of investment or transfer and any later point in time when the issuer is making a determination under Section 501, we would expect such shifts to be gradual and generally not very significant. The consequent risk of over-counting "accredited investors" is, in our view, substantially outweighed by the practical problem otherwise presented for issuers.

More broadly, when fashioning rules implementing Section 501, the Commission should try to build in flexibility that would foster ongoing development of market practices. We understand that various market participants have under consideration and development possible "closed system" platforms and trading venues – for example, platforms that limit access to pre-qualified "accredited investors," or to a particular issuer's employees. It may be that such platforms would afford issuers a reasonable basis to determine that all participants can be treated as "accredited investors" for purposes of Section 501, or are excludable as employees pursuant to Exchange Act Section 12(g)(5)(A), as amended by Section 502 of the JOBS Act. Any rules adopted in this area should be open to these possibilities.

We also recommend that the Commission clarify that holders of securities issued in transactions covered by Rule 701 under the Securities Act would be treated as "persons who receive the securities pursuant to an employee compensation plan" within the meaning of Exchange Act Section 12(g)(5)(A), as amended by Section 502 of the JOBS Act. Linking the scope of Rule 701 and amended Section 12(g)(5)(A) makes sense, in light of the apparent purpose of the latter provision, and will avoid needless complexity.

Finally, we suggest that the Commission, as part of its rulemaking under Exchange Act Section 12(g), consider amending Rule 12g3-2(a) to bring the 300 U.S. resident holder criterion more in line with the new 2,000 holder standard of Section 501. The Rule 12g3-2(a) standard of 300 holders represented, when adopted, 60% of the then-applicable 500-holder trigger for registration under Exchange Act Section 12(g). On this approach, the change effected by JOBS Act Section 501 would suggest that the Rule 12g3-2(a) trigger ought to be increased to 1200 holders.

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

Respectfully submitted,

Robert E. Buckholz
Chair
Committee on Securities Regulation

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