June 25, 2022

The Honorable Patrick J. Toomey, Ranking Member
Committee on Banking, Housing & Urban Affairs
United States Senate
248 Russell Senate Office Building
Washington, D.C. 20510

BY EMAIL (submissions@banking.senate.gov)

Legislation to Accelerate Economic Growth and Spur Job Creation

Dear Ranking Member Toomey:

We applaud the ongoing bipartisan efforts to increase economic growth and job creation by facilitating capital formation. To that end, we are submitting our proposals for consideration by your Committee.

As leaders of the IPO Task Force, whose recommendations in the Report to the U.S. Department of the Treasury formed the basis of Title I of the Jumpstart Our Business Startups (JOBS) Act of 2012, we are pleased to offer our perspective on current reform proposals. We are submitting these proposals in our individual capacity and not as representatives of our respective organizations.

Simplicity contributed to the success of the IPO Task Force recommendations. Today, we recommend three simple changes based on our experience and the last decade of success. Congress should (1) extend the IPO on-ramp by updating the emerging growth company (EGC) definition; (2) expand the category of well-known seasoned issuers (WKSIs) to apply to all short-form eligible registrants; and (3) adopt specific clarifications to eliminate certain inefficiencies remaining after the JOBS Act reforms. The accompanying Appendix describes these recommendations in detail.

We would be pleased to discuss our proposals or answer any questions that the Committee or your staff may have.

Very truly yours,

/s/ Kate Mitchell
Kate Mitchell
Partner, Scale Venture Partners

/s/ Joel H. Trotter
Joel H. Trotter
Partner, Latham & Watkins LLP

Appendix

PROPOSALS TO INCREASE ECONOMIC GROWTH AND JOB CREATION BY FACILITATING CAPITAL FORMATION

1. *Extend the IPO on-ramp based on a decade of successful experience.*

   Congress should extend the IPO on-ramp by updating the EGC definition to (i) increase the $1.07 billion revenue test to $2.0 billion; (ii) extend EGC status for a minimum of five years post-IPO; (iii) secure this five-year minimum period for any company that is an EGC when it begins the IPO review process but loses EGC status before completing IPO; (iv) eliminate disqualification based on large accelerated filer status; and (v) increase the current maximum five-year IPO on-ramp period to 10 years.

   The JOBS Act's IPO on-ramp succeeded by providing accommodations that streamlined the IPO process and promoted efficiency without compromising investor protection. The IPO on-ramp accommodations are limited, measured and based on analogous pre-existing principles or practices in federal securities regulation. The proposed enhancements to the IPO on-ramp represent a balanced approach to promote IPO activity without compromising investor protections, including all of the disclosure and liability requirements that continue to remain in place for all companies.

   As updated, EGC would mean an issuer that had total annual gross revenues of less than $2.0 billion before beginning the IPO registration process until the last day of the fiscal year in which the IPO's fifth anniversary occurs. Thereafter, EGC status will continue until the end of the earliest fiscal year in which (i) revenues exceed $2.0 billion; (ii) the IPO's tenth anniversary occurs; or (iii) the issuer has more than $2.0 billion in non-convertible debt securities outstanding as of year-end.

2. *Expand WKSI eligibility based on decades of successful experience.*

   Congress should expand availability of WKSI status. Currently, WKSI status is unduly limited. As updated, the WKSI definition would apply to companies with a non-affiliate market capitalization, or public float, of $75 million, rather than the public float threshold of $700 million currently required for WKSI status.

   The last two decades of successful experience have shown that the WKSI category merits expansion so that it overlaps with eligibility for short-form registration. First, since the introduction of the WKSI definition nearly two decades ago, the automatic shelf registration process and other benefits available to WKSI issuers have significantly improved capital formation and market efficiency without compromising investor protection. When initially proposing the WKSI category, the Securities and Exchange Commission (SEC) acknowledged that a much lower float test for WKSI status could be appropriate. The last two decades of experience have demonstrated that to be the case. Second, for the last three decades, companies with a public float of $75 million have been able to engage in short-form registration of securities using the integrated disclosure system based on those companies'

periodic reporting. When proposing the short-form registration process, the SEC identified the $75 million public float threshold as the level at which a company's securities efficiently reflect available information about the company.

As a result, WKSI status should now be extended to all companies that otherwise satisfy the WKSI definition and have a public float of $75 million, rather than the current, arbitrarily high requirement of $700 million.

3. *Adopt clarifications to eliminate needless inefficiencies remaining after the JOBS Act reforms.*

(a) *Streamline and clarify the EGC public filing condition to require public filing 10 days before the effective date of the IPO registration statement.*

Congress should update the public filing condition for EGC IPO registration statements to require public filing at least 10 days before effectiveness of the registration statement. The current requirement for an EGC to publicly file its confidential IPO registration statement at least 15 days before conducting a road show is inefficient and subject to uncertain interpretations. The update we propose would enhance efficiency, promote certainty, and builds on the SEC's recognition that modern "communications technology, including the Internet, provides a powerful, versatile, and cost-effective medium to communicate quickly and broadly."

An EGC is permitted to begin SEC registration on a confidential basis if the EGC publicly files its previously confidential registration statement at least 15 days before conducting a road show. This provision was intended to facilitate public review of the registration statement between the first public filing and the IPO pricing. However, experience has shown that 15 days is more than ample time for that purpose. Moreover, the application of the current requirement can sometimes be unclear based on uncertainty surrounding the definition of a road show. This proposed change would enhance efficiency by reducing the minimum time before pricing and provide greater predictability by referring to the date of effectiveness, which is more precise than conducting a road show, which is sometimes unclear. The updated public filing condition would require that an EGC must publicly file its registration statement, the nonpublic draft registration statement and all draft amendments at least 10 days before the effective date of the registration statement.

(b) *Update the confidential review process for draft registration statements to conform to the updated EGC process.*

Congress should update the process for voluntary confidential submission of non-EGC registration statements to conform to the updated requirement for EGCs. The updated confidential registration process for all IPOs, initial listings, and follow-on offerings would conform to the updated EGC process described above. This change would facilitate capital formation and conform practice for non-EGCs to maintain consistency in the registration process if the changes to the EGC process are made.

As updated, the confidential registration process would require that any issuer must publicly file its registration statement, the nonpublic draft registration statement and all draft amendments for (i) an IPO or an initial listing, at least 10 days before the effective date of the registration statement; and (ii) a follow-on offering (before the end of the twelfth month after the effective date of its IPO), at least 48 hours before the effective date of the registration statement.

(c) Update the on-ramp to include spin-off transactions.

Congress should update the EGC financial statement accommodation to clarify that the same accommodation applies to both IPOs and spin-off transactions. This would correct the aberrational effect on a spin-off of an EGC, which currently does not benefit from the two-year financial statement accommodation now applicable only to IPO registration.

The EGC financial statement requirements should be comparable for both an IPO and a spin-off. Equalizing the requirements in both scenarios will promote efficiency and capital formation without compromising investor protection. As updated, the EGC financial statement requirements would clarify that an EGC may present two years, rather than three years, of audited financial statements in either an IPO or a spin-off.

(d) Clarify EGC financial statement obligations to prevent aberrational results.

Congress should update the EGC financial statement accommodation to clarify that an EGC need not provide financial statements for a period earlier than the two years of audited financial statements required in its IPO registration statement. In some instances, misinterpretations have arisen concerning the accommodation allowing an EGC to provide only two years of audited financial statements in its IPO registration statement, and not for any earlier period. This has arisen occasionally, for example, in the case of acquired company financial statements and for follow-on offerings involving an EGC that lost its EGC status during IPO registration.

This change would increase efficiency by ensuring that EGCs can consistently rely on the scaled disclosure accommodation by eliminating aberrational results that have sometimes required burdensome and unnecessary financial statement obligations. Absent this clarification, in some scenarios EGC issuers have needed to provide audited financial statements for financial periods preceding the earliest period in their IPO registration statements. The proposed update would clearly establish that an EGC need not, under any circumstances, provide financial statements for any period preceding the earliest period required to be presented in the IPO registration statement.

The updated requirements would provide that an EGC, as well as any issuer that went public using EGC disclosure accommodations, is not required to provide target company financial statements or pro forma financial information for any period before the earliest period that the EGC presents in its IPO registration statement, including (i) for significant acquisitions, target company financial statements for any earlier period; and (ii) for follow-on offerings,

financial statements for any earlier period by an issuer that went public using EGC disclosure accommodations.

(e) Remove aberrations in the market capitalization test for target company financial statements.

Congress should clarify that a company's market capitalization, for purposes of testing the significance of an acquisition or disposition, may include the value of all shares. When using a market capitalization test to determine whether an acquisition is significant enough to require target company financial statements, current requirements fail to account for the acquirer's full market capitalization by excluding from the calculation some classes of the acquirer's stock.

The significance test is designed to use market capitalization, or aggregate worldwide market value, to ensure that the evaluation of significance for acquisitions and dispositions compares measures that are consistent with fair value. Consistent with that objective, the test should include the market value of preferred stock (whether traded or convertible into common stock) and non-traded common shares that are exchangeable into traded common shares. The proposed change would eliminate aberrations that result from contrary interpretations.

As updated, the new requirements would clarify that a company testing the significance of an acquisition or disposition may include in its market capitalization the value of all of the acquirer's outstanding classes of stock, including preferred stock and non-traded common shares that are convertible into or exchangeable for traded common shares (based on trading value, conversion value or exchange value, as applicable).

(f) For any private company transitioning to public company status, permit the auditor to comply with SEC and PCAOB independence rules for the most recent year and AICPA or home-country independence for prior periods.

Congress should update the SEC and PCAOB auditor independence requirements to provide that the auditor of a private company that is transitioning to public company status (via IPO, spin-off or otherwise) must comply with SEC and PCAOB independence rules for the latest fiscal year, as long as the auditor is independent under AICPA or home-country standards for earlier periods. Requiring a private company's auditor to comply with SEC and PCAOB auditor independence rules for all prior years, rather than only the most recent year, can unnecessarily require hiring a different auditor to re-audit earlier periods even though the original auditor was actually independent under then-applicable standards.

As updated, this would allow the auditor of a private company that is transitioning to public company status (via IPO, spin-off or otherwise) to comply with SEC and PCAOB independence rules for the latest fiscal year, as long as the auditor is independent under AICPA or home-country standards for earlier periods. In scenarios where the auditor is independent under AICPA or home-country standards for earlier periods but the SEC and PCAOB independence rules imposes additional requirements, the auditor should be required to comply with SEC and PCAOB independence requirements only for the most recent year. The more demanding SEC and PCAOB standards should not apply to earlier periods where

the auditor has complied with the relevant auditor independence rules that applied to the private company. Under this balanced approach, the auditor must still satisfy SEC/PCAOB independence requirements for the most recent audited year while AICPA or home-country independence standards would suffice for all earlier years.

(g) *Expand the protection for research reports to cover all securities of all issuers.*

Congress should update the provision for research reports about EGC common equity to cover all securities of an EGC or any other issuer. This would expand the availability of the provision designed to promote publication of research reports about EGCs by deeming the reports a non-offer.

The current provision offers limited protection of research reports in the context of an EGC's proposed offering of its common equity securities. After a decade of marketplace experience, the provision governing EGC research reports has proved wholly successful. Research analysts remain subject to robust regulation, including SEC Regulation AC certification and conflict disclosure requirements, FINRA conduct and communications rules and antifraud requirements. Based on this success, the research report provision warrants expansion. As expanded, the research report provision in Section 2(a)(3) of the Securities Act would cover research reports about any issuer that undertakes a proposed public offering of securities.

(h) *Exclude QIBs and institutional accredited investors from the record holder count for mandatory Exchange Act registration.*

Congress should update the mandatory Exchange Act registration threshold to exclude qualified institutional buyers (QIBs) and institutional accredited investors. The update in the JOBS Act to increase the record holder threshold should not include large institutional investors, such as QIBs or institutional accredited investors.

Section 12(g) of the Exchange Act currently requires every issuer with more than $10 million in total assets and a class of equity security held of record by 2,000 or more persons (or 500 or more unaccredited investors) to register that class of equity security under the Exchange Act. In the decade since the JOBS Act raised this threshold, experience has shown that institutional investors can be excluded from the record holder count. As updated, Section 12(g) would provide that the registration threshold of 2,000 or more holders of record shall exclude QIBs and institutional accredited investors.