

United States House of
Representatives
Committee on Financial
Services
2129 Rayburn House Office
Building
Washington, D.C. 20515

July 22, 2013

The Honorable Mary Jo White
Chairman
U.S. Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549

Dear Chairman White:

We write to seek information regarding the implementation of Title II of the JOBS Act (P.L. 112-106) by the Securities and Exchange Commission and to understand the basis for the expansion of regulation for 506 offerings as proposed within parts of Release No. 33-9416 and titled *Amendments to Regulation D, Form D and Rule 156 under the Securities Act* ("Proposed Rules"). Although we commend you on completing the task of implementing Title II, we are disappointed that it has taken the Commission more than one year since the implementation deadline to do so.

As you know, Section 201 of the JOBS Act promotes job creation and economic growth by allowing private issuers to publicly market securities to raise capital from accredited investors under exemptions to the registration requirements of the Securities Act of 1933. Specifically, Regulation D 506(c) offerings, which benefit from the lifting of the ban on general solicitation, provide opportunities to raise capital from investors that can afford to take risk, can afford advisors and, under the vastly expanded information technology of today as compared to 1933, have an improved ability to investigate investment opportunities and investment managers.

Although we support the Commission's final rule implementing the lifting of the ban on general solicitation, the addition of the Proposed Rules, which require Regulation D 506(c) issuers to comply with new disclosure requirements, surmount additional regulatory hurdles and shoulder increased liabilities, create significant concerns.

The primary concern arising from the Proposed Rules results from an apparent error that the Commission made when drafting this proposal. Proposed Rule 503 requires a fifteen day waiting period, after filing Form D, before allowing advertisements – this restriction appears to violate the law by imposing a fifteen day ban on general solicitation. Title II of the JOBS Act lifted the ban on general solicitation for Regulation D 506 offerings to accredited investors. As a result, the Form D pre-filing requirement effectively violates Title II of the JOBS Act.

This ban on solicitation imposed via a pre-filing requirement would extend substantially longer than fifteen days, particularly for smaller businesses that have reduced access or experience with complex legal matters. If a business decides to proceed with advertising a 506 offering, it must first file an expanded Form D, which will require hiring qualified counsel and require considerable time to complete. Upon submission of a completed Form D, the issuer must then wait fifteen days prior to posting an advertisement.

As a result, the Form D pre-filing requirement imposes a lengthy waiting period between the day that an issuer decides to advertise under Rule 506(c), and the day of the actual advertisement. Congress specifically required the Commission to lift the ban on general solicitation for those Rule 506 offerings that solely target accredited investors and qualified institutional buyers. Congress did not say that the Commission can delay free speech for fifteen days. The Commission must withdraw this proposed pre-filing requirement.

Another immediate concern relates to the uncertainty and liability arising from the potential future implementation of the Proposed Rules and how this may impact issuers that act in advance of those rules. By proposing additional requirements, the SEC has prevented issuers from relying on the new Rule 506(c). In effect, for careful issuers, the ban on general solicitation remains in place.

More generally, multiple requirements within the Proposed Rules will impose significant costs on issuers and, in particular, place smaller issuers at risk to the extent they cannot afford to retain legal counsel prior to raising capital under Rule 506. The failure to properly consider compliance costs to small business under the Regulatory Flexibility Act and via cost-benefit analysis increases the risk that these businesses fail, not due to a bad idea or poor implementation, but due to the cost of compliance.

Additionally, the proposed Rule 510T will require that for the first two years during which the proposed rule is in place, issuers must provide the Commission with all advertisements by the date of first use. Problems clearly exist with the imposition of this same-day or virtually "real-time" compliance requirement on an enormous market of small issuers that, prior to public advertising, have already raised nearly one trillion dollars per year. To the extent the disclosure of advertisements under Rule 510T supports analytical or market evaluation needs, samples of data should clearly suffice, yet the Commission seeks the entire population of advertising information on a same-day basis for two years – as a result, market analysis alone cannot realistically explain the imposition of this heavy burden.

If, however, the Commission seeks to utilize Rule 510T disclosure as part of an enforcement program, then it is not appropriate to demand that the entire population of private issuers report every advertisement in real-time to catch those few that commit a violation. Demanding that the entire population of Rule 506(c) issuers submit to this search is an overreach that cannot be justified under any meaningful cost-benefit analysis. Furthermore, Rule 506(c)-based general solicitations will be public, enabling the Commission or private vendors to collect this information from the locations where it is posted.

We are also troubled by the Commission's requirement for standard or "canned" disclosures attached to advertisements under proposed Rule 509. One thing regulators should understand in this modern internet age is that investors generally ignore standard disclosures, either because of their overuse or limited utility. Proposed Rule 509 will serve as a trap to disqualify issuances whenever smaller issuers overlook the requirement, and increase the costs of expensive advertising space for those that comply. Such disclosures, along with increased disclosure requirements under Form D, constitute the Commission's unauthorized effort to impose a disclosure regime onto private issuers that is clearly outside the intent of Congress.

The JOBS Act sought to empower the smallest businesses. After violating the legally required implementation deadline for over a year, the Commission now proposes to disregard the intent of Title II by vastly expanding the regulatory burden for Regulation D issuers, and even proposes to violate the direct language of the law. We request that the Commission withdraw these proposed amendments to Regulation D, particularly given the failure of the Commission to genuinely consider alternatives to protect small businesses,¹ the admitted inability to perform a cost-benefit analysis,² its failure to respect Congressional intent and its failure to follow the law.

Accordingly, we request that you answer each of the following questions individually and provide, where requested, materials in support of responses:

1. Do you recognize that the Proposed Rules effectively delay the usage of general solicitation for many market participants as the uncertainty and liability arising from the future implementation of the Proposed Rules may impact issuers that acted in advance of those rules?
2. Please clarify that an issuer may immediately begin to use rule 506(c) to generally solicit without having to comply with any of the additional proposals in the future.
3. Proposed Rule 503 requires filings of Form D to be made fifteen days in advance of the first general solicitation. As described above, Congress specifically acted to remove a broad constraint on free speech by lifting the ban on general solicitation in the case of accredited investors. Congress did not authorize the Commission to impose a fifteen day ban on general solicitation. Please confirm that you will withdraw or modify the Proposed Rules to be consistent with Title II.
4. Proposed Rule 510T requires submission of "any written general solicitation materials used in . . . Rule 506(c) offerings to the Commission no later than the date of the first use of these materials."³
 - i. The urgency reflected in the proposal – that the solicitations be provided no later than the date of first use – suggests an enforcement objective. Does the

¹ See Proposed Rules at p. 163.

² *Id.* at 110.

³ *Id.* at 13.

Commission seek to identify fraud or compliance violations by requiring all market participants to inform the Commission of their advertisements on a same-day basis?

- ii. Does this substantial continuing disclosure requirement indicate concerns that Commission staff is incapable of utilizing investigative tools such as programmed search routines, and investor tips to seek out non-compliant advertisements?
 - iii. Does the Commission have a clear plan on how to process and make use of the potentially massive amounts of advertising information that will flow in on a daily basis to investigate fraud or compliance violations? Please provide all documents and communications referring or relating to the planned use of advertising data for enforcement purposes.
 - iv. Do you agree that proposed Rule 510T imposes a substantial and continuous reporting obligation on small businesses? Do you agree that this substantial and continuous reporting requirement applies to those businesses that fail to raise capital?
 - v. Are there less costly and burdensome means by which the Commission can access the advertisements, e.g., use private vendors to buy the publicly posted advertising data relating to Regulation D? Please compare the costs and benefits of the proposed disclosure requirement to other means of seeking data that do not require direct disclosure by potential issuers. Consider these in the context of the Regulatory Flexibility Act and provide the results and analysis to the Committee.
 - vi. Has the Commission considered sampling instead of seeking the entire population of self-reported advertisements? Has the Commission considered that a sample identified through searches, in lieu of self-reporting, would be more complete as it would include those that would otherwise fail to comply? Please explain.
 - vii. Is there a substantive distinction in the statistical values that result from a properly sized sample when compared to statistics extracted from a total population? Please provide an analysis that strictly considers the costs and benefits of capturing the entire population of self-reported advertisements relative to capturing a sample that generates sufficient confidence.
5. The Proposed Rules provide that for small businesses “a partial or complete exemption from the proposed requirements . . . would be inappropriate because these approaches would detract from the completeness and uniformity of the Form D dataset . . .”⁴

⁴ *Id.* at 163.

- i. Based on your rather sparse one-page analysis to comply with the Regulatory Flexibility Act's requirements regarding significant alternatives for small business, your primary concern with providing exemptions to small business seems to be completeness of data.⁵ To the extent the Commission pursues the implementation of Rule 510T, despite alternatives and the risk of harm to capital formation, wouldn't periodic reporting of advertisements provide for completeness of data while reducing the burden on these entities?
 - ii. Provide all documents and communications referring or relating to the Commission's compliance with the Regulatory Flexibility Act as it pertains to the requirement to consider significant alternatives.
6. The Proposed Rules provide, within the economic analysis section:

Because these provisions are being adopted today, the information provided below regarding the current state of the private offering market in the United States does not include data related to the use of general solicitation in Rule 506(c) offerings or the disqualification of bad actors, because no such data exist. Hence, some of our analysis of the potential impact of the proposed rules considers the anticipated effects of the adoption of Rules 506(c) and 506(d). As a result, many of the potential costs and benefits are difficult to quantify with any degree of certainty, especially as the practices of market participants are expected to evolve and adapt to the ability to generally solicit in Rule 506(c) offerings.⁶

Based on the above excerpt, it appears the Commission has determined that the costs and benefits of the Proposed Rules relating to Rule 506(c) offerings cannot be reasonably estimated.

- i. Please confirm that, according to page 110 of the Proposed Rules, and specifically because "many of the potential costs and benefits are difficult to quantify with any certainty," the Commission is incapable of reasonably estimating the costs and benefits of the Proposed Rules.
- ii. To the extent that the Commission cannot understand the impact of its own rules, why wouldn't the Commission start with the current implemented rules and wait to understand their impact on the market and investors?
- iii. As the Commission recently recognized by adopting a policy on cost-benefit analysis, evaluation of the costs and benefits of regulations is a crucial step in confirming the propriety of a proposed regulation. To the extent the Commission cannot perform an appropriate cost-benefit analysis, shouldn't the Commission forgo the sought after regulation or narrow it considerably so that capital formation isn't needlessly impeded?

⁵ *Id.*

⁶ *Id.* at 110.

7. Proposed Rule 509 requires "additional disclosures in written general solicitation materials that include performance data so that potential investors are aware that there are limitations on the usefulness of such data and provide a context to understand the data presented. . ."⁷

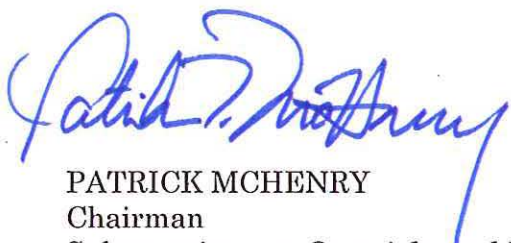
The Commission's economic analysis states, in part, that "[w]e anticipate that the cost of including such legends in sales materials would be minimal for issuers. In some instances, the legends may be of limited benefit to investors because legends do not address whether the offering is fraudulent. It is possible that some unsuspecting accredited investors might erroneously believe that the inclusion of legends validates all of the information and risks regarding the offering. Further, it is possible that because these legends may contain standardized language, investors might discount the relevance of these legends"⁸

Has the Commission evaluated the additional advertising costs necessary to include the legends? Has the Commission sought to understand the extent to which investors would disregard legends? Has the Commission evaluated the extent to which investors may be misled by legends? Please provide a detailed cost-benefit analysis that quantifies these factors and meaningfully estimates the costs and benefits.

8. Please provide a full accounting of the costs in terms of staff time and related expenses that were required to create the proposed amendments to regulation D.

Please provide responses as requested in this letter as soon as practicable but not later than August 6, 2013. Any questions regarding this request should be directed to Peter Haller of the Committee staff at (202) 225-7502.

Sincerely,



PATRICK MCHENRY
Chairman
Subcommittee on Oversight and Investigations



SCOTT GARRETT
Chairman
Subcommittee on Capital Markets and
Government Sponsored Entities

cc: The Hon. Al Green, Ranking Member

⁷ *Id.* at 12.

⁸ *Id.* at 151.