

Jamihlia Johnson  
J.D. Candidate  
University of Missouri School of Law  
203 Hulston Hall  
Columbia, Missouri 65211

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

Dear Ms. Murphy,

Thank you for the opportunity to provide written comment on the Securities and Exchange Commission's ("SECs") Proposed Amendments to Rule 506 of Regulation D and 144A of the Securities and Exchange Act of 1933; both of which stem from implementation of 201(a) of the Jumpstart Our Business Startups Act ("JOBS Act"). Provided below is a brief history of the Rules and the Act, as well as comment on three particular "Request for Comment" provisions of the SEC Proposed Amendments.

### I. General Overview of the Proposed Amendments and JOBS Act

The Securities Act of 1933, Rule 506 of Regulation D provides an exemption for issuers of securities. This exemption allows issuers to not register the sell of their securities to accredited and non-accredited buyers so long as the issuer meets certain requirements. One of the standards that must be met to acquire the exemption is "neither the issuer nor any person acting on its behalf shall offer or sell the securities by any form of general solicitation or general advertising."<sup>1</sup>

Rule 144A under the Securities Act of 1933 provides for the resale of securities exclusively to qualified investment buyers ("QIBs").<sup>2</sup> QIBs include but are not limited to employee benefit plans, pension plans, hedge funds, trust funds, and qualified investment advisors defined under the regulation.<sup>3</sup> In the past, the rule did not state its position in regard to solicitation and advertisement to market the resale of securities.

Section 201(a) of the JOBS Act states "the prohibition against general solicitation or general advertising . . . shall not apply to offers and sales of securities . . . provided that all purchasers of the securities are accredited investors. Such rules shall require the issuer to take reasonable steps to verify that purchasers of the securities are accredited investors, using such

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<sup>1</sup> Rule 502(c) of Regulation D [17 CFR 230.502(c)].

<sup>2</sup> 17 CFR 230.144A.

<sup>3</sup> *Id.*

methods as determined by the Commission.”<sup>4</sup> With the passage of Rule 201(a) of the JOBS Act, both Rules 506 and 144A of the Securities Act of 1933 are changed. The SEC’s Proposed Amendments to 506 would erase the prohibition of general solicitation and marketing of securities for accredited investors only.<sup>5</sup> The amendment states, “[t]he proposed amendment to Rule 506 would provide that the prohibition against general solicitation and general advertising contained in Rule 502(c) of Regulation D would not apply to offers and sales of securities made pursuant to Rule 506, provided that all purchasers of the securities are accredited investors.”<sup>6</sup> The Proposed Amendment under Rule 144A would also allow the resale of securities to be expanded not only to QIBs but also to those individuals who the issuer reasonably believes to be QIBs.<sup>7</sup> The amendment states, “[t]he proposed amendment to Rule 144A(d)(1) would provide that securities may be offered pursuant to Rule 144A to persons other than qualified institutional buyers, provided that the securities are sold only to persons that the seller and any person acting on behalf of the seller reasonably believe are qualified institutional buyers.”<sup>8</sup> The amendments also suggest that Rule 144A would allow solicitation and marketing of these type securities.<sup>9</sup>

As stated by the SEC Chairman, Mary Schapiro, the reasoning for these Purposed Amendments is to “fulfill Congress’s clear directive that issuers be given the ability to communicate freely to attract capital, while obligating them to take steps to ensure that this ability is not used to sell securities to those who are not qualified to participate in such offerings.”<sup>10</sup> By allowing issuers to solicit and advertise securities, Congress is permitting the public to know that companies are seeking to raise capital through the sell of securities. Congress is also streamlining this process, and allowing issuers to continue to enjoy exemption status because issuers are not required to register the sell or resale of their securities when selling only to accredited investors under Rule 506, or reselling securities to QIBs or those reasonably believed to be QIBs under Rule 144A. Thus, Congress is facilitating capital growth, especially for newer startup businesses.

## II. Verification of Rule 506 Accredited Investors

*How does allowing solicitation and advertisement of securities benefit issuers and protect accredited investors?*

General solicitation and advertisement to market securities is available only to accredited investors in order to protect non-accredited investors.<sup>11</sup> Therefore, the proposed rule seeks to require issuers of securities to take steps to verify that the investor is indeed accredited. The code

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<sup>4</sup> *Id.*

<sup>5</sup> *See generally* Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings: 77 Fed. Reg. 54464-01 (purposed Sept. 5, 2012) (to be codified at 17 C.F.R. Parts 230 and 239).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 54465.

<sup>10</sup> *SEC Proposes Rules to Implement JOBS Act Provision About General Solicitation and Advertising in Securities Offerings*, Aug. 29, 2012, available at <http://www.sec.gov/news/press/2012/2012-170.htm> (quoting Mary Schapiro, Securities and Exchange Commission Chairman).

<sup>11</sup> 77 Fed. Reg. 54467 (purposed Sept. 5, 2012) (to be codified at 17 C.F.R. Parts 230 and 239).

of federal regulation states that “[w]hether the steps taken are ‘reasonable’ would be an objective determination, based on the particular facts and circumstances of each transaction.”<sup>12</sup>

Requiring issuers to take reasonable steps to verify that investors of securities are accredited goes to the very purpose of the SEC – to protect investor securities. Therefore, in exchange for an issuer’s ability to solicit and advertise their securities, and stimulate capital growth, extra steps must be implemented to ensure that issuers do not put non-accredited investors at risk with issuer securities. Verifying accredited investor status will protect investors by preventing issuers from selling securities to individuals who would otherwise be susceptible to unwise investment risks induced by solicitation and marketing of securities.

#### *Response to Request for Comment 1*

The amendment purposed that, “[r]egardless of the particular steps taken, it would be important for issuers to retain adequate records that document the steps taken to verify that a purchaser was an accredited investor. Any issuer claiming an exemption from the registration requirements of Section 5 has the burden of showing that it is entitled to that exemption.”<sup>13</sup> In order for this check on the status of investors to become efficient, the SEC should highly consider a more streamlined approach for verifying accredited investor status. The measures taken to verify an investor as accredited should be more than a form with a checkbox of “accredited investor.” The requirements are more flexible, however, a more standardized form, which provides for adequate disclosure of information about the investor’s status as accredited should be implemented. Each investor should be subject to completing this form submitting it to an issuer who then retains it for their records. Another way this can be accomplished is by having accredited investors register as accredited investors with a simple standardized form submitted to the SEC. This could be accomplished through an online portal on the SEC’s website. A more organized system for storing adequate records of accredited investors will allow issuers to effortlessly prove its entitlement to exemption.

#### *Response to Request for Comment 3*

The proposed rule does not specify exactly the means by which an issuer takes reasonable efforts to ensure an investor is accredited. The status of the investor’s past business relations, reputation, criminal history, and any other dealings related to the investor’s prior investments should qualify as reasonable efforts when inquiring into the nature and type of accredited investor.

Not very much information should be supplied in terms of how the accredited investor was solicited. Only if there is information that may appear suspicious of fraud or illegal activity should more information be supplied on how the accredited individual was solicited. Once the investor is reasonably verified as accredited, there is no reason to supply an abundance of information for how the person was solicited since the proposed rule clearly allows for the general solicitation and advertisement of securities to only accredited individuals.

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 54469.

The use of independent third parties verifying whether an investor is accredited should only be a recommendation and never a requirement. Because many startup businesses may not understand how to distinguish between accredited and non-accredited investors, utilizing a third party to make this determination can be beneficial, however, making it a requirement could pose a hurdle to the functioning efficiency of this rule. It could discourage accredited investors from buying securities because of unnecessary and burdensome process of information. Thus, requiring an independent third party to determine accreditation could discourage and decrease stimulation of capital formation, which goes against the purpose of the JOBS Act.

### III. Expansion of Rule 144A Qualified Investment Buyers (QIBs)

#### *Response to Request for Comment 10*

Unlike Rule 506, Rule 144A would allow for issuers of securities to be exempt from registering the resale of their securities with the SEC without taking reasonable steps to ensure the status of QIBs of their securities. This means that issuer's QIBs or those reasonably believed to be QIBs may actually buy securities. If the purpose of the JOBS Act is to facilitate capital growth formation, this rule promulgates that purpose. It does so because it would only require an issuer to sell securities to QIBs it reasonably believes to be QIBs without penalty under the SEC. There is no extra step that the issuer must take in determining what reasonably appears to be a QIB. The possible threat of this more relaxed rule is the potential for fraud. For example, a hedge-fund that is actually not a hedge-fund, could take advantage of a resale of securities from an issuer, however, the issuer would not be penalized by the SEC upon their reasonable belief that the hedge-fund was a QIB.

Thank you for your time and consideration in reviewing these comments. I appreciate the steps taken by the SEC to not only insure investor safety, but also their efforts in stimulating growth in this sector.

Sincerely,

/s/ Jamihlia Johnson