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United States Senate

WASHINGTON, DC 20510

October 12, 2012

The Honorable Mary L. Schapiro
Chairman
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Dear Chairman Schapiro:

We are writing to express our concerns with, and to offer improvements to, the Commission's Proposed Rule to implement Section 201 of the Jumpstart Our Business Startups Act (the JOBS Act).

Section 201 removes the long-standing ban on general solicitation and advertising in some so-called "private" offerings. Yet, because the total dollars raised by these types of offerings now exceeds the dollars raised through registered offerings, how the Commission implements the changes to such offerings in Section 201 is critically important.

Although the JOBS Act removes the long-standing ban on general solicitation and advertising in private offerings, it also requires that the purchasers of such offerings be only accredited investors. The law requires issuers to take "reasonable steps" to ensure that only accredited investors participate. It further directs the Commission to establish the "methods" issuers must use in order to qualify as taking "reasonable steps" to verify that only accredited investors participate in the offering.

The Proposed Rule fails to implement this statutory directive. The Proposed Rule emphasizes the need to provide sufficient flexibility to accommodate the different types of issuers that would conduct offerings under the new Rule 506(c). The Proposed Rule states that requiring issuers to use specified methods of verification would be "impractical and potentially ineffective" in light of the numerous ways in which a purchaser can qualify as an accredited investor, and the potentially wide range of verification issues that could arise. But in its effort to accommodate all types of issuers, the Proposed Rule provides no certainty to issuers and fails to establish methods sufficient to ensure that only accredited investors participate in the offerings.

We believe this is a fatal flaw in the Proposed Rule. The "reasonable steps" language was specifically intended to ensure that only accredited investors participated in private offerings, and the provision's author made it clear that "self-certification" was inadequate.[1] The Proposed Rule needs to require common-sense documentation and/or verification practices and procedures. This will allow the Commission to fulfill its mission to protect investors, while providing needed, bright-line certainty for issuers and investors.

In addition, the Proposed Rule appears to misconstrue Section 201 as a mandate to remove any and all regulation of such general solicitation. However, the statute and legislative

[1] 157 Cong. Rec. H7290 (daily ed. Nov. 3, 2011) (statement of Rep. Waters).

history reflect the intent to only remove the prohibition on general solicitation.[2] Congress could have removed from the Commission any authority to condition, limit, or otherwise regulate the manner or substance of general solicitation. Instead, Congress clearly elected to allow the Commission to retain its authority to regulate this new allowance for general solicitation in offerings exempt from registration pursuant to Rule 506 or Rule 144A. As such, we believe that the Proposed Rule should be significantly revised to provide clear, objective, and meaningful regulation of the manner and substance of general solicitations that may be allowed in private offerings.

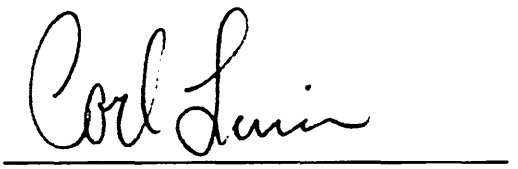
Finally, the Commission should take into account the nature of the securities being offered. In providing a solid regulatory framework within which to permit general solicitation regarding certain private offerings, the Commission should distinguish between issuers that engage in operational businesses and those that are merely investment vehicles.

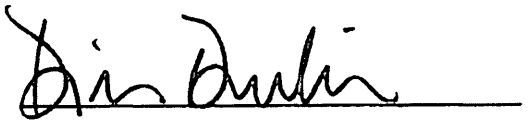
Congress did not contemplate removing the general solicitation ban—without retaining any limitations on forms of solicitation—for private investment vehicles. Indeed, no argument was made during the debate of the bill that the objective was to ease the capital aggregation process for private investment vehicles. The words "hedge fund," "private fund," or "investment vehicle" were not used either during the committee or floor debate in the House of Representatives. Nor did the Senate engage in any debate relating to removing these advertising and marketing restrictions completely from private investment vehicles.

In conclusion, effectively implementing Section 201 is essential to protecting investors and ensuring market integrity. The Commission should work to improve the Proposed Rule and, because of the significance of the changes, re-propose a new regulatory framework for implementation of Section 201 of the JOBS Act.

Thank you for the opportunity to comment on the Proposed Rule.

Sincerely,





[2] *See, e.g.*, 157 Cong. Rec. H7292 (daily ed. Nov. 3, 2011) (statement of Rep. Robert Dold) ("this bill removes the ban"); and 157 Cong. Rec. E2003 (daily ed. Nov. 3, 2011) (statement of Rep. Chris Van Hollen) ("[T]he Access to Capital for Job Creators Act will allow small companies to raise capital more easily by removing restrictions against general solicitation and advertising to potential investors.").

Frank R. Lautenberg Al Franken

Daniel K. Inouye