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Congress of the United States
House of Representatives
Washington, DC 20515–0535

October 16, 2012

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The Honorable Mary Schapiro
Chairman
U.S. Securities and Exchange Commission
Washington, DC 20549

Dear Chairman Schapiro:

First, I write to thank you for moving swiftly on your responsibility to implement Section 201 of the Jumpstart Our Business Startups Act (JOBS Act), which requires the Commission to lift the ban on general solicitation and advertising in Rule 506 offerings. I also wanted to express my support for your decision to move forward with a Proposed Rule,[1] rather than an interim final rule, thereby giving stakeholders an opportunity to weigh-in with the Commission on this very significant change to the offering process. However, I also wanted to express my concerns with the Proposed Rule and convey my desire for you to address several issues before the Commission votes on a final rule.

First, I am concerned that the Proposed Rule does not adequately define the "reasonable steps" issuers must take to verify that purchasers of securities under the new offering exemption proposed under Rule 506(c) are accredited investors, consistent with the mandate in Section 201 of the JOBS Act. While the Proposed Rule suggests that self-certification would be an inadequate form of verification in instances where an issuer solicits new investors through "a website accessible to the general public or through a widely disseminated email or social media solicitation," the Commission fails to set forward what steps would be required in these circumstances, and it leaves open the possibility that self-certification may be acceptable in other circumstances.

As a Member of Congress deeply involved in the legislative drafting of this section of the JOBS Act, I can say that self-certification was never contemplated to be an adequate form of verification. This fact is demonstrated in the Congressional Record.

For example, during Subcommittee consideration of H.R. 2940, the Access to Capital for Job Creators Act, I noted that I offered my amendment requiring issuers to take "reasonable steps" to verify investors' accredited status because, "if we are rolling-back protections for a targeted audience of sophisticated individuals, we must take steps to ensure that those folks are,

[1] Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings, Securities Act Rel. No. 33-9354, 77 Fed. Reg. 54,464 (Sept. 5, 2012) (the "Proposed Rule").

in fact, sophisticated."[2] Moreover, I noted that I offered my amendment because I was "concerned about the process in which accredited investors verify that they are, in fact, accredited. As I understand it, it is currently a self-certification process. This obviously leaves room for fraud."[3] Statements regarding the inadequacy of self-certification were repeated during consideration of H.R. 2940 on the floor of the House of Representatives.[4]

I therefore would urge the Commission to consider defining specific, additional verification requirements. In particular, my concern relates to the protection available to natural persons claiming accredited investor status, and I would be eager for the Commission to consider requiring some form of third-party verification, such as letters from attorneys, accountants, or broker-dealers.

Second, and related to the issue of protection of natural persons, I believe that the Commission should consider amending the definition of accredited investor in light of the expansion to Rule 506 provided in the JOBS Act. Notwithstanding Section 413 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank), which precludes changes in the net worth threshold used in the accredited investor definition before 2014, I believe that the Commission has the authority to make other adjustments to this definition, and I would urge them to do so.

Third, I am disappointed that the Commission did not use the opportunity afforded by this rulemaking to address the outstanding rulemaking related to disqualifying felons and other "bad actors" from relying on the Rule 506 safe harbor, pursuant to Section 926 of Dodd-Frank. Given the Rule 506 expansion provided under the JOBS Act, I believe that the Commission should work swiftly to impose the "bad actor" disqualification before expanding the availability of general solicitation and advertising, particularly since Congress directed the Commission to institute this disqualification provision nearly two years before the JOBS Act became law.

Fourth, I ask the Commission to consider adopting standards for the reporting of performance and fees by private funds using the offering exemption proposed under Rule 506(c). Given that the Commission has acknowledged that hedge funds, in particular, pose heightened risks to investors,[5] I believe it would be appropriate for the Commission to establish clear reporting standards before allowing such funds to advertise or solicit the public.

Finally, while I question whether cost-benefit analysis should be determinative in your rulemakings given its difficulty in capturing hard-to-quantify benefits like enhancing market stability and potentially preventing the next financial crisis, I am concerned that the Commission

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[2] *Access to Capital for Job Creators Act, Markup on H.R. 2940 Before the House Subcommittee on Capital Markets and Government Sponsored Enterprises, House Financial Services Committee*, 112th Cong. (2011). I also noted during general debate on H.R. 2490 that, "if we are allowing companies to circumvent registration with the relevant state, or the SEC, then we should ensure that only sophisticated individuals have access to these securities." The amendment was accepted by the Committee on voice vote, with Chairman Garrett noting that it was a "common-sense amendment."

[3] Ibid.

[4] 157 CONG. REC. H7290 (daily ed. Nov. 3, 2011) (statements of Rep. Waters, Rep. Maloney and Rep. Jackson Lee).

[5] *Implications of the Growth of Hedge Funds*, U.S. Securities and Exchange Commission, at n.5 (2003) *available at* http://www.sec.gov/news/studies/hedgefunds0903.pdf.

is adopting a double-standard with their approach to economic analysis when it comes to rulemakings mandated by the JOBS Act versus those required by Dodd-Frank. Rulemakings put forward for the purpose of protecting investors should not be subject to more rigorous cost-benefit analysis than rulemakings that facilitate capital formation. I urge you to enhance the economic analysis included in the Proposed Rule such that it identifies and evaluates the costs and benefits of alternative regulatory approaches, consistent with the guidelines identified in the recent Commission staff memorandum.[6]

Again, I believe that the Commission should work to improve the Proposed Rule related to implementation of Section 201 of the JOBS Act. Thank you for your prompt consideration of my request.

Sincerely,

Maxine Waters
Ranking Member
Subcommittee on Capital Markets & Government Sponsored Enterprises
House Committee on Financial Services

[6] *Current Guidance on Economic Analysis in SEC Rulemakings*, Memorandum from RSFI and OGC to the Staff of the Rulewriting Divisions and Offices (Mar. 16, 2012) ("Rulewriting Memorandum") *available at* http://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf.