Via Email: rule-comments@sec.gov

August 9, 2012

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

Dear Ms. Murphy:

The Council of Institutional Investors ("Council") appreciates the opportunity to comment in advance of the Securities and Exchange Commission's ("SEC" or "Commission") promulgation of rules under the Jumpstart Our Business Startups Act ("JOBS Act").[1] As a nonprofit, nonpartisan association of public, corporate and union pension funds, and other employee benefit plans, foundations and endowments with combined assets that exceed $3 trillion, the Council is committed to protecting the retirement savings of millions of American workers.[2] With that commitment in mind, the Council has taken a strong interest in the JOBS Act.

For example, the Council issued a letter to the Chairman and Ranking Member of the Committee on Banking, Housing, and Urban Affairs of the United States ("U.S.") Senate on March 1, 2012, raising concerns about some of the provisions of Title I of the JOBS Act that appear to be inconsistent with Council membership approved policies or statements.[3] We also shared those concerns with the Speaker and Minority Leader of the U.S. House of Representatives in a letter dated March 7, 2012.[4]

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[1] Jumpstart Our Business Startups Act §§ 101-701 (Jan. 3, 2012), http://www.gpo.gov/fdsys/pkg/BILLS-112hr3606enr/pdf/BILLS-112hr3606enr.pdf.

[2] For more information about the Council of Institutional Investors ("Council"), including its members, please visit the Council's website at http://www.cii.org/about.

[3] Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to The Honorable Tim Johnson, Chairman, Committee on Banking, Housing, and Urban Affairs et al. 1 (Mar. 1, 2012), http://www.cii.org/UserFiles/file/resource%20center/correspondence/2012/03-01-12%20-%20Council%20letter%20to%20Banking%20Com%20on%20Cap%20Formation%20Bill%20(Final).pdf.

[4] Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to The Honorable John Boehner, Speaker, U.S. House of Representatives et al. 1 (Mar. 7, 2012), http://www.cii.org/UserFiles/file/resource%20center/correspondence/2012/03-01-12%20-%20Council%20letter%20to%20Banking%20Com%20on%20Cap%20Formation%20Bill%20(Final).pdf [hereinafter March 7th Letter].

On March 22, 2012, the Council issued a joint letter with the Center for Audit Quality expressing concerns about provisions of Title I of the JOBS Act that would unduly interfere with the independence of the accounting and auditing standard setting processes.[5] Later that same day, we issued a press release expressing our disappointment that the U.S. Senate passed the underlying bill without further amendments to provide for sufficient investor protections.[6]

Finally, the Council commissioned, and in July released, a series of "Issue Briefs" designed to educate Council members on the key elements of the JOBS Act and their implications for institutional investors.[7] Those Issue Briefs were also distributed to the Commission, Members of Congress, and other policymakers.[8]

As an organization representing capital market stakeholders, the Council supports efforts to promote job and capital creation. However, as indicated, we believe the JOBS Act has the potential to harm the integrity of, and erode faith in, the markets.

While the Commission does not have the authority to amend the JOBS Act, the Commission does have the authority to issue implementing guidance and rules that may limit the potential damage of the JOBS Act. Perhaps more importantly, and as addressed in part in this letter, the Commission also has the authority and, indeed the responsibility, to reject requests to provide guidance or rulemaking that would increase the likelihood that the JOBS Act will prove detrimental to investors and the markets.

The following specific comments are limited to Title I of the JOBS Act.[9] As indicated, Title I is of particular interest to the Council because it includes several provisions that appear to be in direct conflict with membership approved policies or statements and, therefore, inconsistent with corporate governance best practices.[10]

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[5] Letter from Cynthia M. Fornelli, Center for Audit Quality et al. to Members of the United States Senate 1 (Mar. 22, 2012), http://www.cii.org/UserFiles/file/resource%20center/correspondence/2012/03-22-12%20CAQ-CII%20JOBS%20Act%20Letter.pdf.

[6] News Release, Council of Institutional Investors, Council Statement on Senate Passage of JOBs Bill 1 (Mar. 22, 2012), http://www.cii.org/UserFiles/file/03-22-12%20Statement%20on%20Senate%20Jobs%20Bill.pdf.

[7] Members-Only Publications, Council of Institutional Investors, http://www.cii.org/members/login?url=MembersOnlyPublications (on file with author).

[8] Council Correspondence, Council of Institutional Investors (July 20, 2012), http://www.cii.org/CouncilCorrespondence.

[9] Jumpstart Our Business Startups Act §§ 101-108.

[10] *See, e.g.,* March 7th Letter, *supra* note 4, at 1-7.

Section 101 – *Definitions*

We agree with Chairman Schapiro that the definition of an emerging growth company ("EGC") in Section 101 is "so broad that it would eliminate important protections for investors in even very large companies, including those with up to $1 billion in annual revenue."[11] We note that the $1 billion requirement in Section 101 appears to be arbitrary and Members of Congress from both parties had expected, albeit incorrectly, that the amount would be substantially lowered during the legislative process.[12]

We believe the Commission should reject requests by special interests to provide additional guidance to reinterpret the language of Section 101 to further increase the scope of companies eligible for EGC status. More specifically, and by example, the Commission should deny requests to provide interpretation guidance that would:

- Allow companies to exceed the $1 billion of issued debt criteria contained in Section 101(a) by excluding debt issuances classified as refinancings,[13] or
- Narrow the application of the effective date requirement contained in Section 101(d) by allowing certain companies to qualify as an EGC even if the sale of common equity securities occurred on or before the December 8, 2011 date set forth in that section.[14]

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[11] Letter from Mary L. Schapiro, Chairman, United States Securities and Exchange Commission to The Honorable Tim Johnson, Chairman, Committee on Banking, Housing, and Urban Affairs et al. 2 (March 13, 2012), http://www.thecorporatecounsel.net/nonMember/docs/jobs-SchapirotoJohnson.pdf.

[12] Yin Wilczek, JOBS Act Will Increase Private Placements But Not Help Public Markets, Panelists Say, BNA Econs. & Fin. EE-23 (June 22, 2012) (on file with author) (referencing comments of Tyler Gellasch, counsel to Senator Carl Levin (D-Mich.)).

[13] *But see* Letter from Davis Polk & Wardwell LLP to Ms. Elizabeth M. Murphy, Secretary, Securities and Exchange Commission 2 (June 22, 2012), http://www.davispolk.com/files/uploads/CapitalMarkets/SEC_Comment_Letter_JOBS_Act_FINAL.pdf. (arguing "that the Staff should further clarify that refinanced debt need not be counted as part of the debt issued").

[14] *Id*. (arguing that "even if a company became public prior to December 8, 2011, if that company is no longer a reporting company subject to Section 13(a) or 15 of the Exchange Act at the time of determining whether it is entitled to any benefits under the JOBS Act, it should be able to qualify as an EGC").

In our view, broadening the definition of EGCs further through the issuance of guidance would further and unnecessarily increase the risks that the provisions of Title I impose on investors.[15]

Section 103 – *Internal Controls Audit*

We agree with Chairman Schapiro that the "internal controls audit requirement put in place after the Enron and other accounting scandals of the early 2000's has significantly improved the quality and reliability of financial reporting and provides important investor protections, and therefore believe . . . [exempting EGCs from the auditor attestation requirement as provided for in Section 103] is unwarranted."[16] Not surprisingly, therefore, we believe the Commission should reject requests by special interests to issue rulemaking that would further defer the application of internal control requirements for certain EGCs.

More specifically, and by example, we believe the Commission should deny requests to provide rulemaking that would allow a company that outgrows its EGC status to defer filing an auditor attestation report until "its second annual report filed after losing that status."[17] While we acknowledge that the Commission has provided newly public companies a similar transition period for the application of management's assessment of internal controls *and* the auditor's attestation requirement, respectively; that deferral was based on the SEC's concern about imposing on a newly public company the burden of complying with internal control requirements as part of its "first annual report that it files with the Commission."[18]

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[15] *See, e.g.,* Letter from Mary L. Schapiro at 2 (Chairman Schapiro commenting that increasing the threshold for qualifying as an emerging growth company under Title I "would pose less risk to investors and would more appropriately focus benefits provided by the new provisions on those smaller businesses that are the engine of growth for our economy and whose IPOs the bill is seeking to encourage").

[16] *Id.* at 3; *see* March 7th Letter, *supra* note 4, at 6 (noting that an April 2011 Securities and Exchange Commission study "recommends explicitly against—what Sec. 103 attempts to achieve—a further expansion of the Section 404(b) exemption").

[17] David Polk & Wardwell LLP at 3.

[18] SEC, Release No. 33-8760, Internal Control Over Financial Reporting in Exchange Act Periodic Reports of Non-Accelerated Filers and Newly Public Companies 24 (Dec. 15, 2006), http://www.sec.gov/rules/final/2006/33-8760.pdf.

We note that the reasoning the Commission used as a basis for providing a deferral of the internal control requirements for newly public companies is generally not applicable to EGCs that subsequently outgrow their EGC status. Unlike a newly public company, an EGC has already prepared its first annual report and, importantly, as part of that process, has likely already performed and reported on its management's assessment of internal controls.[19]

In any event, it is unclear how former EGCs would realize significant cost savings from a deferral of the auditor attestation requirements because the internal control audit is now fully integrated with the financial statement audit under existing auditing standards applicable to public companies.[20]

Section 105(b) – *Securities Analyst Communications*

We share the concerns expressed by Chairman Schapiro that the provisions of Section 105(b) "would weaken important protections related to . . . the relationship between research analysts and investment bankers within the same financial institution by eliminating a number of safeguards established after the research scandals of the dot-com era . . . ."[21] The Commission, therefore, should reject requests by special interests to provide rulemaking that would extend the requirements of Section 105(b) to supersede any portion of the 2003 Global Research Settlement ("GRS").[22]

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[19] *See id.* ("We stated our belief in the Proposing Release that providing additional time for a newly public company to conduct its first assessment of internal control over financial reporting would benefit investors by making implementation of the internal control requirements more effective and efficient and reducing the costs that a company faces in its first year as a public company.").

[20] *See, e.g.,* Letter from Cindy Fornelli, Executive Director, Center for Audit Quality et al. to The Honorable Scott Garrett, Chairman, House Capital Markets Subcommittee et al. 2 (July 31, 2012), http://www.cii.org/UserFiles/file/resource%20center/correspondence/2012/07-31-12%20HR%206161%20Capital%20Markets%20Subcommittee%20Letter.pdf.

[21] Letter from Mary L. Schapiro at 2; *see* March 7th Letter, *supra* note 4, at 7 ("we agree with the U.S. Chamber of Commerce that the provisions of Sec. 105 as drafted 'may be a blurring of boundaries that could create potential conflicts of interests between the research and investment components of broker-dealers'").

[22] *But see* Letter from Davis Polk & Wardwell LLP at 4 ("the Commission should engage in rulemaking as part of the Rules to supersede those portions of the GRS that are inconsistent with the provisions of the JOBS Act").

The Council's membership approved policies explicitly support the GRS as bolstering "the transparency, independence, oversight and accountability of . . . equity analysts . . ."[23] We believe there is nothing in the language or legislative history of Section 105(b) that mandates that the GRS requirements be revised.[24]

In our view, maintaining the GRS requirements is a necessary backstop to preventing the provisions of Section 105(b) from resulting in a reoccurrence of the worse abuses that were identified by the research scandals during the dot-com era.[25]

Section 106 – *Draft Registration Statements &* Section 107 – *Opt-In Right for Emerging Growth Companies*

We note that question four and the related answer in the Commission's ""Generally Applicable Questions on Title I of the JOBS Act" states:

> (4) Question:
>
> How should an emerging growth company identify itself as an emerging growth company in a draft registration statement submitted to the staff on a confidential basis under the Securities Act Section 6(e) and in the subsequent electronic filing of the registration statement on EDGAR?
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> Answer:
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> The issuer should disclose that it is an emerging growth company on the cover page of its prospectus.[26]

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[23] Council of Institutional Investors, Statement on Gatekeepers 1 (updated Apr. 12, 2010), http://www.cii.org/UserFiles/file/Statement%20on%20Financial%20Gatekeepers.pdf.

[24] *See, e.g., Dana G. Fleischman, JOBS Act on Research: Strong Buy?*, Bus. Law Today 3-4 (May 25, 2012), *http://apps.americanbar.org/buslaw/blt/content/2012/05/article-05-fleischman.shtml* (commenting that the "JOBS Act has no impact on the remaining provisions of the Global Settlement . . . [which] may only be modified by court order or the adoption by the SEC or FINRA of a rule or interpretation that is expressly intended to supersede a particular provision or provisions of the settlement").

[25] *See, e.g.,* Donald Langevoort, JOBS Act Issue Brief: The "On-Ramp" for Emerging Growth Companies 4 (Apr. 5, 2012) (on file with Council) ("Despite these changes, many of the recent analyst independence and conflict of interest rules . . . will remain in effect.").

[26] Jumpstart Our Business Startups Act Frequently Asked Questions, SEC (4) (modified May 3, 2012), http://www.sec.gov/divisions/corpfin/guidance/cfjjobsactfaq-title-i-general.htm.

While we generally support the answer to Question (4), we believe the disclosure should be expanded in a number of ways. In our view, investors need to be able to quickly and easily, and on an ongoing basis, identify EGCs, the specific exemptions from investor protections that those companies have chosen to opt-in to, and the companies' views on how opting-in to those exemptions impacts the risks of investing in the companies' securities.

More specifically, we believe the Question (4) disclosure should be augmented to require, at a minimum, the following additional information:

- Disclosure of status as an EGC on the cover page of the company's Forms 10-Q and Forms 10-K,
- Brief plain-English description in Forms S-1, Forms 10-Q, and Forms 10-K of:
    - Each exemption that the EGC has chosen to opt-in to in accordance with Section 107 of the JOBS Act, and
    - How each JOBS Act exemption that the EGC has chosen to opt-in to impacts the risk of an investment in the EGC's securities.[27]

We believe the above additional information is vital for efficiently and effectively identifying and evaluating the ongoing risks involved in investing in EGCs.[28]

Section 108 – *Review of Regulation S-K*

We look forward to the Commission's report to Congress on its review of Regulation S-K as required by Section 108. We strongly support efforts to "modernize and simplify the registration process."[29] We, however, would oppose any significant changes to Regulation S-K requirements for EGCs or any public company unless it is first determined that those changes benefit investors.

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[27] We note that some emerging growth companies are voluntarily disclosing in their registration statements the Jumpstart Our Business Startups Act provisions that they have opted-in to, and disclosing the risk factors of opting-in to those provisions. *See, e.g.,* Sarah Johnson, A New Risk Factor: The JOBS Act, CFO Mag. 1-3 (June 15, 2012), http://www3.cfo.com/article/2012/6/regulation_jobs-act-risk-disclosures-ipos.

[28] *See, e.g.,* Donald Langevoort at 5 ("Council members should scrutinize closely . . . disclosures and determine whether the information, or lack thereof, requires a re-evaluation of the risks involved in investing in an EGC.").

[29] Jumpstart Our Business Startups Act § 108(a)(2).

More specifically, and by example, we believe the Commission should reject requests by special interests to eliminate or significantly reduce existing compensation related disclosures in prospectuses required by Regulation S-K, including disclosure of:

- Securities authorized under stock-holder approved (or those not approved) compensation plans under Item 201(d), or[30]
- Stock-based compensation under Item 303.[31]

We note that the Council's membership approved policies explicitly provide that:

> [E]xecutive compensation is a critical and visible aspect of a company's governance. Pay decisions are one of the most direct ways for shareowners to assess the performance of the board. And they have a bottom line effect, not just in terms of dollar amounts, but also by formalizing performance goals for employees, signaling the market and affecting employee morale.[32]

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[30] *But see* Letter from Daniel J. Winnike, Fenwick & West LLP et al. to Securities and Exchange Commission 1, 10 (June 19, 2012), http://www.sec.gov/comments/jobs-title-i/reviewreg-sk/reviewreg-sk-1.pdf ("Silicon Valley-based law firms" commenting that the Item 201(d) disclosure on dilution "should not be meaningful to investors").

[31] *Id.* at 1, 4 ("Silicon Valley-based law firms" commenting that "[w]e fail to understand the significance of this information [stock-based compensation] to investors").

[32] Council of Institutional Investors, Corporate Governance Policies **§ 501 Introduction** (updated Dec. 21, 2011), http://www.cii.org/UserFiles/file/CII%20Corp%20Gov%20Policies%20Full%20and%20Current%2012-21-11%20FINAL%20(2).pdf.

In addition, we believe the Commission should deny requests by special interests to eliminate or significantly reduce existing disclosures regarding dilution sustained by investors required under Item 506 of Regulation S-K.[33] Like executive compensation, dilution is explicitly recognized in the Council's membership approved policies as an important metric for investors:

> Dilution measures how much the additional issuance of stock may reduce existing shareowners' stake in a company. Dilution is particularly relevant for long-term incentive compensation plans since these programs essentially issue stock at below-market prices to the recipients. The potential dilution represented by long-term incentive compensation plans is a direct cost to shareowners.[34]

We remain hopeful that as part of the SEC's review of Regulation S-K the Commission will carefully consider the benefits to investors of having EGC's (or any public company) continue to disclose in their registration statement the information currently required. Much of the required information, particularly the existing disclosures about executive compensation and dilution described above, are meaningful to investors and should be retained.

We appreciate this opportunity to comment in advance of the proposed rulemaking for the JOBS Act. Should you have any questions or require any additional information about the Council or the contents of this letter, please feel free to contact me at 202.261.7081 or Jeff@cii.org.

Sincerely,

Jeff Mahoney
General Counsel

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[33] *See, e.g.*, Kurt Schacht, HAZMAT ALERT! Beware of JOBS Act Offerings, CFA Inst. 1 (Aug. 8, 2012), http://blogs.cfainstitute.org/marketintegrity/2012/08/08/hazmat-alert-beware-of-jobs-act-offerings/ (criticizing request from "law firms" to omit from emerging growth company prospectuses "anything about how much they [investors] will be diluted"); *but see* Letter from Daniel J. Winnike at 1, 4 ("Silicon Valley-based law firms" commenting that "[t]he amount of dilution sustained by investors in an IPO does not appear to be a matter that is regarded as meaningful by investors").

[34] Council of Institutional Investors, Corporate Governance Policies **§ 509 Dilution**.