June 18, 2012

Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F St., N.E.
Washington, DC 20549-1090

Re: JOBS Act Rulemaking: Title II

Dear Ms. Murphy,

On behalf of more than 250,000 Public Citizen members and supporters, we write to comment on the pending rulemaking related to Section 201(a)(1) of the Jumpstart Our Business Startups Act of 2012 ("JOBS Act"), which requires that the Commission remove the ban on general solicitation and advertising for private offerings conducted pursuant to Securities Act Rule 506.

In summary, we ask that the Commission

- Establish concrete "reasonable steps" that issuers must take to ensure they sell only to accredited investors
- Prioritize unfinished work under Dodd-Frank ahead of JOBS Act implementation, including the pending Section 201 (a)(1) rulemaking.

The best intentions of the JOBS Act will be frustrated if the Commission fails to exercise its mandate of investor protection. An increase in fraud will subvert the effort to raise capital for worthy enterprise, a result that none of the JOBS Act proponents would endorse. The troubled Facebook IPO provides an important context for JOBS Act rulemaking. Even though this large transaction involved the full plate of SEC oversight, investors suffered a $2 billion paper loss within a week. The Commission along with congressional committees are currently investigating potential violation of rules. The high profile nature of the Facebook IPO has led the Commission and Congress to respond appropriately. But the smaller transactions envisioned under the rubric of the JOBS Act may escape such public and congressional attention. Consequently, the Commission should establish strong standards at the outset to reduce the opportunity for abuse.

1. "Reasonable Steps"

Section 201(a)(1) of the Jumpstart Our Business Startups Act of 2012 ("JOBS Act") requires that the Commission remove the ban on general solicitation and advertising for private offerings conducted pursuant to Securities Act Rule 506. Importantly, the statute mandates

> "that all purchasers of the securities are accredited investors," and
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> "Such rules shall require that issuer to take *reasonable steps* to verify that purchasers of the securities are accredited investors, using such methods as determined by the Commission."

Congress appreciated that the new Rule 506 offerings may attract less sophisticated investors than do Rule 144A offerings and accordingly raised the standard that applies to sales under Rule 506 by requiring "reasonable steps" for investor accreditation. Rule 144A applies to qualified institutional buyers, which are generally defined as institutional investors with at least $100 million in investments.

Current Rule 506 offerings, which *prohibit* general solicitation and advertising, permit sales to accredited investors with only $200,000 in income ($300,000 for married couples) or $1 million in net worth (minus the value of the primary residence) and also up to 35 non-accredited investors who are subject to no wealth requirements at all.

We ask the Commission to reject industry arguments already proffered (without explanation or evidence) that the certification by purchasers provided under Rule 144A offerings suffice to meet the "reasonable steps" standard under a Rule 506 offering. That standard simply requires that the issuer "reasonably believes" that the investor is accredited, without any concrete steps to support the basis for that belief.

Instead, we ask the Commission to develop concrete "reasonable steps" that issuers must take to ensure they are selling to accredited investors. We believe that the Commission has no discretion in this respect and must comply with Congress's command to enhance the standards under which issuers confirm purchasers' accredited status.

At a minimum, the Commission should require that a higher income and net worth standard be applied as part of the accreditation effort. Under Chairman Christopher Cox, the Commission proposed to permit "limited" general solicitation provided that investors demonstrate $2.5 million in investments or $400,000 in annual income. With wholesale elimination of the general solicitation ban provided in the JOBS Act, a reasonable step the Commission should take is to establish even higher wealth and annual income thresholds. In addition, the Investment Company Institute has also provided a general endorsement of higher wealth and income standards.[1]

While companies using the Rule 506 exemption generally need not register their securities or file reports with the SEC, they must file a "Form D" after they sell securities, which include the names and addresses of the company's owners and stock promoters. We believe that the

[1] Letter to SEC, May 21, 2012, available at: http://www.sec.gov/comments/jobs-title-ii/jobstitleii-13.pdf

Commission should require advance filing of Form D for issuers that engage in GS&A activities. To implement the new regulations under Rule 506, the Commission should require that Form D be filed at least 30 days prior general solicitation. This will help the Commission to detect unscrupulous agents. Since the form must already be submitted, a deadline will impose no new paperwork burden.

2. Rulemaking priority

Section 201(a) of the JOBS Act provides that "not later than 90 days" after enactment of the law, the Commission shall revise its rules regarding general solicitation under Section 506 offerings.

At a minimum, we ask that the Commission not place this rulemaking ahead of those rules where the SEC has already missed statutory deadlines, or has lagged in proposing rules for important Dodd-Frank provisions. Though we disagree with many underlying principles of the newly passed JOBS Act, we believe that the complex questions the agency must answer, including the determination of "reasonable steps," require care. This effort should not be rushed, especially when there are many pending and delayed Dodd-Frank rulemakings which are necessary for the market and investors.

We note, for example, the absence of a proposed rule to implement Dodd-Frank Section 953(b). This strait forward investor protection measure directs companies to disclose the CEO's pay as a multiple of the median paid employee of the company. Several trade associations represent that determining the median paid employee eludes measurement. This is no small concern to investors who may otherwise be confident that issuers enjoy a firm grip on employee compensation, which is already a critical item of financial reports. On its face, determining median pay would appear far more accessible than identifying the "reasonable steps" that an issuer must take to verify that purchasers, who are not their employees and with whom issuers have no immediate power to compel disclosure of information, are accredited investors.

As the Commission examines the many important measures required to implement Title II of the JOBS Act, it will be obliged to consider economic impact as it does with all of its rulemaking. While we feel that cost-benefit analysis should not be the ultimate rubric for deciding the utility of a rule or moving forward to implement key public protections in the financial sector, it is a standard that many members of Congress who championed the JOBS Act have emphasized through the Dodd-Frank rulemaking process as critical.

Certain members of Congress have proposed economic analysis requirements for Dodd-Frank at the Commission that exceed those applicable to every other federal agency, with an obvious intent, sometimes explicitly expressed, of further slowing Commission rulemaking on this statute. At the same time, these critics of Dodd-Frank have urged the Commission to adopt rules under the JOBS Act for which Congress itself conducted little if any analysis of the costs to investors, while leaving the Commission substantial rulemaking discretion. The contrast of advocating need for strict economic analysis on disfavored rules, but not on favored rules, is obvious and problematic.

The Commission should not apply an economic analysis standard rigorously to one statute and lightly to another. At a minimum, we urge the Commission to apply economic analysis equally to both statues.

There is certainly no argument for omitting an economic analysis in the case of the JOBS Act. In fact, the issue of economic analysis may become especially acute as the Commission considers the crowd funding provisions, where the statute mandates a rule in 270 days. Since the Commission's own Advisory Committee on Small and Emerging Companies expressed serious concerns regarding the crowd funding concept, any economic impact analysis must be rigorous to withstand an impartial review by a court that has established especially high analysis standards, and should be able to determine the projected costs of increased fraud due to the reduction in disclosure requirements.

Proposing hastily crafted rules with inferior economic analysis would demonstrate that the Commission has succumbed to political pressure. The agency should defend its independence, an important effort given the nation's skepticism about market integrity and the failure of regulators to protect the public from Wall Street excesses that has led to massive, ongoing economic dislocation.

In summary, we ask the Commission to take special care in establishing the "reasonable steps" issuers must exercise regarding the accreditation of investors, to follow consistent standards of economic analysis for the JOBS Act, and to prioritize other important rulemakings, especially those for which the agency has already missed its statutory deadline.

Please feel free to call [redacted] or email ([redacted] with any questions.

Sincerely,

Bartlett Naylor
Financial Policy Advocate